



DELBERT HOSEMANN
Secretary of State

2009 Business Reform Committees
Minutes of the Model Registered Agents Act Study Group, Meeting #3
September 16, 2009

The third meeting of the Model Registered Agents Act Study Group (the "Study Group") was called to order on Wednesday, September 16, 2009 at 11:05 A.M. at the Secretary of State's Office, 700 North Street, Jackson, Mississippi. A list of the persons who were present is attached as Exhibit A.

Approval of Minutes from the Second Meeting held on August 11, 2009

The Study Group unanimously approved the minutes from the first meeting.

Discussion of Pending Items and Review of Proposed Additions to address Pending Items

Ms. Baker distributed a memorandum regarding open issues. See Exhibit B. The first provision of the proposed Mississippi Registered Agents Act approved by the members was to Section 5, Appointment of Registered Agent. The provision requires the entity to not just confirm that the registered agent has consented to the appointment, but the entity must also confirm to the Secretary of State's Office that the entity provided that agent with the represented entity's forwarding address. One of the duties of a registered agent under MoRAA is to send services of process to the represented entity at the forwarding address supplied to the agent by the entity. The provision is intended to facilitate this particular duty of an agent.

The Study Group then approved a provision to Section 11(c) of the proposed Mississippi Registered Agents Act dealing with agent resignations. The proposed provision which requires agents to notify the entity of a resignation of the agent was borrowed from the Mississippi LLC Act and is not in the MoRAA. It requires the agent to notify the entity before the filing of the statement of resignation instead of afterwards and it requires the agent to provide an affidavit to the Secretary of State that it notified the entity in writing of the resignation prior to the filing of the resignation. Ms. Baker pointed out that by requiring the agent to affirm in writing to the Secretary of State that the agent notified the entity of the resignation, it can be assured that the entity is aware that it needs to appoint a new agent. If the entity thereafter does not appoint a new agent by the deadline set forth in the Act, according to MoRAA this would be grounds for administrative dissolution. Chairman Gina Jacobs noted to the Study Group that the goal of this provision was to ensure that the represented entity was made aware that it is lacking an agent before it receives notice that it is being administratively dissolved for lack of a registered agent.

The next provisions reviewed concerned Section 14, Duties of Registered Agents. The proposed provision clarifies that persons who have not consented to act as an agent will not become a registered agent and will not have the duties of a registered agent. Therefore they have no obligation to accept service of process. And if they do mistakenly accept service, they have no duty or legal obligation to accept the process on behalf of the entity and forward it to the entity. The person also would not have any duty to return it or forward it to the Secretary of State's office. Additionally, if an entity makes an

appointment filing without the person's consent, any process served on the person is deemed to be a legal service of process, even if the person does not forward it to the entity. The entity would be estopped from arguing ineffective service of process. One last point was that since the person never consented to the appointment the person would have no need to or duty to resign. Professor Jackson told the Study Group that the rationale of the provision was not to punish unwilling agents and plaintiffs, but to punish the entity because it caused the harm by appointing an agent who had not consented to such appointment. The Study Group also opted to add language to Section 14 providing that a person who has not accepted the appointment in a record and has not consented to serve as the represented entity's registered agent may not be held liable under a judgment, decree, etc., to the represented entity or to a person who reasonably relied on the unauthorized designation or appointment solely because of the person's failure or refusal to perform the duties of a registered agent under this Section.

In addition to the above, the Study Group also agreed to include additional language that allows a non-consenting agent to file a notice of non-acceptance with the Secretary of State's Office. Filing this notice would remove a non-consenting agent's name from the publicly-posted fourteen (14) day list provided for in the Model Act.

Pursuant to the Study Group's recommendation at the previous meeting to make the penalties uniform for making a false statement in a registered agent filing, the Division drafted a new section to the proposed act, Designation of Registered Agent without Consent; Penalties and Liabilities. The new section provides that a person commits an offense if he makes a false statement in a registered agent filing that names a person the registered agent of a represented entity without the person's consent. The penalty would be pursuant to the false filing penalty section for the different entities. The Secretary of State, in his discretion, could also commence a proceeding to administratively dissolve the domestic entity or to revoke the foreign entity's registration. An entity that is administratively dissolved or whose registration is revoked pursuant to this new section would only be reinstated when it complied with the applicable statutory reinstatement requirements and provided the Secretary of State with its application for reinstatement, a statement of appointment of registered agent signed by its appointed registered agent and an additional reinstatement fee of Two Hundred Fifty Dollars (\$250.00). This fee would be in addition to the applicable statutory reinstatement fee.

The final issue addressed by the Open Issues Memo was Section 3, Fees. The members agreed that the Secretary of State shall collect a fee of Twenty-five Dollars (\$25.00) each time process is served on the Secretary of State under this chapter. The Study Group also decided to obtain Secretary of State staff recommendations for the remaining fees in Section 3 and then proceed to make a recommendation after that.

Presentation by Professor Jackson on Service of Process and Notice and Demand Issues

Professor Jeffrey Jackson of the Mississippi College School of Law gave a brief presentation regarding service of process issues raised by MoRAA. See Exhibit C. Section 13 of the Model Act contains provisions that conflict or overlap with Rule 4 of the Mississippi Rules of Civil Procedure ("MRCP") and would be supplanted by Rule 4 under the inherent powers doctrine. If service of process provisions in Section 13 of the Model Act were enacted into law, those service of process provisions would be legally inoperative, and would only add confusion to the existing law. Professor Jackson urged acknowledgement of and deference to the Supreme Court's inherent power in the areas of making rules governing matters of procedure such as service of process. He recommended revising Section 13 to delete the service of process provisions (but to retain the notice and demand provisions which are unrelated to Rule 4 of the MRCP). He noted, however, that the Model Act's provisions on appointment of agents for service of process are not problematic under the Supreme Court's rules. The Supreme Court's Rule 4 recognizes that agents may be "authorized by appointment or by law to receive service of process." Ms.

Baker also added one additional sentence to Professor Jackson's suggested revisions that provided if the governors of an entity cannot with reasonable diligence be served, service of process against the entity shall be upon the Secretary of State in accordance with the Mississippi Rules of Civil Procedure. The Study Group unanimously agreed to all recommendations.

Other Business and Adjournment

Ms. Baker stated that the Division will incorporate all of the recommendations into a final proposed Mississippi Registered Agents Act, which the Division will circulate to the Study Group for approval by email. With no further business to discuss the meeting was adjourned at 12:40 P.M.

Respectfully submitted,



Cheryn Baker
Assistant Secretary of State
Policy and Research Division

EXHIBIT A
to the Minutes of the Model Registered Agents Act Study Group, Meeting #3
September 16, 2009

In Attendance:

1. Gina Jacobs (Chair)
2. Joey Diaz
3. Arthur Jernigan
4. William Noblin, Jr.
5. Caryn Quilter
6. Tom Riley, Assistant Secretary of State, Business Services Division

Attending by Phone:

1. Chad Davidson
2. Charlene Dawkins

Guests in Attendance:

1. Professor Jeffrey Jackson

Secretary of State Staff in Attendance:

1. Cory Wilson, Chief of Staff, Mississippi Secretary of State
2. Cheryn Baker, Assistant Secretary of State, Policy and Research Division
3. Martin Hegwood, Senior Policy Counsel, Policy and Research Division
4. Leann Hager, Legal Intern, Policy and Research Division

Exhibit B
to the Minutes of the Model Registered Agents Act Study Group, Meeting #3
September 16, 2009

MORAA OPEN ISSUES AND PROPOSED SOLUTIONS
SEPTEMBER 16, 2009 (REVISED AND UPDATED SEPT 16)

1. **THIS AMENDMENT TO SECTION 5 (IN RED) REQUIRES THE ENTITY TO CONFIRM TO THE SOS THAT IT HAS PROVIDED THE AGENT WITH A FORWARDING ADDRESS.**

SECTION 5. APPOINTMENT OF REGISTERED AGENT.

(a) A registered agent filing must state:

- (1) the name of the represented entity's commercial registered agent; or
- (2) if the entity does not have a commercial registered agent the name and address of the entity's noncommercial registered agent.

(b) The appointment of a registered agent pursuant to subsection (a)(1) or (a)(2) is an affirmation by the represented entity that the entity has

- (1) notified the agent of the appointment,
- (2) provided the represented entity with a forwarding address as provided in Section 14]and that
- (3) the agent has consented to serve as such.

(c) The Secretary of State shall make available in a record as soon as practicable a daily list of filings that contain the name of a registered agent. The list must:

- (1) be available for at least fourteen (14) calendar days;
- (2) list in alphabetical order the names of the registered agents; and
- (3) state the type of filing and name of the represented entity making the filing.

2. This language that is copied from the LLC Act (which language is not also in the MORAA) would replace Section 11(c) which requires agents to notify the entity of a resignation of the agent. It requires the agent to notify the entity before the filing of the statement of resignation instead of afterwards and it requires the agent to provide an affidavit to the SOS that it notified the entity in writing of the resignation prior to the filing of the resignation. It also provides for where the written notice should be sent and discloses to the SOS where and to whom the notice was sent. By requiring the agent to prove in writing to the SOS that the agent notified the entity of the resignation, we can be assured that the entity is aware that it

needs to appoint a new agent. If the entity thereafter does not appoint a new agent by the deadline (31 days), according to MORAA this would be grounds for administrative dissolution.

There shall be attached to such statement an affidavit of the registered agent that at least thirty (30) days prior to the filing of the statement notices were sent by certified or registered mail to each represented entity for which such registered agent is resigning as registered agent of the resignation of such registered agent. This notice shall be addressed and delivered to the last known principal office of each represented entity identified in the statement. A copy of the notice which shall contain the address to which it was sent shall be attached to the affidavit. After receipt of the notice of resignation of its registered agent, the represented entity for which such registered agent was acting shall obtain and designate a new registered agent.

For purposes of this subsection the "last known principal office" of the represented entity shall be the address of the entity on file with the Secretary of State's Office or the address most recently supplied to the agent by the entity, whichever is more current, or the actual principal office address if such actual address is known to the agent.
[sentence drafted by CNB]

3. The purpose of the following amendments to Section 14 shall be to clarify that persons who have not consented to act as an agent will not have the duties of an agent. Therefore they do not have to accept service of process. And if they do accept service by mistake, they have no duty or responsibility to forward the process to the entity. The person also wouldn't have any duty to return it or to forward it to the SOS Office.

In addition, if an entity makes an appointment filing with out the person's consent, any process served on the person is deemed to be a legal service of process, even if the person doesn't forward it to the entity (or return it or forward it to the SOS). The entity would be estopped from arguing ineffective service of process. This way entities don't benefit from falsely appointing persons to be their agent and they would have to suffer the consequences of this behavior.

In addition since the person never consented to the appointment it would have no need to or duty to resign.

Amendments to Section 14:

- (a) The only duties under this chapter of a registered agent that has complied with this chapter are:
 - (1) to forward to the represented entity at the address most recently supplied to the agent by the entity any process, notice, or demand that is served on the agent;
 - (2) to provide the notices required by this chapter to the entity at the address most recently supplied to the agent by the entity;
 - (3) if the agent is a noncommercial registered agent, to keep current the information required by Section 5(a) in the most recent registered agent filing for the entity; and
 - (4) if the agent is a commercial registered agent, to keep current the information listed for it under Section 6(a).

- (b) A person named as the registered agent for a represented entity in a registered agent filing pursuant to this chapter without the person's consent is not considered to be a "registered agent" of such entity for purposes of this chapter and therefore the person shall not have and shall not be required to perform the duties prescribed by this Section with respect to the represented entity described in this subsection (b).
- (c) In the event a person described in subsection (b) is served with notice of service of process pursuant to Section 13(a) such service on such person shall be deemed to be service on the entity that named the agent, even if the person does not forward service to the entity.
- (d) The person described in subsections (b) and (c) shall have no responsibility to forward such service described in subsection (c) to the entity, even if the person accepts the service by mistake.

Other language that could possibly be added but not sure it is needed:

the person who has not accepted the appointment and has not consented to serve as the represented entity's registered agent may not be held liable:

- (1) under a judgment, decree, or order of a court, agency, or tribunal of any type, or in any other manner, in this or any other state, or on any other basis, for a debt, obligation, or liability of the represented entity, whether arising in contract, tort, or otherwise, solely because of the person's designation or appointment as registered agent; or
- (2) to the represented entity or to a person who reasonably relied on the unauthorized designation or appointment solely because of the person's failure or refusal to perform the duties of a registered agent under this Section.

4. New Section to make penalties for a false statement in a MORAA filing uniform:

SECTION ____. **Designation of Registered Agent without Consent; Penalties and Liabilities.** A person commits an offense if he makes a false statement in a registered agent filing that names a person the registered agent of a represented entity without the person's consent. The following penalties and liabilities shall apply with respect to a false statement in a registered agent filing made under this chapter that names a person the registered agent of a represented entity without the person's consent:

- (a) An offense under this Section is a misdemeanor punishable by a fine of not to exceed Five Hundred Dollars (\$500.00); or
- (b) The Secretary of State may commence a proceeding to administratively dissolve the domestic entity or to revoke the foreign entity's certificate of authority or similar certificate as prescribed by [list cross reference to statutory provisions in the 7 business entity statutes for domestic and foreign entities here [note that there is currently no statute for this for LLCs but there will be a new statute if the LLC bill passes. Some entity statutes may not have administrative dissolution]]. For any entity that is administratively dissolved or whose certificate of authority is revoked pursuant to this subsection such entity shall not be reinstated unless it complies with the applicable statutory reinstatement requirements and unless it provides to the Secretary of State with its application for reinstatement a statement

of appointment of registered agent signed by its appointed registered agent and an additional reinstatement fee of Five Hundred Dollars (\$500.00), in addition to the applicable statutory reinstatement fee.

5. Revisions to Section 13 Service of Process suggested by Professor Jackson.

See Attached Memo. Professor Jackson also recommends the Section be revised to make the Secretary of State's office the default agent for service of process if the governors cannot be served with reasonable diligence.

The following sentence would be added to the end of Section 13 (b) as revised in Jackson's memo.

If the governors of the entity cannot with reasonable diligence be served, service of process against the entity shall be upon the Secretary of State in accordance with the Mississippi Rules of Civil Procedure.

A new provision should be added to section 3 to authorize a \$25 fee to accept service of process as default agent.

Section 3. Fees.

(a) The Secretary of State shall collect the following fees when a filing is made under this chapter:

Document	Fee
(1) commercial registered agent listing statement	\$__
(2) commercial registered agent termination statement	\$__
(3) statement of change	\$10, per entity, not to exceed \$1,000
(4) statement of resignation	no fee
(5) statement appointing an agent for service of process pursuant to Section 12	\$__

(b) The Secretary of State shall collect the following fees for copying and certifying a copy of any document filed under this chapter:

(1) \$__ a page for copying; and

(2) \$__ for a certificate.

- (c) The Secretary of State shall collect a fee of Twenty-five Dollars (\$25.00) each time process is served on him under this chapter. The party to a proceeding causing service of process is entitled to recover this fee as costs if he prevails in the proceeding.
- (d) The Secretary of State may collect a filing fee greater than the fee as prescribed by rule, not to exceed Twenty-five Dollars (\$25.00), if the form for such filings prescribed by the Secretary of State has not been used.
- (e) The Secretary of State may promulgate rules to reduce the filing fees set forth in this Section or provide for discounts of fees as set forth in this Section to encourage online filing of documents or for other reasons as determined by the Secretary.

The effect of this change is that while MORAA eliminates the SOS as default agent if the registered agent cannot be served with reasonable diligence (which is currently the law for LLCs and LPs) it does allow the plaintiff to serve the SOS if the registered agent and the governors of the entity cannot with reasonable diligence be served. In essence it just adds an additional step. Before the plaintiff can serve the SOS it must first try to serve the governors. If that doesn't work, then it can serve the SOS.

Exhibit C
to the Minutes of the Model Registered Agents Act Study Group, Meeting #3
September 16, 2009

September 12, 2009

Memo to: Division of Policy and Research
 Secretary of State's Office

From: Jeffrey Jackson
 Owen Cooper Professor of Law
 Mississippi College School of Law

Re: Service of process provisions in MoRAA

I write to follow up my comments regarding service of process provisions in the MoRAA . My comments from the August 10th memo regarding the scope of the Supreme Court's inherent powers doctrine are reproduced in the Appendix to this memo. As noted, Section 13 of the Model Act contains provisions which, because they conflict or overlap with Rule 4 of the Mississippi Rules of Civil Procedure, would be supplanted by Rule 4 under the inherent powers doctrine. If the service of process provisions in Section 13 were enacted into law, those service of process provisions would be legally inoperative, and would only add confusion to existing law.

I would urge acknowledgement of and deference to the Supreme Court's inherent power in the areas of making rules governing matters of procedure such as a service of process.¹ As such, Section 13 should be revised to delete service of process provisions. Note, however, that the Model Act's provisions on appointment of agents for service of process are not problematic under the Supreme Court's rules. The Supreme Court's Rule 4 recognizes that agents may be "authorized by appointment or by law to receive service of process."

¹The Secretary has two other options when dealing with the Supreme Court and the service of process provisions. The Secretary could take a confrontational approach with the Court, ignoring the Court's asserted power over rulemaking, and propose the Model Act without deletion of the service of process provisions. That assertive approach would add a meaningless provision to our business code, and thereby cause confusion for litigants and businesses faced with statutory and rules provisions on service of process. Second, the Secretary could delete the service of procession provisions from section 13 of the Model Act, and then lobby the Supreme Court to amend Rule 4 to incorporate those service provisions. Lobbying the Court is unseemly, although the Court's asserted powers over rulemaking makes such lobbying necessary if the Secretary wishes to include such service provisions in Mississippi law.

Revising Section 13 of the Model Act; “service of process, notice, or demand”

The language of the Model Act alludes to a number of activities regarding “notification” of the agents. For example, in section 13(a), the Act refers to an agent “authorized to receive service of any process, notice, or demand required or permitted by law to be served on the entity.” Section 13 repeatedly refers to “process, notice, or demand” or “[s]ervice of process, notice, or demand.” It is unclear whether the Model Act intends to refer to three separate activities (i.e., (1) service of process; (2) notice; and (3) demands) or whether “service of process, notice, or demand” is meant to be a series of redundant synonyms. In Section 13(c), for example, the Model Act seems to treat the three terms as synonyms. That subsection provides:

If process, notice or demand cannot be served on an entity pursuant to subsection (a) or (b), service of process may be made by handling a copy

The initial reference in the subordinate clause is to three terms, “process, notice, or demand.” However, in the independent clause, the three terms are replaced by the single subject, “service of process,” suggesting that the three terms in the subordinate clause merely refer to the same thing, that is, service of process in a judicial proceeding.

However, elsewhere in the Model Act (and presumably elsewhere in our business code) are references to notices and demands apart from formal service of process. For example, Section 2, subdivision (8)(A) refers to persons entitled to “receive or demand access” to books and records. It is possible that such access would be “demanded” from the registered agent under the Model Act. Of course, such a “demand” would not involve a formal service of process. Section (b) of the Model Act refers to the obligation of the entity to “notif[y]” its agent of the appointment. Section 8(c) also refers to the entity having “notified” its new agent following a change of agency. Again, such “notifications” of the agent would not involve formal service of process.

It is likely that elsewhere in the business code there are provisions for giving entities “notice” or for making “demands” on entities without institution of civil actions and without formal service of process. For example, the Uniform Limited Liability Company Act has numerous sections referring to notices and demands for payments from the entity.² The provisions in Section 13 on “service of process, notice, or demand,” probably refer to three different activities. Of course, Rule 4, of the Mississippi Rules of Civil Procedure only governs formal service of process. Notices and demands that do not involve formal service of process do not impinge on the Supreme Court’s inherent powers and need not be deleted from Section 13.

²ULLCA, § 9(b), for example, refers to a “person who fails to notify the limited liability company in writing of that person’s demand to be paid...” [Emphasis supplied.] Miss. Code. Ann. § 79-29-214 (on appraisal rights, notices and demands)

Suggested revisions to Section 13 (assuming the notice and demand provisions remain)

Assuming the notice and demand provisions of Section 13 should remain, the following changes are proposed to Section 13:

(b) If an entity that previously filed a registered agent filing with the Secretary of State no longer has a registered agent, or if its registered agent cannot with reasonable diligence be served, the governors of the entity will be treated as the entity's agent for service of process who may be served pursuant the provisions of the Mississippi Rules of Civil Procedure. The names of the governors and the address of the principal office may be as shown in the most recent annual report filed with the Secretary of State. ~~Service is perfected under this subsection at the earliest of:~~

~~(1) the date the entity receives the mail;~~
~~(2) the date shown on the return receipt, if signed on behalf of the entity; or~~
~~(3) five (5) days after its deposit with the United State Postal Service, if correctly addressed and with sufficient postage.~~ [Note: this proposed change merely makes clear that service is accomplished under the MRCP. It deletes the provision regarding when service is effective as that is governed solely by the MRCP.]

(c) If ~~process~~, notice or demand cannot be made served on an entity pursuant to subsection (a) or (b), notice or demand ~~service of process~~ may be made by handing a copy to the manager, or other individual in charge of any regular place of business or activity of the entity if ~~the individual served is not a plaintiff in the action and the individual is authorized by appointment or by law to receive service of process.~~ [Note: the reference to process is deleted, although the references to “notice or demand” is allowed to remain. Service on an entity is governed directly by MRCP (d)(4).]

(d) ~~Service of process~~, Notice or demand on registered agent must be in the form of a written document, except that notice or demand ~~service~~ may be made on a commercial agent [remaining text is fine... .] [Note: Again, the reference to service of process is deleted. The requirements for written service in form are governed by MRCP 4.

(e) Service of process, notice or demand may be perfected by any other means prescribed by law other than this chapter, including provisions in the organic laws that provide for service of process on the Secretary of State in the event that registration of an organic entity has been cancelled, withdrawn or revoked or the domestic organic entity has been administratively dissolved or voluntarily dissolved under the applicable organic entity statute. [Note: No change is suggested, and even the “service of process” references remain. This section merely provides that if other areas of law appoint agents for service of process, those sections of law

remain operative. This does not run afoul of MRCP 4, which recognizes that agents may be “by appointment or by law.”]

Again, the notice-and-demand provisions in Section 13 should remain if those provisions are not meant to be redundant and synonymous with the phrase “service of process.” In that event, Section 13 would provide a regularized method for “notice or demand” on entities, in circumstances where the notice or demand is tendered for purposes other than initiation of civil action through service of process.

Suggested revisions to Section 13 (assuming the notice and demand provisions are merely redundant synonyms for “service of process” which should be deleted.)

Assuming the notice and demand provisions of Section 13 should not remain, the following changes are proposed to Section 13:

(b) If an entity that previously filed a registered agent filing with the Secretary of State no longer has a registered agent, or if its registered agent cannot with reasonable diligence be served, the governors of the entity will be treated as the entity’s agent for service of process who may be served pursuant to the provisions of the Mississippi Rules of Civil Procedure. The names of the governors and the address of the principal office may be as shown in the most recent annual report filed with the Secretary of State. ~~Service is perfected under this subsection at the earliest of:~~

~~(1) the date the entity receives the mail;~~

~~(2) the date shown on the return receipt, if signed on behalf of the entity; or~~

~~(3) five (5) days after its deposit with the United State Postal Service, if~~

~~correctly addressed and with sufficient postage. [Note: this proposed change merely makes clear that service is accomplished under the MRCP. It deletes the provision regarding when service is effective as that is governed solely by the MRCP.]~~

~~(c) If process, notice or demand cannot be served on an entity pursuant to subsection (a) or (b), service of process may be made by handing a copy to the manager, or other individual in charge of any regular place of business or activity of the entity if the individual served is not a plaintiff in the action and the individual is authorized by appointment or by law to receive service of process. [Note: entire section should be deleted as service on an entity is governed directly by MRCP (d)(4).]~~

~~(d) Service of process, notice or demand on a registered agent must be in the form of a written document, except that service may be made on a commercial agent [continue deleting entire section... .] [Note: Again, the entire section would be deleted as the requirements for written service in form are governed by MRCP 4.~~

(e) Service of process, notice or demand may be perfected by any other means prescribed by law other than this chapter, including provisions in the organic laws

that provide for service of process on the Secretary of State in the event that registration of an organic entity has been cancelled, withdrawn or revoked or the domestic organic entity has been administratively dissolved or voluntarily dissolved under the applicable organic entity statute. [Note: No change is suggested, and even the “service of process” references remain. This section merely provides that if other areas of law appoint agents for service of process, those sections of law remain operative. This does not run afoul of MRCP 4, which recognizes that agents may be “by appointment or by law.”]

Appendix 1

Here are my comments from My August 10th memo regarding the impact of the Mississippi Supreme Court's asserted inherent powers doctrine:

[begin comments from August 10th memo]

4. *The service of process provisions in the model act are unhelpful and dead-letter*

I would like to offer a view on section 13 of the statute, which covers "Service of Process on Entities." I was not asked about this provision, but, given the recent tumult in the area of legislatively enacted procedural rules,³ I hope these views are useful.

Rules governing practice and procedure before Mississippi's state courts are promulgated by the state supreme court that has preemptive inherent judicial power in this area. Under the court's inherent power, court rules supplant contrary and even compatible legislative enactments on issues of procedure. Mississippi Rule of Civil Procedure 4 – alone-- governs service of process on all defendants in civil actions in Mississippi. A defendant properly served under Rule 4 is properly served. The legislature – and legislatio n -- have nothing to do with the matter.

Whether one agrees or disagrees with the Supreme Court's assertion of inherent judicial power over procedure, the court has announced that power over four decades⁴ and continues⁵ to strike down legislative enactments that it perceives as involving "procedural" matters." I have been critical of the breadth of the court's asserted inherent power, and testified before a legislative committee on the subject last November. Nonetheless, while I believe the court's assertion of inherent power over procedure is overly broad (and undemocratic), that asserted power is the law in Mississippi.

As such, legislation that establishes criteria for when a defendant is properly served – as section 13 does – is dead-letter and unhelpful. It is unhelpful because it confuses parties – plaintiffs and defendants – by suggesting that compliance with statutory service provisions is necessary and sufficient. Compliance with statutory service provisions is neither necessary nor sufficient.

Rule 4 of the Mississippi Rules of Civil Procedure provides for service on private entities as follows:

³ A select legislative committee held hearings on inherent judicial power in November, after the court's decision in *Wimley v. Reid*, 991 So. 2d 135 (Miss. 2008).

⁴ The first case in this line is *Newell v. State*, 308 So. 2d 71 (Miss. 1975).

⁵ See, e.g., *Wimley v. Reid*, 991 So. 2d 135 (Miss. 2008), striking down legislative requirement that expert affidavit be filed with medical malpractice complaint because that legislative requirement usurped the court's inherent judicial power to create rules governing complaints in state court.

(4) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process.

Simply put, service on such an entity is complete when the rules' provisions are complied with, notwithstanding anything that might be said in the model act.

Note that Rule 4 does not make the model act irrelevant. It merely makes irrelevant the portions of section 13 that establish rules for when service is complete. Rule 4 clearly provides that service under the rule may be made by upon an "agent authorized *by appointment or by law.*" Rule 4 recognizes a role for the legislature to facilitate a regularized process for agent appointment, as the model act does well. However, the rules do not otherwise invite legislative regulation of service of process on entities, which would infringe on the court's inherent rulemaking authority.

[end comments from August 10th memo]