IN THE SUPREME COURT OF MISSISSIPPI

NO. 2009-CA-01412
CONSOLIDATED WITH 2008-M-1855

TOULMAN D. BOATWRIGHT, JR. — APPELLANT

- VERSUS -

GRACE BONDS BOATWRIGHT — APPELLEE

APPEAL FROM THE CHANCERY COURT OF
MARSHALL COUNTY, MISSISSIPPI

REPLY BRIEF OF THE APPELLANT

HELEN KENNEDY ROBINSON
MSB [redacted]
POST OFFICE BOX 187
OXFORD, MISSISSIPPI 38655

9065 GOODMAN ROAD
OLIVE BRANCH, MISSISSIPPI
TELEPHONE: (662)890-9596
FACSIMILE: (662)234-7111

ATTORNEY FOR APPELLANT

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The abbreviations were used for reference in Appellant's Reply Brief:

1. "RE" means the record submitted by the Chancery Clerk in four (4) bound volumes containing 468 pages;

2. "AB" means the Appellee's Brief containing 47 pages.

3. "PRE" means Petitioner's Record Excerpts filed in the Petition for Review and consolidated with this case by Order of the Mississippi Supreme Court containing 178 pages.

4. "ARE" means Appellant's Record Excerpts filed with Appellant's Brief containing 242 pages.

5. "AE" means Appellee's Record Excerpts filed with Appellee's Brief containing 161 pages.

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Reply to Appellee's statement of the case.

Counsel for Ms. Boatwright states the following in her statement of the case: "The Chancellor and counsel agreed to continue the matter until the next week and to suspend Mr. Boatwright's visitation with the minor children until the hearing." Mr. Boatwright would show that the matter was not continued for one week, it was not heard for nine months. After the hearing, the motion was found to be unsupported by the evidence.

As counsel for Ms. Boatwright states in Appellee's Brief, a hearing on the merits of **all** pending motions, petitions and counter-petitions was initially scheduled for February 10, 11th, and 12th, 2009. (RE..214). Ms. Boatwright noticed her Counter-Motion for Sanctions for February 9th. As shown by the record and argued in his brief, at the end of the three day hearing, Ms. Boatwright's attorneys had put on no proof regarding their Motion for Sanctions or on attorney fees requested in their contempt action. Counsel for Ms. Boatwright states in their brief, "The Court's staff attorney advised counsel for Ms. Boatwright at the beginning to the trial, however that the hearing on sanctions would be taken up at the conclusion of trial. Counsel for Mr. Boatwright was not informed of this until after the conclusion of the three day trial. This type of failure by the court and its staff to provide necessary information to both sides is just one

example of the disparity in treatment of the parties and the attorneys in this matter.

Ms. Boatwright argues in her brief that Mr. Boatwright is procedurally barred from raising the issue of error by Chancellor Roberts for failing to recuse himself. This simply ignores facts which were not disclosed by counsel opposite or the Chancellor which were clearly relevant to the Motion to Recuse filed by Mr. Boatwright. The newly discovered evidence regarding the relationship of Chancellor Roberts and counsel opposite could not have been discovered by Mr. Boatwright until he learned on April 8, 2009 about the recent turkey hunt of counsel opposite and Chancellor Roberts. To say that this fact could be concealed by the attorneys and judge involved in the case when there is a highly contested and heated Motion to Recuse at issue would fly in the face of equity and justice. This is not a case where a group of people go hunting or playing golf, it is a case where an attorney is inviting a sitting judge, who he regularly practices before, to go hunting on his property with only the attorney and the judge present. Not many hunters I know regularly invite someone with whom they are not close friends or that they do not need to repay a favor to hunting alone with them on their property.

Ms. Boatwright argues that Chancellor Roberts did not have a duty to disclose his relationship with her attorney because he did not hunt immediately prior to the hearing on the merits. The evidence clearly showed that they had a relationship beginning around 2004 when Chancellor Roberts first took office which continued up until the time Chancellor Roberts recused himself on his own motion in this matter. The record also shows that many of their turkey hunts as testified to by opposing counsel occurred while prior proceedings were ongoing in this matter.

A. <u>Reply to Appellee's allegation that Mr. Boatwright is not entitled to a review of</u>

the Chancellor's findings under heightened scrutiny.

Ms. Boatwright alleges that Mr. Boatwright is not entitled to review of the Chancellor's finds under the heightened standard applied in cases where the Chancellor has adopted a parties findings of fact "verbatim". Mr. Boatwright pointed out numerous examples in his brief. The findings of fact and of the parties and the court were voluminous in this case. To state that the Court submitted its own findings of fact, although they mirror everything requested in Ms. Boatwright's findings, fails to meet the "verbatim" requirement is contrary to the law in this matter. The Mississippi Supreme Court held the following in *Rice Researchers, Inc. v. Hiter,* 512 So.2d 1259, 1265 (Miss. 1987):

"RI formally assigns as error the Chancery Court's verbatim adoption of Defendants' proposed findings of fact and conclusions of law. RRI cites federal cases holding in disfavor the mechanical or wholesale adoption by a trial court of findings of fact and conclusions of law submitted by the prevailing party. See *George W. Bennett Bryson & Co. Ltd. v. Norton Lilly & Co., Inc.*, **502 F.2d 1045** (5th Cir.1974); *Kelson v. United States*, **503 F.2d 1291** (10th Cir.1974); *Hagans v. Andrus*, **651 F.2d 622** (9thCir.1981). RRI contends that while such a practice may not constitute reversible error in and of itself, the appellate courts in such a case must engage in much more careful analysis of adopting findings than in cases where the findings and conclusions have been authorized by the trial judge himself. *Amstar Corp. v. Dominos Pizza, Inc.*, **615 F.2d 252** (5th Cir.1980). With this we agree. While an appellate court may not summarily disregard findings adopted by a trial judge verbatim from the submission of the prevailing party, the appellate court must view the challenged findings of fact and the appellate record as a whole with a more critical eye to ensure that the trial court has adequately performed its judicial function. *Ramey Construction Co., Inc. v. Apache Tribe of Mescalero Reservation*, **616 F.2d 464** (10th Cir.1980); *Otero v. Mesa Co. Valley School District No. 151*, **470 F.Supp. 326**, 328 (D.C.Colo.1979). RRI contends that courts have repeatedly held to the principle of favoring factual findings drawn with the insight of a disinterested mind as opposed to adopting findings of fact verbatim. *Relex Corp. v. Speed Check Corp.*, **457 F.2d 1040**, 1042 (5th Cir.1972)."

As pointed out previously, this case involved a very heated and highly contested Motion to Recuse wherein Mr. Boatwright alleged bias on the part of the Chancellor. The Chancellor not only refused to recuse himself in the matter, he sanctioned Mr. Boatwright and his attorney for filing the Motion. Ms. Boatwright argues that each and every instance Mr. Boatwright points to

where the Chancellor adopted her findings of fact were supported by the evidence, which she apparently believes negates the fact that adopting all or part of her findings of fact is error. This argument simply ignores the law and is contrary to the record in this case. The adoption of all or part of Ms. Boatwright's fact should be reviewed under heightened scrutiny, as cited above and it should be reviewed using the standard required when reviewing whether a judge should have recused himself. "In determining whether a judge should have recused himself, this Court must consider the trial in its entirety and examine every ruling to determine if those rulings were prejudicial to the moving party." *Hunter v. State*, 684 So.2d 625, 630,631 (Miss.1996).

B. Reply to Appellee's allegation that the Chancellor's rulings are supported by the weight of the evidence and are not based on bias.

Ms. Boatwright argues that the Chancellor's rulings were not biased because they were supported by the evidence. Although all findings were in favor of Ms. Boatwright, she would have us believe in a case with voluminous issues that all evidence was in her favor and the Chancellor was correct in so finding. This is simply untrue. The Chancellor interpreted all evidence in favor of Ms. Boatwright, even when it was not supported by the evidence and was contrary to law. In *Hunt v. Asanov*, 975 So.2d 899, 902-03 (¶11) (Miss.App.2008), the Court of Appeals reversed a finding of willful contempt and held, "Before a party may be held in contempt for failure to comply with a judgment, "the judgment must be complete within itself...leaving open no matter or description or designation out of which contention may arise as to meaning." Citing, *Davis v. Davis*, 829 So.2d 712, 714 (¶9). The transcript of the February 2009 hearing shows the confusion by both parties regarding the payment of expenses of the children. Most of the confusion involved the payment and method of billing and payment of out-

of-pocket medical bills. Mr. Boatwright received one to five of these letters per month and that each bill list numerous amounts he owes. (ARE 163-219) Mr. Boatwright agrees that the method of billing and payments were confusing. Mr. Boatwright testified that some months he receives five or six bills per month and that once received he has thirty days in which to make payment. (CRT 771, 4-7) The Guardian ad Litem understood the confusion in the billing and payment record, and believed it to be such a source of contention between the parties, that she made a recommendation in her report regarding future payment of expenses. (CRT 275-76). In his ruling, the Chancellor followed the recommendation of the Guardian ad Litem regarding future payment of support. It is the confusing payments that no one could follow that Mr. Boatwright was held in contempt for failure to pay. And, the unpaid amount was a small fraction compared to what he did pay. He was not held in contempt for failure to pay all of any court ordered expense with the exception of a couple of college expenses which he did not believe were legitimate expenses. It is hard to believe that someone who paid the sum of $12,827.15 in support for the period in question, would willfully fail to pay the small amounts for which he was found in willful contempt. (RE 356-358) Payment of these amounts were clearly a hardship for Mr. Boatwright considering his gross monthly income was less than $3,000.00 per month. (ARE 149-155)

The contempt for non-payment of child support, college expenses, and medical bills is a blatant example of how the Chancellor ignored the law and stretched the imagination to find Mr. Boatwright in willful contempt. Mr. Boatwright was even prevented, in pre-trial discovery, to obtain all information needed to defend Ms. Boatwright's allegations of contempt. Mr. Boatwright propounded Request for Production of Documents requesting cancelled checks from

Ms. Boatwright regarding college expenses and medical bills due to the large amounts he was being billed. The Chancellor ruled that these items were irrelevant and refused to order Ms. Boatwright to produce her cancelled checks. (CRT 23-27)

In his application of a $543.47 payment made to Ms. Boatwright by Mr. Boatwright as reimbursement for out-of-pocket medical expenses, the Chancellor found that it was unclear where the payment should be applied so he refused to give him credit on the amount of arrearage that was alleged, he gave him credit on future payments. (CRT 1038, 13-26) Counsel opposite argues in her Finding of Facts and Conclusions of Law that he should not be given credit for the $543.47 as it was unclear where it should be applied. (RE 406, ¶2) Mr. Boatwright would show that he was only found to be in willful contempt for failure to pay $694.39 in out-of-pocket medical expenses. The Chancellor's refusal to give credit for all payments is crucial to Mr. Boatwright having been found in willful contempt. Giving Mr. Boatwright credit for a payment he in fact made would leave by their totals an arrearage of $150.92. That the only amount not paid by Mr. Boatwright was $312.50 for missed appointments with Frank Hudspeth which were made by Ms. Boatwright during his period of summer visitation with his minor son, Dunn. Ms. Boatwright billed Mr. Boatwright for the entire amount when it was she that made the appointment, not Mr. Boatwright. The court held Mr. Boatwright responsible for the entire amount. (CRT 1036, 11-17) This certainly could not be a willful contempt of the part of Mr. Boatwright when he was only ordered to pay one-half of medical expenses and was never ordered to pay counselors. (RE 46) Even if Mr. Boatwright is responsible for one-half this payment, rather than the entire amount, he is not in arrears when credited back Ms. Boatwright's half of the $312.50, in fact, the figures almost balance to the letter. He has a credit of 25 cents.

Although she did not request so in her pleadings, Ms. Boatwright testified that she preferred to communicate with Mr. Boatwright by facsimile, but that he refused to buy a fax machine. (CRT 317, 6-29; 318, 1-11, 18-29) In his ruling, the Chancellor did just that. He ordered Mr. Boatwright to purchase a fax machine. (ARE 124, ¶23)

When the Chancellor ruled that Ms. Boatwright would have standard visitation with Hannah, Mr. Boatwright's attorney pointed out that Dr. Nichol's recommendation was that visitation take place only as directed by a counselor. The Chancellor ignored the argument and stated, "that is not how I remember it", and ordered standard visitation. (CRT 1074, 3-20)

Although it was contrary to the recommendation of the court appointed psychologist and the Guardian ad Litem, counsel opposite argued in her Findings of Fact and Conclusions of Law that Ms. Boatwright should have standard visitation with the minor child, Hannah. (RE 423) The Court did exactly as she argued, although upon request of the Guardian Ad Litem the parties had a conference with the Court two weeks later and that ruling was modified. (CRT 1074, 3-20) The Chancellor at that time retracted the above ruling like it was never what he meant. (CRT 1086, 11-29; 1087, 1-1-29;1088, 1-10)

Throughout the Chancellor's opinion, he finds all testimony presented by Ms. Boatwright to be credible, and almost no testimony presented by Mr. Boatwright to be credible unless it admits a fact alleged by Ms. Boatwright or when it was testimony detrimental to Mr. Boatwright. (CRT 987-1063). That although Dr. Nichols, was court appointed, was more qualified than Ruth Cash, who was retained by Ms. Boatwright, and although Dr. Nichols conducted psychological examination on both parties as well as Hannah and Dunn, the Chancellor put a greater weight on Ruth Cash's testimony because she made negative findings regarding Mr.

Boatwright. (CRT 1019, 2-29; 1020, 1-16)

In his Counter-Petition for Contempt Mr. Boatwright asked the court to hold Ms. Boatwright in contempt for her failure to provide 48 hour notice of doctor's appointments as had been previously ordered by the Court. Ms. Boatwright had testified that she preferred to notify Mr. Boatwright by email or fax so that her notices were not always timely. (CRT 317, 2-14) Letters sent via certified mail to Mr. Boatwright were introduced and clearly show her failure to notify Mr. Boatwright of doctors appointments as ordered by the Court. (ARE 163-64, 174, 179, 181-82, 185, 187, 197, 201, 204, 217, 219) She admitted her notice was not timely but the Chancellor still refused to hold her in contempt. (CRT 1034, 7-29; 1035, 1-20)

Mr. Boatwright was fined $1,000.00, ordered to pay $1,616.27 and incarcerated until such amounts were paid, ordered to pay attorney fees in an amount to be later determined, and sanctioned for filing a Motion to Recuse. . (CRT 1057, 9-14) The adverse rulings Mr. Boatwright complains of were not supported by the evidence, were contrary to law and clearly show bias on the part of the Chancellor. Mr. Boatwright submits that a reasonable person knowing the totality of the circumstances would not believe the Chancellor was impartial. In *Mississippi United Methodist Conference v. Brown,* 929 So.2d 907, 910 (Miss.2006), our Supreme Court set out the standard in determining whether a chancellor was impartial holding, "We have previously determined that impartiality is viewed under the totality of the circumstances analysis using an objective reasonable person, not a lawyer or judge, standard." *Hathcok,* 912 So.2D 849(citing *Dodson v. Singing River Hosp. Sys.,* 839 So.2d 530, 534 (Miss.2003).

1. <u>Reply to Appellee's allegation that the Chancellor was acting in the best interest</u>

of the child and therefore was proper when he temporarily suspended Mr. Boatwright's visitation.

Ms. Boatwright quotes *Henderson v. Henderson* 952, So.2d 273, 279 (Miss.Ct.App.2006) (citing *Bredemeier v. Jackson*, 689 So.2d 770, 775 (Miss.1977)), as follows: "Where a chancellor has made a factual finding on the matter of visitation, this Court has held that it will not disturb those findings unless there is no credible evidence, he has committed manifest error or he has applied an erroneous legal standard." In this case, Mr. Boatwright's visitation was suspended for months without a hearing and without the chancellor hearing any evidence on the issue for almost nine months thereafter. When evidence was heard, the Guardian ad Litem, court appointed psychologist, and even Ms. Boatwright's privately retained counselor all recommended that Mr. Boatwright have regular visitation with Dunn. (RE 282) The Guardian ad Litem recommended standard visitation between Mr. Boatwright and Dunn, in part, based on Dr. Nichol's findings and recommendation. (RE 275) The Guardian ad Litem testified that she had spoken with Ms. Boatwright's expert, Ruth Cash, about her recommendations regarding visitation with Dunn. (CRT 731, 17-29) The Guardian ad Litem testified that Ruth Cash had told her that stopping visitation between Dunn and his father would be harmful to Dunn, that it would do more harm than good. (CRT 732, 1-7) The Guardian ad Litem admitted that is exactly what happened in this case. (CRT 732, 8-11) Ms. Boatwright argues that the cases of *R.L.N. v. C.P.N.* 931 So.2d 620 (Miss.Ct.App.2005) and *Craft v. Craft*, 32 So.3d 1232, 1237, wherein the court placed restrictions on a father's visitation are applicable in this case. Both of the cases cited by Ms. Boatwright involve restrictions on visitation, not suspension of visitation; and, in both cases evidence was presented prior to the chancellor restricting visitation.

Ms. Boatwright in support of her Motion for Emergency Relief being granted without a hearing of any evidence argues that her motion sets out all the facts. That argument is clearly contrary to law. The Motion for Emergency Relief was an 81(d) matter, at best, it was only signed by Ms. Boatwright's attorney, was not sworn, and was accompanied by a Notice of Hearing noticing it for hearing in three days. (RE 67-72; PRE 159-160) *Mississippi Rule of Civil Procedure 81(d)(3)*, provides, "Complaints and petitions filed in the actions and matters enumerated in subparagraphs (1) and (2) above shall not be taken as confessed."

Mr. Boatwright was never allowed to bring his Motion to Dismiss the Motion for Emergency Relief before the Court. Counsel for Mr. Boatwright addressed the Court at the end of the testimony regarding her pending Motion to Dismiss the Motion for Emergency Relief filed by Ms. Boatwright. (CRT 914, 10-13) Before she could finish the Court cut her off stating, "Well, Ms Robinson, okay, and I'm cutting you off. But I announced at the beginning of this trial that the Court was considering every one of those pleadings at this trial, and so there's no need for you to call that motion up at this point." (CRT 914, 14-19) Mr. Boatwright had raised the affirmative defense of insuffiency of process in his Motion to Dismiss. (AE 139) Immediately after that Ms. Boatwright, attorney brought up his pending Motion for Sanctions and was not cut off. (CRT 914, 26-29; 915, 1-13)

In her brief, Ms. Boatwright argues a plethora of reasons for her Motion for Emergency Relief never being set. When in fact it was her motion which she had an obligation to set. The fact is that after she got what she wanted without the necessity of proper notice or a hearing, she wasn't interested in her motion being set. The truth of the matter is shown by Mr. Boatwright, after numerous efforts to set the hearing, and that is Mr. Boatwright's efforts, not Ms.

Boatwright's, he was forced to file a Motion to Dismiss her Motion for Emergency Relief. (AE140, ¶ 3-4) And, it had been so difficult getting the attorneys for Ms. Boatwright to agree to a hearing date, that counsel for Mr. Boatwright had to file a Motion for Setting of her Motion to Dismiss in order to have any chance at getting a hearing date on it. (RE 22) Ms. Boatwright's submission to the court in her brief that Mr. Boatwright allowed the motion to linger is not supported anywhere in the record and contrary to the record.

Ms. Boatwright argues that the Chancellor's failure to understand the recommendation of Dr. Nichol's regarding visitation with Dunn Boatwright and his questioned of Ruth Cash in support of supervising visitation was not evidence of bias as argued by Mr. Boatwright in his brief. Mr. Boatwright made that argument in support of his allegation that the Chancellor interpreted all evidence and testimony against him. This was simply a clear example. No one had suggested they did not understand Dr. Nichol's recommendation. The Guardian ad Litem had not problem interpreting the recommendation. If the Chancellor really had a question as to what Dr. Nichol's recommendations was, he could have inquired directly to Dr. Nichol's who was court appointed or to the Guardian ad Litem. The Chancellor did nothing of the kind.

Mr. Boatwright further argues that upon receiving clarification from Nichol's, the Chancellor followed his recommendation. This was not just the recommendation of Dr. Nichol's, it was also the recommendation of the Guardian ad Litem. As argued by Mr. Boatwright in his brief, the Chancellor refused to follow the recommendation of Dr. Nichol's regarding visitation between Hannah and Ms. Boatwright, even after counsel for Mr. Boatwright tried to point out it was contrary to Dr. Nichol's recommendation. The Chancellor opined to counsel for Mr. Boatwright, "that is not how I remember it", and ordered standard visitation.

(CRT 1074, 3-20) The Chancellor's ruling failed to follow the recommendation of the court appointed psychologist, but did exactly what was requested by Ms. Boatwright in her findings of fact and conclusions of law which was standard visitation with Hannah. Because of serious problems caused by this ruling, the Guardian ad Litem requested a conference with the Chancellor and the attorneys several weeks after the ruling and it was modified with the Chancellor attempting to say that he did not mean it should have been the way he originally ruled. (CRT 1086, 11-29; 1087, 1-1-29;1088, 1-10)

Ms. Boatwright argues because the allegations in her Motion for Emergency Relief were proved to be unfounded the court gave Mr. Boatwright some additional visitation to make up some of the visitation he missed. Mr. Boatwright did not have his normal standard visitation with his son from May of 2008 until mid-February 2009. He missed weekend visitation, all holiday visitation and all summer visitation for 2008. Summer visitation alone was six weeks. The Chancellor very reluctantly ordered that four weeks of that visitation be made up by giving him two extra weeks in the summer for the next two years. (CRT 1061, 20-29; 1062, 1-11) That did not even make up the missed summer visitation for one year.

Ms. Boatwright argues, "the Chancellor exercised his discretion when he temporarily suspended Mr. Boatwright's visitation with his son." She argued further, "nothing in the record reflects the Chancellor's rulings on visitation indicate bias." Mr. Boatwright would show that there are numerous reflections in the record to show that stopping Mr. Boatwright's was not supported by the evidence and was contrary to the best interest of Dunn. The most obvious example is Ms. Boatwright's failure to prove the allegations set out in her Motion for Emergency Relief. Even Ms. Boatwright's own expert testified and reported to the Guardian ad Litem that

stopping Dunn's visitation with his father would be harmful to Dunn. (CRT 731, 22-29; 732, 1-10) Ms. Boatwright is so accustomed to receiving everything she wants in this case, that it seems normal to her that she should be granted extraordinary relief without proper notice and without a hearing.

2. Reply to Appellee's allegation the Chancellor's denial of Mr. Boatwright's request to terminate his obligation to pay support and college expenese for the benefit of Wynne Boatwright was proper.

The fact that Wynne refused to have any type of relationship with him was not Mr. Boatwright's only ground for requesting the court relieve him of the duty to pay support and college for her benefit. After her first semester in college, Wynne without Mr. Boatwright's knowledge or permission moved in with her boyfriend and then changed schools every semester to follow him around. Mr. Boatwright testified that Ms. Boatwright did not inform him that Wynne was moving in with her boyfriend. (CRT 744,12-18) Ms. Boatwright admitted that she did not inform Mr. Boatwright that Wynne was moving in with her boyfriend, she simply mailed him a copy of the lease with the boyfriends name on it with no explanation when she billed him for rent. (CRT 513, 13-25)

3. Reply to Appellee's allegation the denial of Mr. Boatwright's request for back child support and reimbursement for child support paid to Ms. Boatwright was not an abuse of discretion.

This is yet another example of the Chancellor's bias against Mr. Boatwright. In the past, Mr. Boatwright was ordered to pay exorbitant amounts, especially considering his income, to Ms. Boatwright for the support of the parties minor children. The Chancellor refused to even order Ms. Boatwright to reimburse Mr. Boatwright for support paid to her after she requested and it was ordered that one of the minor children be removed from her home. Mr. Boatwright in his

Counter-Petition also requested that Ms. Boatwright be ordered to pay support for the period Ms. Boatwright did not have custody of Hannah which was less than a year. Reviewing Ms. Boatwright's 8.05, she is more able to pay support than Mr. Boatwright and the child taken from her custody was a senior in high school with greater needs. (ARE 157-162)

4. Reply to Appellee's allegation the Chancellor's findings in regard to contempt, the imposition of fines and the award of attorney fees was proper and supported by the evidence.

(a) Finding of willful contempt.

The evidence clearly supports the fact that Mr. Boatwright did not willfully violate any order of the Court. He was found in willful contempt for non-payment of certain medical bills which all agree were to confusing for anyone to figure out. He was found in willful contempt for failure to pay for a computer for Wynne Boatwright which Ms. Boatwright alleged was a legitimate college expense. Mr. Boatwright paid large sums in tuition, books, and other items billed, but did not believe the computer was a legitimate expense. Mr. Boatwright was found in willful contempt for failure to provide Ms. Boatwright a complete copy of his Income Tax Return as ordered in the Final Decree of Divorce. The evidence clearly showed that Mr. Boatwright provided the portion of his return which showed his total income. Mr. Boatwright was found in willful contempt for failing to provide timely proof of life insurance, although he carried it at all times as the proof showed. Finding Mr. Boatwright in willful contempt for all of the aforementioned matters clearly shows bias on the part of the Chancellor, was not supported by the evidence and was clearly contrary to law.

(b) Ms. Boatwright was entitled to an award of attorney fees.

Ms. Boatwright argues that "where an individual has willfully not complied with a

chancery court order, Mississippi law mandates, pursuant to §93-5-23 of *Mississippi Code Annotated* that 'the chancery court shall order the alleging party to pay all court cost and reasonable attorney's fees incurred by the defending party...'" After a careful review of §93-5-23, no such provision is found, in fact, contempt actions are not even mentioned. Ms. Boatwright cites the case of *Creel v. Cornacchione*, 831 So.2d 1179, in support of her argument. *Creel* is totally distinguishable from this case in that it involved the mother filing numerous unfounded contempt actions against the father and being ordered to pay the father's attorney fees as a result thereof.

(c) Mr. Boatwright was subject to a fine.

The Chancellor's finding Mr. Boatwright in willful contempt when it was not supported by the evidence; ordering that he be incarcerated until all amounts owing were paid in full; sanctioning he and his attorney approximately $6,000; ordering he pay attorney fees in an amount to be determined later; and, then fining him $1,000.00 is simply overkill and additional evidence of the bias the Chancellor harbored against Mr. Boatwright.

(d) Ms. Boatwright was not in willful contempt

Ms. Boatwright was ordered to provide Mr. Boatwright with 48 hours advance notice of the children's doctor's appointments. (PRE 61,10-19) Ms. Boatwright refused to telephone him to notify him of appointments. She sent notices she did give via certified mail. As an example, the first letter in question is dated June 6, 2006. (ARE 163) The letter states in paragraph 3, "Hannah and Wynne both saw Dr. Henson." Paragraph 4 states, "Wynne and Hannah both had physicals last month." Paragraph 5 states, "Dunn has a dentist appointment on June 8." Paragraph 7, states, "Wynne has a dentist appointment on June 9." Paragraph 7 also states,

"Wynne will have an appointment with Dr. Tinker on Thursday (this would be June 8)." The June 6 letter notified Mr. Boatwright of eight doctor's appointments. Only one of those notifications is within 48 hours of the appointment as ordered.

5. Reply to Appellee's allegation the Chancellor's sanctioning of Mr. Boatwright and his attorney was proper.

Mr. Boatwright and his attorney filed their Motion to Recuse in good faith as designated in attached affidavits as well as in the motion itself. This case began in April of 2003 and continued up until the time Chancellor Roberts recused himself on his own motion in April of 2009, with a few pending matters resolved by the other Chancellor by March of 2010. Mr. Boatwright would show that from 2004 forward he believed the Chancellor harbored bias against him. After careful review of the voluminous court file in this matter, coupled with the Chancellor's statements to the attorneys regarding the case, and the Chancellor's handling of preliminary matters, Mr. Boatwright's new attorney agreed that something was wrong with the Chancellor's handling of the matters before him in this case. Mr. Boatwright and his attorney strongly believed the bias exhibited by the Chancellor was continuing and would continue.

Pursuant to *Rule 1.11 of the* Uniform *Chancery Court Rules*, which provides, in part: "...it shall be filed within 30 days after the filing party could reasonably discover the facts underlying the grounds asserted;" Mr. Boatwright filed his Motion to Recuse. Although it was an unusual set of facts, Mr. Boatwright and his attorney believed if they did not raise the issue of bias, it would be waived. "One is not at liberty to await the outcome of litigation and then seek disqualification of the Judge." *Jackson v. Jackson*, 732 So.2d 916, 925-926 (¶16) (Miss.1999). It was clear to Mr. Boatwright that after the hearing on procedural motions which were set out in

his Petition for Review, the next evidence of bias could not take place until the Chancellor's Final Ruling in this matter. Mr. Boatwright took every precaution available to him to avoid waiting until a final ruling and then being in the position of having the Chancellor's rulings being bias against him. After the Chancellor denied his Motion to Recuse, Mr. Boatwright filed a Petition for Review with the Supreme Court which was also denied. In researching this matter, no case involving such a long history of bias and animosity toward a party could be found. At no time during the proceedings on the recusal motion, did Mr. Boatwright have knowledge of why the Chancellor harbored bias against him. Mr. Boatwright believes this is a case of first impression and should be addressed at length by the court. There is no doubt had Mr. Boatwright waited until after the Chancellor's ruling on the merits to allege bias, that Ms. Boatwright would be arguing that he had waived the right to make the allegation because he waited until after the Chancellor had ruled. The Court in *Jackson* quoting *Ryals v. Pigott*, 580 So.2d 1140 (Miss.1990), held, "A party who fails, through wilful ignorance or otherwise, to timely apprise itself of such critical information (grounds for recusal) waives the right to have the issue addressed on the merits. The principle of well-entrenched law is designed particularly to nullify the "rewards" of "sandbagging" through employment of dilatory tactics." *Id.* Mr. Boatwirght would show that he did everything in his power to determine the basis for the Chancellor's bias. Not during the hearing on the Motion to Recuse, the almost three hour ruling on the motion, the one hour hearing on the Counter-Motion for Sanctions, nor during the ruling on the sanctions, did counsel opposite or the Chancellor disclose their personal relationship. In his ruling on the Motion to Recuse the Chancellor found, "Mere speculation is not sufficient to raise a reasonable doubt as to the validity of the presumption that the trial judge was qualified and unbiased." (CRT

189, 1-4) There would have been no speculation had the Chancellor disclosed his relationship with counsel opposite. The fact that once the relationship was discovered by Mr. Boatwright's attorney and the attorney brought it to the Chancellor's attention, the fact that the Chancellor recused himself on his own motion speaks volumes. How can anyone have faith in our legal system if this type of conduct is allowed. No reasonable person knowing all these circumstances would want the Chancellor to hear their case. "The standard is one of determining not whether the judge had acted improperly, but whether there is an appearance to the general public of conflict. *Id.* (citing *Jenkins v. Forrest Co. General Hosp.*, 542 So.2d 1180 (Miss.1988).

After the hearing on the Motion to Recuse and the Chancellor's lengthy ruling, the Chancellor deferred hearing on Ms. Boatwright's Counter-Motion for Sanctions until the final hearing. And for reasons unknown to Mr. Boatwright, it was later continued until after the final hearing. At the end of the trial, the Chancellor took the case under advisement and ordered the parties to appear before him on March 11, 2009 for his opinion. A letter was sent out by the law clerk stating that "argument" would be heard on the Counter-Motion for Sanctions on that day. (RE 286) When we appeared there was a full blown hearing and attorneys for Ms. Boatwright were allowed to call witnesses.

In his ruling on the Counter-Motion for Sanctions, the Chancellor found, "It is undisputed, that the attorney for Mr. Boatwright did not talk with the guardian ad litem or opposing counsel about the prior hearings regarding this case." (CRT 979, 1-14) There is absolutely nothing in the record to support this finding. The Guardian ad Litem was never asked the question, nor was counsel for Mr. Boatwright. The evidence also shows that the Guardian ad Litem had limited involvement in the past in this case. (CRT 145, 20-29; 146, 21)

The Counter-Motion for Sanctions filed by Ms. Boatwright consisted of approximately 50 pages. (PRE 14-63) The Chancellor's ruling on the Motion to Recuse lasted for hours and consisted of 95 pages of transcript. (CRT 185-280) Mr. Boatwright would show that a Motion to Recuse is a unique animal which sets out safeguards to insure every litigant is heard by a fair and impartial tribunal. To allow sanctions to be levied against a party for merely filing a single Motion to Recuse endangers the sanctity of our judicial process.

6. Reply to Appellee's allegation it is the proper duty of the Chancellor to sit as the finder of fact, assess evidence and determine what weight and worth to give it.

Ms. Boatwright's response to Mr. Boatwright's allegation that the Chancellor found almost no testimony presented by him to be credible and that the Chancellor gave more weight to certain testimony than other and as such, is evidence of bias, is to say that is what the Chancellor is suppose to do.

C. Reply to Appellee's allegation Mr. Boatwright is procedurally barred from raising issue of whether Chancellor erred in previously failing to recuse.

The Court of Appeals held in the case of, *In the Matter of the Estate of Woodfield, v. Sharon Mccoy Woddfield, et al, 2004-CA-00238-COA (MSCA),* (Miss.2006), that filing an interlocutory appeal on the issue of refusal to recuse which was denied did not render the matter res judicata. The Court found that the rulings made by the Judge were evidence of bias and that a reasonable person, knowing all the circumstances, would not think the Judge could have been impartial. *Id.* The Judge also ordered the opposing attorney to refer the attorney/conservator to the Mississippi Bar and the District Attorney's Office. The Court of Appeals found this to be further evidence that the Chancellor was bias. *Id.* Just like in *Woodfield,* the Supreme Court denied hearing of the Petition for Review in Boatwright so that matter was not adjudicated.

Mr. Boatwright would show that the Court always has authority to decide issues using the plain-error doctrine. In *Faerber v. Faerber*, 13 So.3d 853, 865, ¶48(Miss.App.2009), this Court held, "the plain-error doctrine has been construed to include anything that 'seriously affects the fairness, integrity or public reputation of judicial proceedings..'" (quoting *Pickle v. State*, 942 So.2d 243, 246, (¶13) (Miss.Ct.App.2006) (quoting *United States v. Olano*, 507 U.S. 725, 732, 113 S.Ct. 1770, 123 L.Ed.2d508 (1993)). Taken as a whole, this case is an extreme example of why the public lacks confidence in our judicial system. No reasonable person (non-lawyer, non-judge) knowing the totality of the circumstances would think the Chancellor was ever impartial in this case.

D. Reply to Appellee's allegation the terms of the relationship shared by Chancellor Roberts and Ms. Boatwright's attorney did not require recusal and Chancellor's failure to make disclosure of same was neither improper nor a violation of law.

Since the relationship between Chancellor Roberts and Ms. Boatwright's attorney was never disclosed, the only evidence available was from the testimony of her attorney. He failed to be forthright and disclose the relationship until such time as it was discovered by the attorney for Mr. Boatwright and he was called to testify and now we are suppose to take his word for every detail of that relationship. Ms. Boatwright argues that the disclosure was not "per se" required in this case and cites *Hathcock v. Souther Farm Bureau,* 912 So.2d 844, 853 (Miss.2005) in support of her argument. Ms. Boatwright would have us believe that disclosure is never required which is simply contrary to the law in our State. In *Hathcock*, the court determined that even if the disclosure had been made it still would not have required the judge to recuse himself. *Id. 853.* Cannon 3(E)(1) of the Code of Judicial Conduct, provides, "Judges should disqualify themselves

in proceedings in which their impartiality might be questioned by a reasonable person knowing all the circumstances...." In a case where all rulings from 2004 through April of 2009 were in favor of one party, where there has been a highly contested Motion to Recuse, and where the Chancellor sanctions a party and his attorney exorbitant amounts for filing a Motion to Recuse, the disclosure of the Chancellor's relationship with the attorney for the all prevailing party is certainly relevant. The comment to the rule provides:

"A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification. By decisional law, the rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In the later case, the judge **must** disclose on the record the basis for possible disqualification....*Id.*

Ms. Boatwright forgets that the main controversy in this case began with her Motion for Emergency Relief which under the later part of the comment would clearly require such a disclosure if not from the facts of this case alone.

Ms. Boatwright's attorney argues in his brief that the record reflects (referring to his own testimony) that he did not go hunting at all with Judge Roberts in 2008. (CRT 1124, 21-22) The record only reflects that he did not hunt with Judge Roberts in the spring of 2008. The attorney then argues that he did not hunt before the hearing on the merits so all is well. No, the attorney waited until the day before we were to appear before Judge Roberts on a ruling on attorney fees wherein Ms. Boatwright's attorney was requested approximately $40,000 in fees. To Ms. Boatwright this makes everything alright. In an attempt to vindicate themselves, Ms. Boatwright and her attorneys appear to argue that since they only admitted to hunting during certain times that their relationship with the Chancellor is of no importance. Attorneys for Ms. Boatwright

have an active law practice wherein they practice in Chancery Court on a regular basis. What about all the other cases they appeared before Judge Roberts on during that time. What about all the past times the Boatwrights were in court and Ms. Boatwright's attorney was hunting with the Judge. In May of 2006 an order was entered on a hearing wherein Mr. Boatwright was not allowed to proceed with his case, and although he had allegations of contempt against Ms. Boatwright, she was allowed to proceed. (PRE 133-134) Ms. Boatwright hunted with Chancellor Roberts at least two times immediately prior to that hearing. (CRT 1124, 26-27) Counsel for Ms. Boatwright admitted in his testimony that he and Judge Roberts were not friends and in fact did not like each other before he took office, but that shortly after Judge Roberts took office he began to invite him to go turkey hunting with him on property he owned in Marshall County. (CRT 1125-1126) The attorney testified further, that although the other Chancellor was also a hunter, he had never invited him to hunt. (CRT 1126, 19-29) Mr. Boatwright submits that the point well made by the testimony of Ms. Boatwright's attorney is that there existed an ongoing relationship with Chancellor Roberts who according to the testimony of Mr. Smith was an avid turkey hunter.

Ms. Boatwright compares this case to *Cheney v. United States District Court For District of Columbia*, 541 U.S. 913, 124 S.CT. 1391 (2004) wherein Justice Scalia refused to recuse himself because vice-president Cheney was not personally involved in the lawsuit, the governmental office which he served was only named.. Scalia also noted that there were eight other justices ruling on the case and that he would not be deciding it alone. And, even though Cheney was not personally involved in the case, Scalia received a lot of public criticism for not recusing himself.

Ms. Boatwright's attorney argues that he denied speaking with the Chancellor about the

case while hunting alone with him. We only have the attorneys word for this. The attorney should be reminded that it is the "appearance of impropriety" that is at issue. Who is their right mind would feel comfortable with a Judge deciding their case when they go hunting alone, not in a group such as golf, with the Judge. To insure this case was handled with the utmost fairness it seems that it would have been so simple for Chancellor Roberts to just say no. The fact that Ms. Boatwright's attorney waited until the most money was at stake to invite the Judge to hunt raises more suspicion.

Ms. Boatwright argues that the a reasonable person might find it suspect that her attorney hunted with Chancellor Roberts the day before the hearing wherein she and her attorneys were asking for approximately $40,000 in attorney fees, but says the Chancellor cured any potential error by recusing himself, once caught. (AB 41, ¶3) Is this not an admission? If Ms. Boatwright's attorney knew this conduct was suspect of impropriety, why did he invite the Judge to go hunting? This is not something that the Chancellor or Ms. Boatwright's attorney owned up to, it was something Mr. Boatwrigt's attorney discovered accidentally thanks to an ethical attorney, who know about the upcoming proceedings and who had knowledge of the hunt. (CRT 1120, 8-29; 1121, 1-10) Ms. Boatwright argues that there is nothing in the record to show the Judge was bias. This is clearly contrary to the record. The record from 2004 through March of 2009 shows only adverse and harsh treatment of Mr. Boatwright on behalf of the Chancellor. The record reflects beginning before the final decree was entered that the Court for little to no reason refused to enforce his visitation rights although he filed one contempt action after another. Mr. Boatwright sets out this history in great detail in his Petition for Review of Denial of Motion to Recuse. Ms. Boatwright's repeated argument that her attorney did not hunt with the Judge

until after the hearing on the merits so everything alright is ludicrous. This case was ongoing for five years, it was during these five years that Ms. Boatwright's attorney decided to develop a relationship with the Chancellor. The only evidence we have in the record is that admitted by the attorney only after being caught. It would be peculiar for this to be the only contact, and if it is it would even be more suspicious. It simply does not make sense that the attorney and the Chancellor have no other relationship, but to go hunting alone on the attorney's property a couple of times a year. Mr. Boatwright would show that this case was not the only case Ms. Boatwright's attorneys had before this Judge. They apparently had no problem hunting with the Judge while the other cases were pending.

Ms. Boatwright argues that it stands to reason that judges and attorneys are going to have contact outside the courtroom. The record in this case reflects, that the attorney and the judge did not even live in the same county, and that they were not only not friends before the judge took the bench, they had a strained relationship. Ms. Boatwright's attorney admits that after the judge took the bench he sought out and developed a relationship with the judge. (CRT 1125, 3-29; 1126, 1-18)

E. Chancellor Alderson's denial of Toulie Boatwright's Motion to Alter or Amend or For a New Trial was neither an abuse of discretion or a miscarriage of justice.

Chancellor Alderson ruled that since he did not hear the trial, he was in no position to rule on the motion. The Chancellor made it clear from the beginning of the hearing on the motion as to his position. Mr. Boatwright filed his Motion on April 16, 2009 while the matter was still pending before Chancellor Roberts. (RE 30) On April 13, 2009, Chancellor Roberts entered the order on the hearing on the merits. (RE 30) On April 16, 2009, the Chancellor

entered the order imposing sanctions. (RE 30) Prior to the hearing on the Motion, on April 20, 2009, the Chancellor entered an order on his own motion recusing himself from further proceedings in this matter, "in the interest of equity and justice." To allow the orders entered by Chancellor Roberts on April 13 and 16, 2009 to stand would result in a miscarriage of justice. Mr. Boatwright's hands should not be tied because of the timing chosen by the Chancellor to recuse himself in this matter. Mr. Boatwright submits that the Chancellor's recusal on his own motion, after a lengthy and heated motion to recuse wherein exorbitant sanctions were levied for filing the motion, shows at the very least that the Chancellor realized he was wrong. Although he did recuse himself, his recusal did not remedy all the harm done to Mr. Boatwright as Ms. Boatwright argues. Judge Alderson only found that he was not in a position to decide the motion. He did not find that the motion did not have merit. This is per se grounds for reversal.

In conclusion, Ms. Boatwright argues that there is not evidence outside turkey hunting of any relationship between her attorney and the Chancellor. Mr. Boatwright would show that there was not even evidence of the turkey hunting prior to his accidental discovery of same because counsel opposite and the Chancellor chose not to disclose same. Ms. Boatwright's admitted to the turkey hunting only after being caught red handed and we are suppose to take his word for the fact that there was no more to the relationship. At the limited hearing on the Motion to Alter or Amend or for a New Trial , Mr. Boatwright clearly showed newly discovered evidence.

It is not Mr. Boatwright who put the entire proceedings in this matter in jeopardy. He had no control over the actions of the Chancellor and opposing counsel.

RESPECTFULLY SUBMITTED,

HELEN KENNEDY ROBINSON, MSB
Attorney for Appellant
P.O. Box 817
Oxford, MS 38654
(662)890-9596 phone

CERTIFICATE OF SERVICE

I, **Helen Kennedy Robinson**, do hereby certify that I have this mailed via U.S. Mail or Federal Express postage prepaid, a true and correct copy of the above and foregoing Appellant's Reply Brief to:

Hon. Kent and Amanda Smith
P.O. Box 849
Holly Springs, MS 38635

Honorable Edwin Roberts, Chancellor
P.O. Box 49
Oxford, MS 38655

Supreme Court of Mississippi
450 High Street
Jackson, Mississippi 39201

This the 16th day of Jan 2011.

HELEN KENNEDY ROBINSON

Canon 3. A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently.

Mississippi Rules

Code Of Judicial Conduct

As amended through July 1, 2009

Canon 3. A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently

A. Judicial Duties in General. The judicial duties of judges take precedence over all their other activities. The judges' judicial duties include all the duties of their office prescribed by law. In the performance of these duties, the following standards apply:

B. Adjudicative Responsibilities.

(1) A judge shall hear and decide all assigned matters within the judge's jurisdiction except those in which disqualification is required.

(2) A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.

(3) A judge shall require order and decorum in proceedings before the judge.

(4) Judges shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom they deal in their official capacities, and shall require similar conduct of lawyers, and of their staffs, court officials, and others subject to their direction and control.

Commentary

The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Courts can be efficient and business like while being patient and deliberate.

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, gender, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so. A judge shall refrain from speech, gestures or other conduct that could reasonably be perceived as sexual harassment and shall require the same standard of conduct of others subject to the judge's direction and control.

Commentary

A judge must perform judicial duties impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Facial expression and body language, in addition to oral communication, can give to parties or lawyers in the proceeding, jurors, the media and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial.

(6) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, age, sexual orientation or socioeconomic status, against parties, witnesses, counsel or others. This Section 3B(6) does not preclude legitimate advocacy when race, gender, religion, national origin, disability, age, sexual orientation or socioeconomic status, or other similar factors, are issues in the proceeding.

(7) A judge shall accord to all who are legally interested in a proceeding, or their lawyers, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

(a) where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized: provided:

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

(b) Judges may obtain the advice of a disinterested expert on the law applicable to a proceeding before them if the judges give notice to the parties of the person consulted and the substance of the advice, and afford the parties reasonable opportunity to respond.

(c) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

(d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.

(e) A judge may initiate or consider any ex parte communications when expressly authorized by law to do so.

Commentary

The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted. To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge. Whenever presence of a party or notice to a party is required by Section 3B(7), it is the party's lawyer, or if the party is unrepresented, the party, who is to be present or to whom notice is to be given.

An appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite the expert to file a brief amicus curiae.

Certain ex parte communication is approved by Section 3B(7) to facilitate scheduling and other administrative purposes and to accommodate emergencies. In general, however, a judge must discourage ex parte communication and allow it only if all the criteria stated in Section 3B(7) are clearly met. A judge must disclose to all parties all ex parte communications described in Sections 3B(7)(a) and 3B(7)(b) regarding a proceeding pending or impending before the judge. A judge must not independently investigate facts in a case and must consider only the evidence presented.

A judge may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprized of the request and are given an opportunity to respond to the proposed findings and conclusions.

A judge must make reasonable efforts, including the provision of appropriate supervision, to ensure that Section 3B (7) is not violated through law clerks or other personnel on the judge's staff.

If communication between the trial judge and the appellate court with respect to a proceeding is permitted, a copy of any written communication or the substance of any oral communication should be provided to all parties.

(8) A judge shall dispose of all judicial matters promptly, efficiently and fairly.

Commentary

In disposing of matters promptly, efficiently and fairly, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. Containing costs while preserving fundamental rights of parties also protects the interests of witnesses and the general public. A judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays and unnecessary costs. A judge should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts.

Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to insist that court officials, litigants and their lawyers cooperate with the judge to that end.

(9) A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This Section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This Section does not apply to proceedings in which the judge is a litigant in a personal capacity.

Commentary

The requirement that judges abstain from public comment regarding a pending or impending proceeding continues during any appellate process and until final disposition. This Section does not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity, but in cases such as a writ of mandamus where the judge is a litigant in an official capacity, the judge must not comment publicly. The conduct of lawyers relating to trial publicity is governed by Rule 3.6 of the Rules of Professional Conduct.

(10) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding, but may express appreciation to jurors for their service to the judicial system and the community.

Commentary

Commending or criticizing jurors for their verdict may imply a judicial expectation in future cases and may impair a juror's ability to be fair and impartial in a subsequent case.

(11) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity.

(12) Except as may be authorized by rule or order of the Supreme Court, a judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions, except that a judge may authorize:

(a) the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record, or for other purposes of judicial administration;

(b) the broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings;

(c) the photographic or electronic recording and reproduction of appropriate court proceedings under the following conditions:

(i) the means of recording will not distract participants or impair the dignity of the proceedings;

(ii) the parties have consented, and the consent to being depicted or recorded has been obtained from each

witness appearing in the recording and reproduction;

(iii) the reproduction will not be exhibited until after the proceeding has been concluded and all direct appeals have been exhausted; and

(iv) the reproduction will be exhibited only for instructional purposes in educational institutions.

Commentary

The ABA Model Code does not address broadcasting, televising, recording or photographing in the courtroom. This provision is taken from the Section 3A(7) of the prior Mississippi Code of Judicial Conduct.

Section 3B(12) prohibits broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto except as authorized by rule or order of the Supreme Court. The Supreme Court has now adopted the Rules for Electronic and Photographic Coverage of Proceedings which provides detailed guidance for such coverage.

[Commentary amended effective April 17, 2003.]

C. Administrative Responsibilities.

(1) A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and shall cooperate with other judges and court officials in the administration of court business.

(2) A judge shall require staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.

(3) A judge with supervisory authority for the judicial performance of other judges shall take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.

(4) A judge shall not make unnecessary appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism and favoritism. A judge shall not approve compensation of appointees beyond the fair value of services rendered.

Commentary

Appointees of a judge include assigned counsel, officials such as referees, commissioners, special masters, receivers and guardians and personnel such as clerks, secretaries and bailiffs. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by Section 3C(4).

(5) A judge shall not appoint a major donor to the judge's election campaign to a position if the judge knows or learns by means of a timely motion that the major donor has contributed to the judge's election campaign unless

(a) the position is substantially uncompensated;

(b) the person has been selected in rotation from a list of qualified and available persons compiled without regard to their having made political contributions; or

(c) the judge or another presiding or administrative judge affirmatively finds that no other person is willing, competent and able to accept the position.

D. Disciplinary Responsibilities.

(1) A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this Code should take appropriate action. A judge having knowledge that another judge has committed a violation of this Code that raises a substantial question as to the other judge's fitness for office shall inform the appropriate authority.

(2) A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct should take appropriate action. A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate authority.

(3) Acts of a judge, in the discharge of disciplinary responsibilities, required or permitted by Sections 3D(1) and 3D(2) are part of a judge's judicial duties and shall be absolutely privileged, and no civil action predicated thereon may be instituted against the judge.

Commentary

Appropriate action may include direct communication with the judge or lawyer who has committed the violation, other direct action if available, and reporting the violation to the appropriate authority or other agency or body.

E. Disqualification.

(1) Judges should disqualify themselves in proceedings in which their impartiality might be questioned by a reasonable person knowing all the circumstances or for other grounds provided in the Code of Judicial Conduct or otherwise as provided by law, including but not limited to instances where:

Commentary

Under this rule, a judge should disqualify himself or herself whenever the judge's impartiality might be questioned by a reasonable person knowing all the circumstances, regardless whether any of the specific rules in Section 3E(1) apply.

A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.

By decisional law, the rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In the latter case, the judge must disclose on the record the basis for possible disqualification and use reasonable efforts to transfer the matter to another judge as soon as practicable.

For procedures concerning motions for recusal and review by the Supreme Court of denial of motions for recusal as to trial court judges, see M.R.C.P. 16A, URCCC 1.15, Unif. Chanc. R. 1.11, and M.R.A.P. 48B. For procedures concerning motions for recusal of judges of the Court of Appeals or Supreme Court justices, see M.R.A.P. 27(a).

(a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge served as lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

Commentary

A lawyer in a government agency does not ordinarily have an association with other lawyers employed by that agency within the meaning of Section 3E(1)(b); judges formerly employed by a government agency, however, should disqualify themselves in a proceeding if the judges' impartiality might reasonably be questioned because of such association.

(c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse or member of the judge's family residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; (iv) is to the judge's knowledge likely to be a material witness in the proceeding;

Commentary

The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that "the judge's impartiality might be questioned by a reasonable person knowing all the circumstances " under Section 3E(1), or that the relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Section 3E(1)(d)(iii) may require the judge's disqualification.

(2) Recusal of Judges from Lawsuits Involving Major Donors. A party may file a motion to recuse a judge based on the fact that an opposing party or counsel of record for that party is a major donor to the election campaign of such judge. Such motions will be filed, considered and subject to appellate review as provided for other motions for recusal.

Commentary

Section 3E(2) recognizes that political donations may but do not necessarily raise concerns about a judge's impartiality. The filing, consideration and appellate review of motions for recusal based on such donations are subject to rules governing all recusal motions. For procedures concerning motions for recusal and review by the Supreme Court of denial of motions for recusal as to trial court judges, see M.R.C.P. 16A, URCCC 1.15, Unif. Chanc. R. 1.11, and M.R.A.P. 48B. For procedures concerning motions for recusal of judges of the Court of Appeals or Supreme Court justices, see M.R.A.P. 27(a). This provision does not appear in the ABA Model Code of Judicial Conduct; however, see Section 3E(1) (e) of the ABA model.

F. Remittal of Disqualification. A judge who may be disqualified by the terms of Section 3E may disclose on the record the basis of the judge's possible disqualification and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

Commentary

A remittal procedure provides the parties an opportunity to proceed without delay if they wish to waive the possible disqualification. To assure that consideration of the question of remittal is made independently of the judge, a judge must not solicit, seek or hear comment on the remittal or waiver of the possible disqualification unless the lawyers jointly

propose remittal after consultation as provided in the rule. A party may act through counsel if counsel represents on the record that the party has been consulted and consents. As a practical matter, a judge may wish to have all parties and their lawyers sign the remittal agreement.

in an effort to resolve the dispute and has been unable to do so. Motions to compel shall quote verbatim each contested request, the specific objection to the request, the grounds for the objection and the reasons supporting the motion.

RULE 1.11 MOTIONS FOR RECUSAL OF JUDGES

Any party may move for the recusal of a judge of the chancery court if it appears that the judge's impartially might be questioned by a reasonable person knowing all the circumstances, or for other grounds provided in the Code of Judicial Conduct or otherwise as provided by law. A motion seeking recusal shall be filed with an affidavit of the party or the party's attorney setting forth the factual basis underlying the asserted grounds for recusal and declaring that the motion is filed in good faith and that the affiant truly believes the facts underlying the grounds stated to be true. Such motion shall, in the first instance, be filed with the judge who is the subject of the motion within 30 days following notification to the parties of the name of the judge assigned to the case; or, if it is based upon facts which could not reasonably have been known to the filing party within such time, it shall be filed within 30 days after the filing party could reasonably discover the facts underlying the grounds asserted. The subject judge shall consider and rule on the motion within 30 days of the filing of the motion, with hearing if necessary. If a hearing is held, it shall be on the record in open court. The denial of a motion to recuse is subject to review by the Supreme Court on motion of the party filing the motion as provided in M.R.A.P. 48B.

[Adopted April 4, 2002.]

RULE 1.12 ELECTRONIC MEDIA COVERAGE

Electronic media coverage of judicial proceedings by means of cameras, television and other electronic devices is governed by the Rules for Electronic and Photographic Coverage of Judicial Proceedings.

[Adopted effective April 17, 2003 for proceedings conducted from and after July 1, 2003.]

Rule 1.13. ELECTRONIC FILING AND SERVICE PROCEDURES

A court may, by local rule, allow pleadings and other papers to be served, filed, signed, or verified by electronic means in conformity with the Mississippi Electronic

RULE 81. APPLICABILITY OF RULES

(a) Applicability in General. These rules apply to all civil proceedings but are subject to limited applicability in the following actions which are generally governed by statutory procedures.

(1) proceedings pertaining to the writ of habeas corpus;

(2) proceedings pertaining to the disciplining of an attorney;

(3) proceedings pursuant to the Youth Court Law and the Family Court Law;

(4) proceedings pertaining to election contests;

(5) proceedings pertaining to bond validations;

(6) proceedings pertaining to the adjudication, commitment, and release of narcotics and alcohol addicts and persons in need of mental treatment;

(7) eminent domain proceedings;

(8) Title 91 of the Mississippi Code of 1972;

(9) Title 93 of the Mississippi Code of 1972;

(10) creation and maintenance of drainage and water management districts;

(11) creation of and change in boundaries of municipalities;

(12) proceedings brought under sections 9-5-103, 11-1-23, 11-1-29, 11-1-31, 11-1-33, 11-1-35, 11-1-43, 11-1-45, 11-1-47, 11-1-49, 11-5-151 through 11-5-167, and 11-17-33, Mississippi Code of 1972.

Statutory procedures specifically provided for each of the above proceedings shall remain in effect and shall control to the extent they may be in conflict with these rules; otherwise these rules apply.

(b) Summary Proceedings. In *ex parte* matters where no notice is required proceedings shall be as summary as the pertinent statutes contemplate.

(c) Publication of Summons or Notice. Whenever a statute requires summons or notice by publication, service in accordance with the methods provided in Rule 4 shall be taken to satisfy the requirements of such statute.

(d) Procedure in Certain Actions and Matters. The special rules of procedure set forth in this paragraph shall apply to the actions and matters enumerated in subparagraphs (1) and (2) hereof and shall control to the extent they may be in conflict with any other provision of these rules.

(1) The following actions and matters shall be triable 30 days after completion of service of process in any manner other than by publication or 30 days after the first publication where process is by publication, to-wit: adoption; correction of birth certificate; alteration of name; termination of parental rights; paternity; legitimation; uniform reciprocal enforcement of support; determination of heirship; partition; probate of will in solemn form; caveat against probate of will; will contest; will construction; child custody actions; child support actions; and establishment of grandparents' visitation.

(2) The following actions and matters shall be triable 7 days after completion of service of process in any manner other than by publication or 30 days after the first publication where process is by publication, to wit: removal of disabilities of minority; temporary relief in divorce, separate maintenance, child custody, or child support matters; modification or enforcement of custody, support, and alimony judgments; contempt; and estate matters and wards' business in which notice is required but the time for notice is not prescribed by statute or by subparagraph (1) above.

(3) Complaints and petitions filed in the actions and matters enumerated in subparagraphs (1) and (2) above shall not be taken as confessed.

(4) No answer shall be required in any action or matter enumerated in subparagraphs (1) and (2) above but any defendant or respondent may file an answer or other pleading or the court may require an answer if it deems it necessary to properly develop the issues. A party who fails to file an answer after being required so to do shall not be permitted to present evidence on his behalf.

(5) Upon the filing of any action or matter listed in subparagraphs (1) and (2) above, summons shall issue commanding the defendant or respondent to appear and defend at a time and place, either in term time or vacation, at which the same shall be heard. Said time and place shall be set by special order, general order or rule of the court. If such action or matter is not heard on the day set for hearing, it may by order signed on that day be continued to a later day for hearing without additional summons on the defendant or respondent. The court may by order or rule authorize its clerk to set such actions or matters for original hearing and to continue the same for hearing on a later date.

(6) Rule 5(b) notice shall be sufficient as to any temporary hearing in a pending divorce, separate maintenance, custody or support action provided the defendant has been summoned to answer the original complaint.

(e) Proceedings Modified. The forms of relief formerly obtainable under writs of fieri facias, scire facias, mandamus, error coram nobis, error coram vobis, sequestration, prohibition, quo warranto, writs in the nature of quo warranto, and all other writs, shall be obtained by motions or actions seeking such relief.

(f) Terminology of Statutes. In applying these rules to any proceedings to which they are applicable, the terminology of any statute which also applies shall, if inconsistent with these rules, be taken to mean the analogous device or procedure proper under these rules; thus (and these examples are intended in no way to limit the applicability of this general statement):

Bill of complaint, bill in equity, bill, or declaration shall mean a *complaint* as specified in these rules;

Plea in abatement shall mean *motion*;

Demurrer shall be understood to mean *motion to strike* as set out in Rule 12(f);

Plea shall mean *motion* or *answer*, whichever is appropriate under these rules;

Plea of set-off or *set-off* shall be understood to mean a permissible counter-claim;

Plea of recoupment or *recoupment* shall refer to a compulsory counter-claim;

Cross-bill shall be understood to refer to a counter-claim, or a cross-claim, whichever is appropriate under these rules;

Revivor, revive, or r*evived*, used with reference to actions, shall refer to the substitution procedure stated in Rule 25;

Decree pro confesso shall be understood to mean entry of default as provided in Rule 55;

Decree shall mean a judgment, as defined in Rule 54;

(g) Procedure Not Specifically Prescribed. When no procedure is specifically prescribed, the court shall proceed in any lawful manner not inconsistent with the Constitution of the State of Mississippi, these rules, or any applicable statute.

[Amended effective June 24, 1992; April 13, 2000.]

Advisory Committee Historical Note

Effective April 13, 2000, Rule 81(d)(5) was amended to make a continuance effectual on a signed rather than an entered order. 753-754 So. 2d XVII) (West Miss.Cas. 2000.)

Effective June 24, 1992, Rule 81(h) was deleted. 598-602 So. 2d XXIII-XXIV (West Miss. Cas. 1992).

Effective January 1, 1986, Rule 81(a) was amended by adding subsections (10) – (12); Rule 81(b) was amended by deleting examples and by deleting a provision that no answers are

required in *ex parte* matters; Rule 81(d) was rewritten to provide for proceedings in a number of specified actions and to abrogate its treatment of domestic relations matters. 470-473 So. 2d XVI-XVIII (West Miss. Cas. 1986).

Comment

Rule 81 complements Rule 1 by specifying which civil actions are governed only partially, or not at all, by the provisions of the M.R.C.P.

Rule 81(a) lists 12 categories of civil actions which are not governed entirely by the M.R.C.P. In each of those actions there are statutory provisions detailing certain procedures to be utilized. *See* generally Miss. Code Ann. §§ 11-43-1, *et seq.*, (habeas corpus); 73-3-301, *et seq.*, (disciplining of attorneys); 43-21-1, *et seq.*, (youth court proceedings); 43-23-1, et seq., (family court proceedings); 23-5-187 (election contests); 31-13-1, *et seq.*, (bond validation); 41-21-61, *et seq.*, (persons in need of mental treatment); 41-30-1, *et seq.*, (adjudication, commitment and release of alcohol and drug addicts); 11-27-1, *et seq.*, (eminent domain); 91-1-1, et seq., (trusts and estates); 93-1-1, et seq., (domestic relations); 51-29-1, et seq., and 51-31-1, et seq., (creation and maintenance of drainage and water management districts); 21-1-1, et seq., (creation of and change in boundaries of municipalities); and those proceedings identified in category (12) by their Code Title as follows: 9-5-103 (bonds of receivers, assignees, executors may be reduced or cancelled, if excessive or for sufficient cause); 11-1-23 (court or judge may require new security); 11-1-29 (proceedings on death of surety on bonds, etc.); 11-1-31 (death of parties on bonds having force of judgment); 11-1-33 (death of parties on bonds having force of judgment -- citation in anticipation of judgment); 11-1-35 (death of parties on bonds having force of judgment when citation issued and returnable); 11-1-43 through 11-1-49 (seizure of perishable commodities by legal process); 11-5-151 through 11-5-167 (receivers in chancery); and 11-17-33 (receivers appointed for nonresident or unknown owners of mineral interests).

However, in any instance in the twelve listed categories in which the controlling statutes are silent as to a procedure, such as security for costs, form of summons and methods of service of process and notices, service and filing of pleadings, computation of time, pleadings and motions, discovery, subpoenas, judgments and the like, the M.R.C.P. govern.

Rule 81(b) recognizes that M.R.C.P. are limited in applicability to ex parte matters and that such may be disposed of as summarily as any pertinent statutes permit. Rule 81(b) is intended to preserve, inter alia, the summary manner in which many matters testamentary, of administration, in minors'/wards' business, and in cases of idiocy, lunacy, and persons of unsound

mind are handled. *See* Miss. Code Ann. § 11-5-49 (1972); *Duling v. Duling's Estate*, 211 Miss. 465, 52 So.2d 39 (1951).

Rule 81(c) pertains to actions or matters where a statute requires that summons or notice be made by publication. In those instances, publication as provided by Rule 4 shall satisfy the requirements of such statute(s).

Rule 81(d) recognizes that there are certain actions and matters whose nature requires special rules of procedure. Basically these are matters of which the State has an interest in the outcome or which because of their nature should not subject a defendant/respondent to a default judgment for failure to answer. Furthermore, they are matters that should not be taken as confessed even in the absence of the appearance of the defendant/respondent. Most of the matters enumerated are peculiar to chancery court. Rule 81(d) divides the actions therein detailed into two categories. This division is based upon the recognition that some matters, because of either their simplicity or need for speedy resolution, should be triable after a short notice to the defendant/respondent; while others, because of their complexity, should afford the defendant/respondent more time for trial preparation.

Rule 81(d)(1) enumerates those actions which are triable 30 days after completion of service of process in any manner other than by publication, or, 30 days after the first publication where process is by publication.

Rule 81(d)(2) enumerates those actions which are triable 7 days after completion of service of process in any manner other than by publication, or, 30 days after the first publication where process is by publication.

Rule 81(d)(3) provides that the pleading initiating the action should be commenced by complaint or petition only and shall not be taken as confessed. Initiating Rule 81(d) actions by "motion" is not intended.

Rule 81(d)(4) expressly provides that no answer is required but allows a defendant/respondent to file an answer or other pleading if he so desires. The rule does recognize that on occasion an answer may be necessary to properly present issues or to narrow them; therefore, the Court may require an answer to be filed. The rule also provides that a party who fails to provide an answer when required shall not be permitted to present evidence on his behalf.

Rule 81(d)(5) recognizes that since no answer is required of a defendant/respondent, then the summons issued shall inform him of the time and place where he is to appear and defend. If the matter is not heard on the date originally set for the hearing, the court may sign an order on that day continuing the matter to a later date. (The rule originally required that the continuance order be *entered* on the date originally set for the hearing. This requirement proved burdensome in those instances in which the court was sitting in a county different from the one in which the clerk's office was located. Under the present rule, the court may sign the continuance order on the date of the original hearing, thus giving all present parties notice of the continuance, then transmit the order to the clerk for entry.) The rule also provides that the Court may adopt a rule or issue an order authorizing its Clerk to set actions or matters for original hearings and to continue the same for hearing on a later date. (Local rules should be filed with the Supreme Court as required by Rule 83).

Rule 81(d)(6) provides that as to any temporary hearing in a pending action for divorce, separate maintenance, child custody or support, notice in the manner prescribed by Rule 5(b) shall be sufficient, provided the defendant/respondent has already been summoned to answer.

Rule 81(e) provides that the forms of relief formerly obtainable under the listed writs continue to be available under the M.R.C.P., but that such actions are not to be considered as special forms of action. Rather, the relief obtainable heretofore pursuant to those special forms of action are still available as a civil action, or as a motion, in which the object of the former writ is now the prayer for relief.

Rule 81(f) modernizes legal terminology and is intended to ensure that conflicts need not arise over the technical labels applicable to the proceedings detailed in these rules. This method was selected to eliminate the necessity for rewriting numerous statutes which, while not changed or modified in sub stance, contain a term or terms inconsistent with those in the M.R.C.P.

[Amended effective January 10, 1986; June 24, 1992; April 13, 2000.]