

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION**

UNITED STATES OF AMERICA

PLAINTIFF

V.

CIVIL ACTION NO.: 3:16-CV-00622-CWR-FKB

THE STATE OF MISSISSIPPI

DEFENDANT

**THE STATE OF MISSISSIPPI'S MEMORANDUM
IN SUPPORT OF MOTION FOR CLARIFICATION
OF SPECIAL MASTER'S ROLE AND OBLIGATIONS**

Introduction

On February 25, 2020, the Court issued its Order Appointing Special Master (ECF 241). The Court appointed Dr. Michael Hogan to serve as Special Master from February 25, 2020, until entry of Final Judgment (ECF 241 at 2). The court ordered that Special Master Hogan's discussions with the parties "will remain confidential under Federal Rule of Evidence 408" (ECF 241 at 2-3).

On February 24, 2021, the Court issued its Order (ECF 253) regarding moving this case toward Final Judgment. The State of Mississippi seeks clarification of that Order. In particular, the Court should clarify that (i) the Special Master's input regarding any proposed remedial plan must be in the form of a written report, (ii) the Special Master cannot provide information which is outside the record regarding mental health systems, and (iii) the Special Master is prohibited from relying on or disclosing any Rule 408 information in providing his report.

I. Special Master's Input Must Be In The Form Of A Written Report.

In its Order, the Court stated the following: "The Special Master is asked to weigh in on the parties' points of disagreement – again, if any The Special Master's input is requested by June 4, 2021" (ECF 253).

FRCP 53(e) provides that “[a] master must report to the court as required by the appointing order. The master must file the report and promptly serve a copy on each party, unless the court orders otherwise.” Consistent with Rule 53(e), the Court should clarify that the Special Master’s input regarding a remedy be in the form of a written report filed with the Court.

II. No Extra-Record Evidence Regarding Mental Health Systems.

In its Order, the Court stated that “[t]he *Special Master is asked to support his recommendations by reference to his vast experience and knowledge of mental health systems, rather than to any statement made by a party during settlement negotiations*” (ECF 253) (emphasis added). The State objects to the italicized language above to the extent it permits the Special Master to include in his report any information that was not admitted into evidence at trial.

To the extent that the parties desired the Court to consider information regarding any mental health systems other than the State’s mental health system, the parties were required to introduce such evidence before they rested at trial. The Court should not allow the Special Master to provide, introduce, or discuss in his report any information regarding mental health systems other than the State’s mental health system that was not admitted into evidence at trial. Any such information is prejudicial as it is outside the trial record and not subject to cross examination.

III. Special Master Must Not Rely On Or Disclose Rule 408 Information In Providing His Input.

For approximately one year the Special Master has functioned as a mediator in the parties’ on-going settlement negotiations. In doing so, the Special Master received extensive information that is subject to Rule 408. He received Rule 408 information verbally (through both ex parte communications with the parties and in joint sessions with the parties) and in writing (including in the form of the parties’ drafts of a preliminary remedial plan).

Rule 408 bans evidence of settlement or attempted settlement of a disputed claim regarding liability or amount of settlement offers. The ban includes “furnishing, promising, or offering or accepting, promising to accept, or offering to accept – a valuable consideration in compromising or attempting to compromise the claim.”¹

Rule 408 information cannot be admitted regarding “the quantum of damages.” *Branch v. Fidelity & Cas. Co. of New York*, 783 F.2d 1289, 1294 (5th Cir. 1986). In the context of this case, “the quantum of damages” is the remedy for the Court’s prior finding that the State’s adult mental health system violates the Americans With Disabilities Act.²

In its Order, the Court directed that the Special Master cannot “support his recommendations by reference to ... any statement made by a party during settlement negotiations” (ECF 253). Because Rule 408 is broader than “statements made by a party during settlement negotiations,” the Court should clarify its Order to state that the Special Master is prohibited from relying on or disclosing any Rule 408 information in providing his report, including any statements made by the parties, verbally or in writing, and any draft remedial plans that were made while attempting to compromise the claim.

Request for Relief

The State’s Motion for Clarification (ECF 254) should be granted.

Dated: March 5, 2021.

Respectfully submitted,

PHELPS DUNBAR LLP

BY: /s/ James W. Shelton
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¹ Fed. R. Evid. 408 (a)(1).

² See ECF 241, Order Appointing Special Master at 1.

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CERTIFICATE OF SERVICE

I certify that on March 5, 2021, I electronically filed this document with the Clerk of the Court using the ECF system, which sent notification of such filing to all ECF counsel of record in this action.

/s/ James W. Shelson
JAMES W. SHELSON