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Section Chair's Corner

By William E. "Bill" McLeod, Esq.

Welcome to the Fall 2010, issue of the Business Law Section Newsletter, The Mississippi Business Law Reporter. It is my pleasure to serve as your Chair of the Business Law Section for the 2010-2011 fiscal year. The other Section Officers are Jimmy Milam, Vice-Chair, Henry Dick, Secretary-Treasurer, and the immediate past Chair is Bill Mendenhall. The Executive Committee Members are Joyce Hall, Cheryn Baker, and Ken Farmer. Our newsletter editor is Stan Smith who worked with our past newsletter editor, Ken Farmer, to publish this Business Law Section Newsletter. Special thanks to our immediate past Chair, Bill Mendenhall, and other Section officers and committee members for the many activities undertaken this past year, and to our immediate past newsletter editor, Ken Farmer, for publishing several newsletters with many timely and informative articles that were helpful to members of our Section and the Mississippi Bar.

The Business Law Section Officers and Executive Committee Members met recently to discuss the activities and goals for the Business Law Section for the upcoming fiscal year, some of which are as follows:

1. Publication of three newsletters, Fall 2010, Spring 2011, and Summer 2011. If you have articles or suggested topics of any interest that would be informative and helpful to our members, please submit these to Stan Smith.

2. Our Section plans to co-sponsor a CLE program with the Mississippi Secretary of State's Office in April 2011, as well as to continue the joint annual Ethics hour CLE program with the Mississippi Corporate Counsel Association in July 2011.

3. The Business Law Section plans to award scholarships this fiscal year to a deserving law student at each of the Mississippi College School of Law and University of Mississippi School of Law.

4. Our section, together with the Health Law Section, plans to co-sponsor a CLE presentation at the Mississippi Bar in July 2011. Cheryn Baker with the Mississippi Secretary of State's Office will also present an update on legislative changes in the area of business law.

5. Our Section plans to co-sponsor the annual CPA Social in the Spring of 2011.

6. Our Section now has a Listserv which can Be used to share information with members of the Business Law Section. Cheryn Baker is the Listserv Moderator for the Business Law Section.

7. Our Section plans to create a Facebook page which will be separate from The Mississippi Bar Facebook page. Look for it soon, as we will be the first Section to have our own Facebook page. Thanks to Cheryn Baker for taking the initiative in creating the Facebook page.

Many thanks to our Section Officers and Executive Committee Members for your efforts on behalf of the Business Law Section in planning our upcoming activities for this year. If you have an interest in taking an active role in our section or have any suggestions for improvement, I would urge you to contact me or any of your section officers with your ideas and comments for the section.

Ex Parte Contact with Former Employees of a Represented Party

By Christopher T. Graham, Esq.

Former employees can provide a wealth of information to assist attorneys in investigating and prosecuting litigation involving a former employer. As such, former employees can potentially represent a significant risk to the organization previously employing them. Consider the following fact pattern: A closely held corporation you represent is involved in a commercial dispute with a supplier over the quality of equipment provided to your client. Your client enlists your help in bringing a suit against the supplier. During the pre-suit investigation, you and the client learn that ten former employees of the supplier may have information concerning quality issues at the supplier's factory. Can you informally contact these individuals to discover the information they may have in order to avoid the time and expense of formal depositions? What if the shoe is on the other foot and you represent the supplier? Do you seek to prevent the supplier's attorney from conducting *ex parte* interviews of the former employees?

RISKS INVOLVED

One of the difficulties in answering these questions is the lack of a bright line test to determine when an attorney can seek information from a former employee. A majority of states employ a standard that is dependent upon the factual particulars of the case, the information sought, and the position of the employee from whom information is sought. Under applicable Mississippi law (discussed below), the general rule is that no former employee is "off limits" from *ex parte* contact, but certain types of information present ethical situations for the attorney contacting the employee.

Ex parte contact with a former employee of an organization carries risks for the attorney making the contact. During the preliminary investigation stage of a case it is often advantageous for an attorney to conduct informal interviews with former employees of a potential defendant to obtain facts concerning the client's claim against the defendant. Informal interviews can easily be conducted prior to litigation, or if litigation has already commenced, such informal interviews are almost always less expensive than a deposition. However, an attorney's attempt to contact ex-employees is often followed by allegations of ethical violations and efforts to disqualify the attorney seeking the informal discovery.

For the organization whose former employees are contacted *ex parte*, the risks are generally high as well. Former employees may take with them information obtained during employment that is not generally known in the business community. While confidential and proprietary information and trade secrets can be protected through non-disclosure agreements, other information learned by employees on the job is not as easily protected from disclosure to third parties. If allowed to meet with one's adversary behind closed doors, a former employee may disclose information that he or she would be more reluctant to disclose in a formal interview or deposition. There is also the real concern that an able attorney can use his or her advocacy skills in an informal interview to develop the testimony of a layperson witness, whose testimony as a former employee may carry more weight with a jury.

THE "ANTI-CONTACT RULE"

The American Bar Association's ("ABA") Model Rules of Professional Conduct govern lawyers' conduct in a majority of jurisdictions. Mississippi, like many jurisdictions, has adopted ABA Model Rule 4.2, commonly referred to as the "anti-contact rule," which applies to lawyers' communications with persons who are represented by counsel. Rule 4.2 of the Mississippi Rules of Professional Conduct provides:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

The comments to Rule 4.2 make it clear Rule 4.2 prohibits communication with any represented person,

not just a party to a dispute, about the subject matter of the representation. The use of the terms "person" and "matter" establish that Rule 4.2 does not simply apply to cases in litigation; rather, Rule 4.2 applies to any matter in which a person is represented by counsel.

The comments to Rule 4.2 also explain the application of the anti-contact rule to employees of an organization represented by counsel as follows:

> In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. If an agent or employee of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule.

Nothing in the Rule or comments provides that Rule 4.2 expressly applies to former employees. However, a number of courts and the Ethics Committee of the Mississippi Bar Association have examined Rule 4.2 in the context of *ex parte* communication with former employees of a represented party. *See* Miss. Bar Ethics Op. 141, *Communication With Unrepresented Adverse Party* (1988); Miss. Bar Ethics Op. 192, *Communication With Person Represented by Counsel* (1991) (withdrawn Spring 1992).

In *Durham v. Advance Stores Company*, the United States District Court for the Southern District of Mississippi acknowledged that "no Mississippi case . . . squarely addresses the issue of whether an opposing party's counsel may contact a former employee of an adverse party corporation without consulting the former employer's counsel." *Durham*, No. 3:04cv199, 2007 WL 2903206, at *1-2 (S.D. Miss. Sept. 30, 2007). The *Durham* case involved allegations by the Plaintiff that her employer failed to comply with a settlement agreement and engaged in retaliatory conduct in violation of certain employment discrimination laws. Counsel for the plaintiff contacted former managers employed by plaintiff's employer. Counsel for the employer sought sanctions against plaintiff's counsel. The Court denied the motion, for sanctions holding the *ex parte* contact did not violate ethics rules:

> Three arguments readily come to mind why counsel may conduct *ex parte* interviews of the former employees of an adverse corporate party: first, the language of Rule 4.2 does not cover former employees; secondly, no current attorney-client relationship exists; and thirdly, former employee's statements cannot bind the corporation and are not excluded from the hearsay rule as admissions.

Durham, 2007 WL 2903206, *1 (citations omitted).

In Ethics Opinion 215, the Ethics Committee of the Mississippi Bar Association explained that "the primary purpose of Rule 4.2 is to prevent improper approaches of those known to be represented by counsel and to protect the attorney/client relationship." Miss. Bar Ethics Op. 215, *Ex Parte Contact With Former Employees of a Represented Party* (1994). When faced with the issue, the Committee refused to create a blanket rule prohibiting all *ex parte* contacts with former employees. Instead, the committee explained that no former employees are "off limits" under Rule 4.2 based solely on the fact that the employee's former employer is represented by counsel. *Id*. The Committee went on to provide the following guidance to attorneys seeking to contact former employees of an adversary:

> This approach is …supported by the fact that the attorney/client privilege only protects disclosure of communications not underlying facts. In other words, a former employee should not be asked what they said or communicated to the corporate attorney but, rather, inquiries should be limited to what the witness saw or knows about the matter being investigated. Any concern about the likelihood that some former employees will reveal privileged information can best be addressed on a case-by-case basis. It seems clear that counsel for the corporation would be aware of the

> former employees that possess such information and, in those circumstances, could seek court protection.

Id.

CONCLUSION

Based on the above authorities, attorneys can generally contact former employees concerning factual matters related to the matter the attorney is prosecuting and/or investigating. However, in dealing with former employees, the attorney should be careful to inform the former employees of the purpose of the contact (Rule 4.1), explain to the former employees that the attorney represents a party related to a potential claim against the employer (Rule 4.3), advise the former employees that they may wish to seek the advice of an attorney (Rule 4.3), and inform the former employees that they should not reveal any information that could potentially be privileged. *See* Miss. Bar Ethics Op. 141; and Miss. Bar Ethics Op. 215. As explained in Ethics Opinion 215, "[t]he lawyer must make clear that he is not disinterested and must stick to facts." If counsel for the former employer suspects the attorney is not appropriately dealing with former employees or if there is a good faith basis to believe privileged information may be revealed, Ethics Opinion 215 recommends the attorney seek protection from a court as necessary.

The Ins and Outs of Obtaining Discovery from Nonparties in Arbitrations

By Michael J. Bentley, Esq.

Today, almost any civil dispute is arbitrable. Judicial hostility towards arbitration has receded and businesses increasingly employ arbitration clauses in their contracts, or agree to arbitrate disputes after they arise, in order to avoid the expense and protracted nature of civil litigation. Arbitration agreements that were once reserved for complex commercial transactions now appear in everything from service contracts to employment contracts to contracts for the purchase of real estate. As one commentator recently noted, "court-like" arbitration has become a "surrogate for civil litigation." Thomas J. Stipanowich, *Arbitration: The "New Litigation"*, 2010 U. Ill. L. Rev. 1, 1 (2010).

Of course, there are tradeoffs in selecting arbitration over civil litigation. This article focuses on one of those tradeoffs – the limitations on obtaining discovery from nonparties in arbitration. Parties that agree to arbitrate their disputes implicitly, or explicitly in many contracts, accept limitations on their prehearing discovery rights. *See Speetjens v. Larson*, 401 F. Supp. 2d 600, 608 (S.D. Miss. 2005). These parties may be surprised to find out just how "limited" their discovery rights can be in the case of nonparties to the arbitration. An arbitrator may issue a subpoena that "orders" a nonparty to give testimony or produce documents, but the party seeking the discovery may find that there is little recourse when the nonparty objects, refuses to comply or simply ignores the arbitrator's subpoena altogether.

Consider, for example, an employment-related dispute that is subject to an arbitration provision.[1] The plaintiff-employee asserts that she was discriminated against on the basis of her sex and race. The plaintiff's key witness is a former employee who was present for potentially critical exchanges between the plaintiff and her supervisor and kept a private journal detailing office matters. However, the nonparty witness refuses to speak with the employer's attorney. If the case was pending in state or federal court, the employer's attorney could simply serve the nonparty witness with a Rule 45 subpoena (a "subpoena ad testificandum" or "subpoena duces tecum") commanding that the witness appear for a deposition and make her notes available for inspection. *See* Fed. R. Civ. P. 45; Miss. R. Civ. P. 45. If the nonparty witness refused to comply, she could be held in contempt of court and punished accordingly. Simply put, the rules of civil procedure require that nonparties participate in pretrial discovery when ordered to do so by a court.

However, there is no similar rule requiring nonparties to participate in prehearing arbitration discovery. Arbitration is a matter of contract and, therefore, is limited by ordinary contract principles. Nonparties that neither signed nor benefited from the contract are not subject to the arbitrator's authority generally[2] or his subpoena authority particularly[3]. An arbitrator's subpoena may only be enforced by a court acting pursuant to a federal or state statute that gives legal force to an arbitrator's nonparty subpoena. Therefore, continuing with our example above, it is possible that the key nonparty witness, whose testimony and documents were readily discoverable in a civil proceeding, may ignore prehearing discovery requests altogether in the case of an arbitration.

This article is intended to aid businesses and their attorneys in navigating the rules for obtaining prehearing discovery from nonparties to a Mississippi-based arbitration proceeding.[4] As arbitrations increasingly supplant civil litigation it is important to understand potential limitations on *nonparty* discovery when advising a client on such things as whether to include arbitration provisions in certain contracts or whether to invoke an arbitration provision when a dispute arises. Familiarity with these limitations is also necessary when pursuing or defending a claim that depends on information held by nonparties or when advising a client that is not participating in an arbitration on the proper response to an arbitrator's subpoena.

I. Navigating state and federal laws governing nonparty discovery in arbitration: the Federal Arbitration Act, the Mississippi arbitration code, and the Mississippi Construction Arbitration Act.

According to the rules of the major arbitration organizations, arbitrators may issue discovery subpoenas to nonparties.[5] The parties' contract may provide for additional discovery rights from nonparties; however, these contracts and an arbitrator's subpoenas are not self-enforcing. A party to the arbitration must resort to federal or state court to enforce an arbitrator's subpoena.

Under federal law, it is not clear whether an arbitrator's prehearing discovery subpoena may be enforced against a nonparty. The federal circuit courts are divided on this question and the Fifth Circuit has not addressed the issue. Further, no federal district court in Mississippi has considered the issue. Under Mississippi law, an arbitrator's prehearing discovery subpoena is enforceable against a nonparty when the arbitration involves a *construction* dispute. In non-construction disputes, however, it is not clear whether Mississippi law permits the enforcement of an arbitrator's prehearing discovery subpoena to a nonparty.

A. Federal courts are divided on whether the Federal Arbitration Act permits prehearing discovery from nonparties.

Parties may seek enforcement of an arbitrator's nonparty discovery subpoena under the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1–16.[6] Section 7 of the FAA provides as follows:

> The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, *may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case*. . . . [I]f any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

9 U.S.C. § 7 (emphasis added). Section 7's operative language provides that arbitrators may summon any person to "attend before them" and "bring with him or them any book record, document, or paper" that is material to the case. Courts agree that this language empowers an arbitrator to order nonparty witnesses to appear at the arbitration hearing to give testimony and produce documents. *See* Martin Domke, Larry E. Edmonson, & Gabriel M. Wilner, Domke on Commercial Arbitration § 29:12 (3d ed. 2003) (updated Aug. 2009).

However, the federal circuit courts are divided on the question of whether Section 7 of the FAA empowers an arbitrator to compel prehearing discovery, such as depositions and document production, from nonparties. The majority rule, applied by the Second and Third Circuits, is that arbitrators have no authority to issue prehearing discovery subpoenas to nonparties and such subpoenas are not enforceable under the FAA. *Life Receivables Trust v. Syndicate 102*, 549 F.3d 210, 212 (2d Cir. 2008); *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 407 (3d Cir. 2004). These courts reason that "Section 7's language unambiguously restricts an arbitrator's subpoena power to situations where the non-party has been called to appear in the physical presence of the arbitrator and to hand over the documents at that time." *Hay Group*, 360 F.3d at 407. The Fourth Circuit follows this majority rule but recognizes an exception in "unusual circumstance" or where the party seeking production can show a "special need or hardship." *COMSTAT Corp. v. Nat'l Science Foundation*, 190 F.3d 269, 275-76 (4th Cir. 1999). In order to invoke the special need exception, "at a minimum, the party must demonstrate that the information it seeks is otherwise unavailable." *Id.* at 276; *see Gresham v. Norris*, 304 F. Supp. 2d 795, 797 (E.D. Va. 2004).

By contrast, the Eighth Circuit follows the minority rule under which an arbitrator may compel nonparties to participate in prehearing arbitration discovery. *In re Sec. Life Ins. Co. of America*, 228 F.3d 865, 870-71 (8th Cir. 2000). Notwithstanding Section 7's restrictive language, the Eight Circuit held that the FAA implicitly grants an arbitrator the power to compel prehearing discovery from a nonparty: "implicit in an arbitration panel's power to subpoena relevant

documents for production at hearing is the power to order the production of relevant documents for review by a party prior to the hearing." *Id.* The court reasoned that this implicit power promotes the FAA's underlying policy of efficient resolution of arbitrable disputes. *Id.* at 870.

The Fifth Circuit has not decided whether an arbitrator may compel a nonparty to give deposition testimony or produce documents prior to the hearing. The federal district courts in Mississippi have not addressed this question either. However, a federal district court in Texas recently adopted the majority rule, holding that "[Section] 7 of the FAA does not authorize arbitrators to compel production of documents from a non-party, unless they are doing so in connection with the non-party's attendance at an arbitration hearing." *Empire Financial Group, Inc. v. Penson Financial Servs.*, 2010 WL 742579, *3 (N.D. Tex. March 3, 2010). The district court rejected the Eight Circuit's reasoning that the FAA grants arbitrators an "implicit power" to compel discovery from nonparties in order to further the supposed policy goals of the FAA. *Id.* According to the district judge, "the court's policy preferences cannot override the clear text of the statute." *Id.*

Accordingly, a party seeking to enforce an arbitrator's nonparty subpoena under the FAA is writing on a somewhat clean slate in Mississippi. There is no binding authority that precludes enforcement of such a subpoena under Section 7 of FAA. However, because this is an open question which involves a circuit split, any party seeking enforcement of a nonparty subpoena should prepare for protracted litigation on the issue. At the very least, the uncertain state of the law in the Fifth Circuit means that Section 7 of the FAA does not provide a simple and efficient means for obtaining prehearing discovery from nonparties to the arbitration.

B. Under Mississippi law, prehearing discovery is available in construction-related disputes, but may not be available in disputes involving other subjects.

If the uncertainty surrounding the nonparty subpoenas under the FAA causes concern, an arbitrating party may invoke Mississippi's state arbitration laws instead of federal law. Mississippi has two acts governing arbitration, the primary arbitration code and the Mississippi Construction Arbitration Act. As will be discussed, prehearing discovery from nonparties is available in construction disputes, but it may not be available in all other disputes.

Mississippi's primary arbitration code (the "arbitration code"), Miss. Code §§ 11-15-1 to 11-15-37, applies to "any controversy" that the parties have agreed to arbitrate *except* construction disputes. Miss. Code § 11-15-1.[7] The arbitration code provides as follows:

> All witnesses before arbitrators shall be sworn as if before a court, and *the parties shall have the benefit of legal process to compel the attendance of witnesses*, which may be issued by the clerk of any court or a justice of the peace, and shall require the witness *to attend before the arbitrators* on a day and at a place certain to be named in the subpoena.

Miss. Code § 11-15-13 (emphasis added). If a witness that has been subpoenaed under this provision fails to appear and testify at the arbitration hearing, he may be held in contempt of court. Miss. Code § 11-15-17.

As with Section 7 of the FAA, the operative language of the Mississippi arbitration code permits a party to "compel the attendance of witnesses . . . *before the arbitrators*." Under a plain reading, the code permits parties to compel the attendance of witnesses at the arbitration hearing, but it does not explicitly provide for prehearing discovery from nonparties. *Compare* Uniform Arbitration Act § 7 (providing that "arbitrators may issue subpoenas for the attendance of witnesses and for the production of books, records, documents and other evidence"). However, there are no Mississippi cases construing this language. Therefore, a party may argue that implicit in the Mississippi arbitration code's authority to compel witnesses to appear at the arbitration hearing is the lesser power to compel nonparties to comply with an arbitrator's prehearing discovery orders. *See e.g., In re Sec. Life Ins. Co. of America*, 228 F.3d 865, 870-71 (8th Cir. 2000).

The Mississippi Construction Arbitration Act ("MCAA"), Miss. Code §§ 11-15-1-101 to 11-15-143, applies only to disputes arising from construction contracts and related agreements. Miss. Code § 11-15-101.[8] The MCAA, which is modeled on the 1956 Uniform Arbitration Act, specifically provides for prehearing discovery in arbitration:

> (1) The arbitrators may issue subpoenas for the attendance of witnesses and for the production of books, records, documents and other evidence and shall have the power to administer oaths. Subpoenas so issued shall be served and, upon application to the court by a party to the arbitration or the arbitrators, enforced in the manner provided by law for the service and enforcement of subpoenas in a civil action.
>
> (2) On application of a party to the arbitration, the arbitrators, in the manner and upon terms designated by the arbitrators, may permit a deposition to be taken of any person.
>
> (3) Any prehearing discovery other than that referred to above shall only be permissible if agreed to by the parties involved in the arbitration.

Miss. Code § 11-15-117(1)-(3). The MCAA does not contain language that would limit the arbitrator's authority to compel testimony or document production only in the presence of the arbitrator, like that which appears in the FAA (arbitrators "may summon in writing any person to *attend before them*") and the Mississippi arbitration code (arbitrators may "compel the attendance of witnesses . . . *before the arbitrators*"). In fact, it explicitly contemplates that parties may have "prehearing discovery" from "witnesses" and "any person." Although there are no published Mississippi opinions applying this provision, a plain reading of the statute would permit a court to enforce an arbitrator's prehearing discovery subpoena against a nonparty. Other courts have construed this language to authorize an arbitrator to order prehearing discovery from nonparties. *See* Revised Uniform Arbitration Act ("RUAA") § 17 cmt. 8 (citing cases).

C. Deciding whether to seek enforcement in federal or state court.

There are two important matters to consider when deciding whether to petition a state or federal court for enforcement of an arbitrator's nonparty subpoena: (1) whether the federal court will have subject matter over the case and (2) whether the state court's subpoena power will extend to a nonparty that is beyond the state's borders.

First, the FAA does not provide an independent grant of federal court jurisdiction. *Smith v. Rush Retail Centers, Inc.*, 360 F.3d 504, 505-06 (5th Cir. 2004). Therefore, the petitioning party must establish an independent basis for subject matter jurisdiction, such as diversity, federal question or admiralty jurisdiction, when seeking enforcement of an arbitrator's subpoena under the FAA. *See Stolt-Nielsen, SA v. Celanese*, AG, 430 F.3d 567, 572 (2d Cir. 2005). These jurisdictional concerns are not present in state court.[9] The Mississippi arbitration code provides that "any court" or justice of the peace in Mississippi may compel the attendance of witnesses at the arbitration hearing (Miss. Code § 11-15-13) and the MCAA grants jurisdiction to the circuit court for the county where the arbitration hearing is held (Miss. Code §§ 11-15-129, 11-15-131).

Second, a Mississippi state court has no power to subpoena a witness when the court lacks personal jurisdiction over that witness. *See* 81 Am. Jur. 2d *Witnesses* § 15. Further, nonparties that reside outside of Mississippi are generally beyond the state court's subpoena power even if they are subject to personal jurisdiction in the state. The Mississippi Supreme Court recently held that "a Mississippi court cannot subpoena a nonresident nonparty to appear and/or produce in Mississippi documents which are located outside the State of Mississippi, even if that nonresident nonparty is subject in another context to the personal jurisdiction of the court." *Syngenta Crop Protection, Inv. v. Monsanto, Co.*, 908 So. 2d 121, 129 (Miss. 2005). By contrast, federal courts have generally held that the personal jurisdiction requirements and the territorial limitations of Rule 45(b)(2) (the 100 mile rule) do apply to the enforcement of an arbitrator's subpoena under the FAA. *See e.g., In re Arbitration between Sec. Life Ins. Co. of America*, 228 F.3d 865, 871-72 (8th Cir. 2000); *Festus & Helen Stacy Foundation, Inc. v. Merrill Lynch, Pierce Fenner, & Smith Inc.*, 432 F. Supp. 2d 1375, 1378-79 (N.D. Ga. 2006); *Schlumbergersema, Inc. v. Xcel Energy, Inc.*, 2004 WL 67647, **2-3 (D. Minn. Jan. 9, 2004) (unpublished); *but see Legion Ins. Co. v. John Hancock Mutual Life Ins. Co.*, 33 Fed. Appx. 26, 27-28 (3d Cir. 2002) (unpublished). Therefore, a federal court sitting in Mississippi may be able to compel discovery from a distant nonparty witness when a Mississippi state court could not.[10]

II. Conclusion

Discovery from nonparties is commonplace in civil litigation. As arbitration proceedings trend towards full-fledged civil litigation, where the parties expect extensive prehearing discovery, it is important to remember the significant uncertainties surrounding an arbitrator's authority to compel nonparties to participate in prehearing arbitration discovery. The plain language of the FAA does not provide for prehearing discovery from nonparties and the majority of federal circuit courts hold that such discovery is not available under the FAA. While the Fifth Circuit has not ruled on the issue, there is a significant chance that a federal district court in Mississippi would apply the majority rule and prohibit nonparty discovery under the FAA. Similarly, the plain language of Mississippi's arbitration code does not provide for prehearing discovery from nonparties. Only in disputes governed by the Mississippi *Construction* Arbitration Act may a party comfortably rely on the availability of prehearing discovery from nonparties.

Unless and until these uncertainties are resolved, the potential limitations on nonparty discovery in arbitrations must be considered when deciding whether to incorporate an arbitration provision into a contract, determining whether to invoke an arbitration provision, or preparing to present a case to an arbitrator or arbitration panel. The contract drafter or arbitrating attorney that overlooks these potential limitations may find himself in an ambush of his own making.

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[1] This example is based not-so-loosely on *Ware v. C.D. Peacock, Inc.*, 2010 WL 1856021 (N.D. Ill. May 7, 2010). In *Ware*, the district court held that an arbitrator had no authority to subpoena a nonparty former employee in an employment related dispute even though it was likely that the former employee had relevant evidence.

[2] *See Millmaker v. Bruso*, 2008 WL 4560624 *4 & n.6 (S.D. Tex. Oct. 9, 2008) (unpublished).

[3] *See Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 406 (3d Circ. 2004).

[4] The location or site of an arbitration is fixed by the contract containing the arbitration provision or by agreement among the parties after a dispute has arisen. *See e.g.*, American Arbitration Association Commercial Arbitration Rule R-10. This article presumes that the arbitrator is sitting in Mississippi or Mississippi is the designated location for the arbitration; thus, any effort to obtain discovery would be governed by Mississippi law or federal law.

[5] *See, e.g.*, American Arbitration Association Commercial Arbitration Rules, R-31(d); National Arbitration Forum Code of Procedure, Rule 30.

[6] The FAA will not apply unless the contract containing the arbitration provision involves interstate commerce. *See* 9 U.S.C. § 2. Courts interpret the FAA's interstate commerce requirement broadly. *See* Corey D. Hinshaw and Lindsay G. Watts, *A Review of Mississippi Law Regarding Arbitration*, 76 Miss. L. J. 1007, 1012-17 (2007).

[7] The Mississippi Construction Arbitration Act explicitly provides that the primary arbitration statutes, Miss. Code §§ 11-15-1 to 11-15-37, do not apply to construction-related arbitrations. *See* Miss. Code § 11-15-143.

[8] The Mississippi Construction Arbitration Act applies to disputes arising from "any agreement for the planning, design, engineering, construction, erection, repair or alteration of any building, structure, fixture, road, highway, utility or any part thereof and to any purchase by, or supply to, any contractor or subcontractor qualified to do business in [Mississippi] of any materials to be used in the planning, design, engineering, construction, erection, repair or alteration of any building, structure, fixture, road, highway, utility or any part thereof…" Miss. Code § 11-15-101.

[9] The FAA is enforceable in state court. *See Sanderson Farms, Inc. v. Gatlin*, 848 So. 2d 828, 857-58 (Miss. 2002) (Cobb, J., dissenting).

[10] Even if a nonparty is beyond the subpoena power of a Mississippi state court, the petitioning party could obtain a subpoena from the Mississippi court and then use the letters rogatory (or similar state law process) to enforce the Mississippi subpoena in the other state.

2010 Changes to Mississippi's Uniform Commercial Code

By W. Rodney Clement, Jr., Esq.

Mississippi Senate Bill 2419 was signed by Governor Barbour on April 13, 2010. SB 2419 makes a number of changes to Mississippi's Uniform Commercial Code ("UCC") and related statutes. Below is a summary of the changes to Article 1 and related statutes. Changes to Article 3, Article 4 and Article 4A will be addressed in an article in the next edition of The Mississippi Business Law Reporter.

In SB 2419, the Mississippi legislature substantially adopted the uniform versions of Revised UCC Article 1 (General Provisions), Article 3 (Negotiable Instruments), Article 4 (Bank Deposits and Collections) and Article 4A (Funds Transfers). Conforming amendments were made to the other articles. Some changes are stylistic to conform to changes in other articles, and other changes address new technologies such as online payments and electronic checks as well as new federal statutes and regulations.

Here are some of the significant and debated changes in Article 1:

Definition of "good faith" - Revised Article 1 defines "good faith" in Section 75-1-201(20) as "honesty in fact and the observance of reasonable commercial standards of faith dealing." Prior to the 2010 amendment, the definition of "good faith" was "honesty in fact in the conduct or transaction concerned." The difference is that the revised definition requires commercial reasonableness in addition to honesty in fact. The comments to the definition of "good faith" in Revised Article 1 state that the additional concept of "fair dealing" is "concerned with the fairness of conduct rather than the care with which an act is performed." Of the 37 states that have adopted Revised Article 1, 27 have used this uniform definition, and ten states have kept the original definition. This revised definition of "good faith" is already incorporated into every other Article of the UCC except for Article 5. In Mississippi, of course, a duty of good faith and fair dealing already is implied in every contract. Given the narrow scope of Article 1 (*see* Section 75-1-102) and that fact that an obligation of good faith and fair dealing already is incorporated into the other articles of the UCC and is implied by law into every contract, the new definition of "good faith" should not be a substantive change in Mississippi law.

Choice of law - SB 2419, as originally introduced in the Mississippi legislature, contained a nonstandard choice-of-law provision in Section 75-1-301 that permitted two *business entities* (not consumers) to choose the law of any state to govern their contract. This non-uniform choice-of-law provision was drafted and recommended by the Secretary of State's Business Reform Study Group to give business entities more freedom to choose the law governing their contracts. So, for example, under this nonstandard choice-of-law provision, a Mississippi corporation and a California corporation could agree to have the law of Delaware govern their contract, even though the transaction otherwise had no significant relation to Delaware. After the bill to adopt Article 1 was introduced, an industry group expressed strong opposition to the non-standard choice-of-law language. As a result, the choice-of-law provision was amended to substitute the current uniform choice-of-law language in Section 1-301, which limits the parties' choice of law to a state that has a reasonable relationship to the transaction, in place of the nonstandard language that the Business Reform Study Group had recommended. Under the uniform version of the choice-of-law language, the Mississippi corporation and the California corporation can only choose Mississippi or California law to govern their contract, unless the transaction otherwise has a reasonable relation to another state. The uniform choice-of-law language was adopted by the Mississippi legislature. The uniform version of the choice-of-law provision that was adopted is the same as the choice-of-law language that was in the prior version of Article 1. So at the end of the day, the choice-of-law provision in Section 75-1-301 of Revised Article 1 is unchanged from the prior version of Article 1 (former Section 75-1-105). Section 75-1-301 carries forward the same non-uniform language regarding implied warranties as former Section 75-1-105.

Narrower scope - The prior version of Article 1 did not define the scope of Article 1. As a result, questions arose about whether Article 1 created a body of law that was independent of the other articles of the UCC and provided the governing law in situations when

none of the other articles were applicable. Revised Article 1 clarifies that Article 1 applies only when one other the other articles governs. Section 75-1-102 provides "[t]his article applies to a transaction to the extent that it is governed by another article of the Uniform Commercial Code."

Definition of "record" - Revised Article 1 substitutes the definition of a "record" for the requirement that a document be in writing. A record is defined in Section 75-1-201(b)(31) as "information that is inscribed as a tangible medium or which is stored in an electronic or other medium and is retrievable in perceivable form." Under some circumstances, an email or voicemail can be a "record." This change from "writing" to "record" was previously made in Revised Article 9 to facilitate electronic filing.

Waiver of claims after breach - The prior version of Article 1 dealing with waiver of claims after breach, Section 75-1-107, stated that "[a]ny claim or right arising out of an alleged breach can be discharged in whole or in part without consideration by a written waiver or renunciation signed and delivered by the aggrieved party." The corresponding provision in Revised Article 1, Section 75-1-306, provides that "[a] claim or right arising out of an alleged breach may be discharged in whole or in part without consideration by agreement of the aggrieved party in an authenticated record." Section 75-1-107 eliminates the requirement that the waiver be "signed and delivered" and substitutes the merged concept of "agreement." The effect of permitting a claim to be waived by a "record" rather than in "writing" is to make it easier to waive claims. The official comments to Section 75-1-306 note that one can "authenticate" a record by "attaching to or logically associating with a record that is not a writing an electronic sound, symbol or process with the present intent to adopt or accept the record."

Definition of "notice" and "knowledge" - In the prior version of Article 1, "notice" and "knowledge" were defined in the general definitions of former Section 75-1-201(25)-(27). Revised Article 1 treats these terms as substantive rather than purely definitional and groups them together in a separate and new Section 75-1-202. Section 75-1-202 also defines "knows," "knowledge," "discover," "learn," "notifies," and "gives" when they relate to notice, and it defines when notice to an organization is effective. The prior definitions provided, "[t]he time and circumstances under which a notice or notification may cease to be effective are not determined by this code." This phrase is omitted in new Section 75-1-202. In regard to when a person receives notice, Revised Article 1 adds to the prior definition that the notice is deemed received when the notice is delivered "in a form reasonable under the circumstances."

Course of performance - Section 75-1-205 of the prior version of Article 1 defined "course of dealing" and "usage of trade." The corresponding section of Revised Article 1, new Section 75-1-303, adds the definition of "course of performance." The concept of course of performance already is a part of Article 2, in Section 75-2-208. By adding it to Article 1 and defining it, Revised Article 1 makes "course of performance" applicable to all of the articles of the UCC, not just Article 2. "Course of performance" is defined in new Section 75-1-303(a) as "a sequence of conduct between the parties to a particular transaction that exists if (1) the agreement of the parties with respect to the transaction involves repeated occasions for performance by a party; and (2) the other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection."

In addition to the changes to the text of the UCC, SB 2419 made the following additional changes to related statutes:

Priority of deed of trust when real property turns personal - Prior to July 1, 2010, Miss. Code § 75-2-107, which is the uniform version of Section 2-107 of the UCC, provided that the rights of a purchaser of goods severed from the land are subject to "third party rights provided by the law relating to realty records." SB 2419 amended Section 75-2-107(3) to add at the end of the quoted language the following: "including the priority of previously recorded deeds of trust under Section 89-9-5." This language was intended to make clear that if minerals or timber are severed from the land, the lien and priority of an existing deed of trust continues in the minerals or timber despite their severance. This change incorporates the holding of a case of first impression on this issue decided by the Mississippi Court of Appeals, *Feliciana Bank & Trust v. Manuel & Sessions, L.L.C.*, 943 So. 2d 736 (Miss. Ct. App. 2006).

Disclaimers of implied warranties - Prior to July 1, 2010, Miss. Code Ann. § 11-7-18 prohibited limitations of remedies or disclaimers of implied

warranties of merchantability or fitness for a particular purpose by any seller. SB 2419 limited Section 11-7-18 to consumer goods purchased by consumers. Mississippi's other nonstandard UCC provisions regarding implied warranties, namely choice of law in Article 1 (Mississippi law always governs implied warranties); Section 75-2-315.1 (no waivers of implied warranties by seller or manufacturer of consumer goods); and Section 75-2-719(4) (no limitation of remedies for breach of implied warranties), remain unchanged.

Enforceability of anti-assignment provisions in corporate documents - Under Sections 75-9-406(d) and 75-9-408(a) of Mississippi's version of Article 9 of the UCC, a provision in a limited partnership agreement that prohibits assignment of a limited partner's partnership interest does not apply to any rights to income from that interest. In other words, a limited partner can pledge his rights to any income or distributions from his limited partnership interest as security for a loan despite the fact that the limited partnership agreement prohibits assignment. SB 2419 adds new sections to the limited partnership statutes (codified as new Section 79-14-706) and general partnership statutes (codified as new Section 79-13-505) making Sections 75-9-406 and 75-9-408 inapplicable to the anti-assignment provisions of a limited partnership or general partnership agreement. House Bill 683, the new Mississippi limited liability company bill, adds a new section (codified as new Section 79-29-711, effective January 1, 2011) that makes the same change regarding assignments of limited liability company interests. Delaware, Texas, Virginia, Colorado and Kentucky have put similar limitations on Sections 9-406 and 9-408.

Statute of limitations for non-negotiable notes - Under current law, the statute of limitations on negotiable promissory notes is six years under Mississippi's version of Article 3, while the general three-year statute of limitations applies to non-negotiable promissory notes by default. This difference is an historical accident and not the result of any policy decision. Whether a note is negotiable or not is often unclear on the face of the note, and this is an issue about which attorneys can and do disagree. SB 2419 added a new statute, codified as new Section 15-1-81, which provides that the statute of limitations for non-negotiable notes is extended from three years to six years. Under the new law all promissory notes will have the same statute of limitations. One effect this change will have is that it will be easier to tell from the land records when a deed of trust begins to lose priority to third parties. Under Miss. Code Ann. § 89-5-19, a deed of trust begins to lose priority when the statute of limitations runs on the secured note. Since one usually cannot tell from the face of a deed of trust whether the secured note is negotiable or non-negotiable, one cannot tell whether the statute of limitations on the secured note is three years or six years and, accordingly, cannot tell when the deed of trust begins to lose priority.

SB 2419 became effective on July 1, 2010, except for the change to the statute of limitations for non-negotiable notes. The change to the statute of limitations for non-negotiable notes becomes effective on July 1, 2012 and will apply to all non-negotiable notes for which the statute of limitations in effect prior to the effective date has not run.

With these changes, Mississippi's version of the UCC is current with the uniform version of the UCC except for the most recent amendments to Article 7 (Documents of Title), Article 2 (Sales) and Article 2A (Leases). Revised Articles 2 and 2A were promulgated in 2003, but they have not been adopted by any state because of, among other things, issues in addressing the sale of goods in which software is embedded. Amendments to Article 9 to address problems with names of debtors in financing statements (as illustrated by a case construing Mississippi law, *Peoples Bank v. Bryan Brothers Cattle Co.*, 504 F. 3d 549 (5th Cir. 2007)), currently are in the final approval stage and will probably be introduced in the next session of the Mississippi legislature.

Limited Liability Companies now Required to file Annual Reports beginning January 2011

By Cheryn N. Baker, Esq., Assistant Secretary of State for Policy and Research Division

Under a new law passed by the Mississippi Legislature this year, all limited liability companies (LLCs) formed in Mississippi, or registered to transact business in Mississippi, are required to file annual reports with the Secretary of State's Office, effective January 1, 2011. *See the Revised Mississippi Limited Liability Company Act, Sections 79-29-101 et seq. (the "Revised Act").*

Please review important information on the new LLC annual reporting requirement below:

- **The LLC annual report form will be available on the Secretary of State's Business Services Division website on January 2, 2011.**

- **Fees.** The Annual Report fee is *free* for LLCs formed in Mississippi, and $250 for foreign LLCs registered to transact business in Mississippi.

- **Filing Methods.** Annual reports for domestic LLCs may be filed online or by mail. Foreign LLCs may only file by printing the report from the website and mailing it to the Secretary of State's Office; Post Office Box 136; Jackson, MS; 39205-0136.

- **Due Date.** Annual reports for LLCs will be due on a date set by the Secretary of State's Office. This date is expected to be April 15, 2011.

- **Penalty for Failure to File is Administrative Dissolution.** Failure to file the annual report will be grounds for administrative dissolution or revocation. Administratively dissolved LLCs may be reinstated under the Revised Act.

- **Further information on the annual report will be available on the Business Services website starting later this month.**

Other LLC Forms. In addition to the new annual report form, the Revised Act also provides for several new LLC forms and revisions to existing LLC forms. The new and revised forms will be available on the Secretary of State's website in January 2011. Please continue to check the Secretary of State's website at www.sos.ms.gov, Business Services homepage, for further information on the new requirements of the Revised Act.

Secretary of State Business Reform Study Groups consider proposed legislation

By Cheryn N. Baker, Esq., Assistant Secretary of State for Policy and Research Division

For the past three years the Mississippi Secretary of State's Office has organized volunteer groups to study all aspects of our business laws with a goal of making them more business-friendly. This year, Secretary of State Delbert Hosemann has formed three study groups to review the state's corporation laws, nonprofit corporation laws and intellectual property laws. These groups meet all summer and will make legislative recommendations to the Mississippi Legislature later this month. Below is a summary of each group's considerations.

The Corporation Laws Study Group, co-chaired by Henry Chatham of Jackson, Mississippi, and Stephen Burrow of Pascagoula, Mississippi, has recommended that recent amendments to the Model Business Corporation Act be adopted in Mississippi to allow shareholder meetings to be held by telephone or online, and will adopt and incorporate other concepts of electronic technology into the Mississippi Business Corporation Act. For example, the amendments will allow corporations and shareholders to communicate electronically for meetings and other matters. The Group has also proposed an amendment which will allow shareholders to vote on merger transactions, even if the board of directors subsequently withdraws its approval of the transaction. This action is commonly called a "Force the Vote" provision in merger agreements.

The Nonprofit Corporation Laws Study Group is co-chaired by Kendall Moore of Jackson, Mississippi, and Barry Jones of Jackson, Mississippi. This group has recommended adoption of a meaningful definition of a nonprofit corporation, similar to the definition used in other states. This definition would provide that the assets, income and profits of the nonprofit corporation are not distributable to the officers, directors and members with certain exceptions. Other recommendations include:

- Adding an automatic liability shield from personal liability (with exceptions for criminal law violations, receipt of un-entitled financial benefit, etc.) for directors of charitable corporations (charities) and an optional liability shield which corporations may include in their articles of incorporation for other types of nonprofit corporations. These amendments would provide specific statutory protections to volunteers serving as directors of nonprofits, making it easier for charities to recruit board members.

- Increasing from one person to three the minimum required number of members of a charitable nonprofit board of directors which solicits donations in the state. This amendment which would apply to nonprofit corporations formed after January 1, 2012, and would be consistent with the laws in at least 37 other states which require a minimum of three directors for nonprofit corporations.

- Proposing provisions to implement electronic technology concepts in communications and in membership meetings. These amendments would be similar to the amendments recommended by the Corporation Laws Study Group.

In addition to the nonprofit legislation being proposed, the study group is also considering:

- Improvements to Agency forms which nonprofits file with the Secretary of State's Office;

- Improvements to our website content by:

    1. Guiding individuals through the process of forming a nonprofit and informing how to comply with all the laws and requirements (IRS, Tax Commission, Charities Division, etc.),

2. Increasing public knowledge of the difference between a nonprofit corporation and a charity,

3. Explaining that only donations made to nonprofits which have obtained tax exempt status from IRS are tax deductible,

4. Finally, adding information to help the public determine whether or not a nonprofit is tax exempt and registered as a charity.

The Technology and Intellectual Property (TIPS) Study Group chaired by Danny Drake of Jackson, Mississippi, has recommended proposed amendments to Mississippi's enactment of the Uniform Trade Secrets Act (UTSA) to clarify and expand what may be considered a trade secret. The group is also considering adopting proposals to UTSA to protect the secrecy of trade secrets during litigation, particularly the discovery process.

In addition to UTSA, the TIPS Group has recommended the adoption of the Mississippi Right of Publicity Act, which would establish a statutory right in every person to control the use of his or her photograph, likeness, voice, or signature for commercial purposes. Persons or companies using a person's photograph, likeness, voice, or signature for commercial purposes within the state without prior authorization would be subject to an injunction and potential damages. Under the current draft of the statute, the right would exist during a person's life and would extend to 50 years after their death. While the right of publicity exists at common law in Mississippi, the proposed statute would clarify the duration of the right, would make explicit that the right may be transferred via contract or will, and would provide clear-cut exceptions to the right in order to eliminate confusion regarding what constitutes an infringement of the right.

Another area the TIPS Group is considering is the adoption of tax and other incentives aimed at making Mississippi more competitive in attracting technology-based businesses, such as software publishers and research and development firms. While these recommendations are not yet finalized, it is likely the group will propose targeted tax credits to attract these businesses, as well as measures aimed at bringing former Mississippi residents and graduates of Mississippi educational institutions back to the state.

Lastly, the group is working with recognized scholars in an effort to determine whether specialized laws regarding software licensing could be modified to better protect Mississippi's software publishers and attract other publishers to the State.

If you are interested in hearing more about the areas being considered by the study groups, or, if you would be interested in participating in a future Business Reform Study group, please contact the Policy and Research Division of the Secretary of State's Office at 601.359.3101 or via email at Cheryn.Baker@sos.ms.gov.

New Mississippi Law Allows Businesses to Register Their Trade Names

By Cheryn N. Baker, Esq., Assistant Secretary of State for Policy and Research Division

The Mississippi Legislature adopted the Fictitious Business Name Registration Act (the "Act") during the 2010 General Session (SB 2003 to be codified at §§75-93-1 et seq.). Effective July 1, 2010, the new law benefits both businesses and customers by allowing businesses to register their fictitious names and basic ownership information with the Business Services Division of the Secretary of State's Office. The voluntary registration is accepted for a nominal fee ($25) and puts Mississippi in line with 45 other states allowing or requiring the registration of fictitious names.

What is a fictitious name?

Many individuals, corporations and other types of entities choose to operate under a fictitious name. A fictitious name is one different from their legal name i.e., the name shown on their birth certificate or in their articles of incorporation or certificate of formation. It may also be referred to as an alias, a trade name, assumed name, "dba" (or "d/b/a") name or "doing business as" name.

Examples of fictitious names and their legal owners are:

- Jackson Bakery, owned by Susan Smith (an individual as a sole proprietor)
- Susan's Bakery, owned by Susan Smith (an individual as a sole proprietor)
- Quality Cleaners, owned by XYZ Corporation
- Mississippi Storage Company, owned by ABC, LLC

While state law provides small businesses an additional form of protection and legitimacy, fictitious names are not just used by small, family-owned businesses. Large companies use them as well. For example, AT&T Mississippi is actually a "dba" name. The legal name of this company is BellSouth Telecommunications, Inc. d/b/a AT&T Southeast and d/b/a AT&T Mississippi.

What is the difference between a trade name and a trademark?

Trade names or fictitious names differentiate one *business* from another, while trademarks differentiate one *good* from another. Registering a trade name *does not* afford exclusivity of use, while trademarks are the exclusive property of the owners of the marks.

Why should a business register?

Though registration under the Act is completely voluntary, businesses may want to consider registering their fictitious name for a number of reasons:

- Registration can serve to put other businesses on notice a particular name is already in use. For example, anyone discovering Susan Smith is using the name Jackson Bakery might be less likely to adopt a confusingly similar name.
    - **Note**: The Act specifically states registration does *not* grant the registrant the exclusive right to the use of the registered name.
- Similarly, should a trademark dispute arise between Susan Smith and another business, Ms. Smith's registration could potentially add weight to her claim she began using the "Jackson Bakery" mark in commerce prior to the other business's use of its claimed name.
- Finally, should Ms. Smith seek a loan or want to open a separate bank account for her business, she could be required to register her fictitious name to comply with the bank's lending guidelines. With the adoption of the Act, Mississippi banks may require businesses to register their fictitious names prior to obtaining a loan or opening an account in order to prevent fraudulent activity.

How will consumers benefit from the Act?

- The Act requires the Secretary of State to provide a searchable database of registered fictitious names on its website. Since the Act provides consumers with a free, simple way to find the identity and location of the true owner

of a business using a fictitious name, the database should enable consumers to make better decisions about the businesses with whom they deal.

- Likewise, if consumers do not find a business's name in the fictitious name database, they are more likely to be cautious in dealing with the business. Therefore, they are less likely to become a victim of fraudulent activity.

How long does the registration last?

Registration of a fictitious name lasts for five (5) years and is renewable indefinitely.

How do I register? Can I register on-line?

Online registration is not yet available. However, you can print a blank registration form on the Secretary of State's website at http://www.sos.gov, by clicking the "Business Services" tab, then "Fees and Forms," and finally "Other Filings." The fee for registration is $25. The form, fee and other materials requested should be filed with the Business Services Division at P.O. Box 136, Jackson Mississippi 39205-0136

There is already a fictitious name registered in the database identical or similar to a name my business is currently using, but we are unrelated. Can I still register my fictitious name?

Yes, you can. Per the Act, our Office may not reject an application for the registration of a fictitious business name merely because the name to be registered is similar or identical to an existing registered name. There is no limit to the number of entities which may register the same fictitious name.

Same question as above, but the name is in the trademarks database, not the fictitious business name database. Can I still register my fictitious business name?

Yes, you can. Our Office may not reject an application for the registration of a fictitious business name merely because the name to be registered is similar to an existing registered Mississippi trademark.

Where is the fictitious business name database located on the Secretary of State's website? How can I search the database?

The fictitious business name database is part of the corporation and other entity names database which is accessible through the Business Services section of the Secretary of State's website. Just type the fictitious name or legal name into the "Search Business Entities" search box on the website, and it will direct you to the company/entity using that name.

I have already obtained a federal trademark and/or a Mississippi trademark for my business' name. Is there any reason I should also register my fictitious business name?

A business still may want to register its fictitious business name in this situation to provide the public an easy way to determine the ownership of its business.

About the Editor

Stanley Q. Smith is a shareholder at Watkins Ludlam Winter & Stennis, P.A. A graduate of the University of Mississippi (1976 B.B.A.; 1979 J.D.), Stan concentrates his practice in the areas of communications and public utilities law. Stan is admitted to all state and federal courts in Mississippi, the United States Fifth Circuit Court of Appeals, and the United States Tax Court. He is a current member of the American Bar Association's National Advisory Panel, and he has twice served as President of the Associate Members of the Alabama-Mississippi Telecommunications Association. Stan has been a speaker at national communications conferences on the topic of the Low Income Program of the federal Universal Service Fund. He handles matters involving wireline and wireless communications, including certificates, transfers of authority, corporate restructures, rates and tariffs, utility pole attachments for power and communications carriers; cable franchises; water and sewer services; and gas and electric issues. Stan is a member of the Board of Deacons of First Baptist Church of Jackson and the Board of Directors of the Booster Club of St. Andrews Episcopal School.

How to Contribute

Persons interested in submitting news, a proposal or an article for publication in The Mississippi Business Law Reporter should submit it by e-mail to the Editor, Stanley Q. Smith, at stansmith@watkinsludlam.com. All news, proposals and articles are subject to review and approval by the Editor and Section Leadership.

When submitting an article, the article should be the original work of the author and must not have been previously published (unless proof of consent to reproduction can be provided). Articles shall not, to the best of the author's knowledge, contain anything which is libelous, illegal, or otherwise infringes upon anyone's copyright or other rights. Authors are responsible for the accuracy of all citations and quotations.

Articles should be arranged in the following order: (i) article title, (ii) author's name, (iii) acknowledgement of assistance, if applicable or desired, and (iv) text of the article. All contributions should be submitted in MS Word format.

A short biographical statement should also be provided at the time the article is submitted. The statement should include, at minimum, the author's (i) current position, (ii) practice areas, (iii) professional affiliations. A head and shoulder photograph of the author(s) in color is requested, but not required.

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Bill practices in the areas of wills, trusts, estate planning, probate, business entity formation (including the formation of tax-exempt organizations), as well as sales, mergers, acquisitions and other business transactions, and tax controversy matters. He is a member of the Mississippi Bar, (Member, Trusts & Estates, Taxation and Business Law Sections, Chair (2010-11), Chair of Taxation Section (1999-2000), Mississippi Society of Certified Public Accountants and the American Institute of Certified Public Accountants. Bill received his B.B.A. in Accounting in 1988 from Millsaps College. Bill worked for KPMG Peat Marwick from 1988-1990. Bill received his J.D. from the University of Mississippi, School of Law in 1993, where he was the Associate Editor of Casenotes of the Mississippi Law Journal. He received his LL.M. in Taxation from the University of Florida, College of Law in 1994.

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Cheryn joined the Mississippi Secretary of State's Office in March of 2008 and currently serves as the Assistant Secretary of State for the Division of Policy and Research. A magna cum laude graduate of University of Mississippi in 1988, Ms. Baker has been practicing law in the Jackson area since she graduated from the University of Denver College of Law in 1991. Ms. Baker's legal experience includes business and corporate law, mergers and acquisitions, securities law, health care law and gaming law. Ms. Baker was recently appointed by Governor Barbour to the Uniform Law Commission (formerly the National Conference of Commissioners on Uniform State Laws (NCCUSL)).

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The Business Law Section now has a Listserv!

- Use the listserv to share information with the Section
- Get input on questions you may want to pose to the members

The MS Bar will be sending you an email soon about how to join the listserv

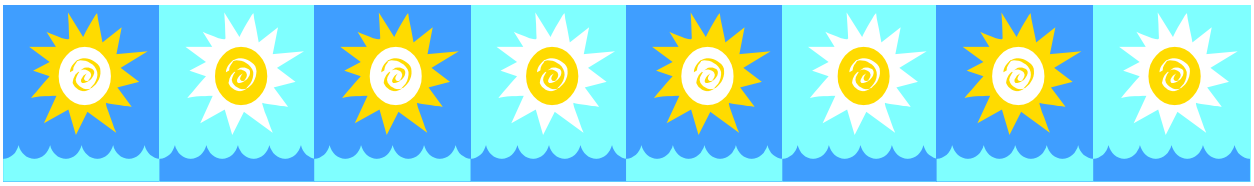
Listserv Moderator: Cheryn Baker

The Business Law Section is coming soon to Facebook!

Stay tuned for information on how to become a fan of the Business Law Section on Facebook

This will be our own page, separate from The Mississippi Bar FB page

Become a fan to stay up to date on all of the activities and events of the Business law Section



SAVE THE DATE!

Make plans to attend

The Business Law Section
Annual Membership Meeting

SanDestin, Florida

July 14, 2010