

**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
RESPONSE TO PLAINTIFF'S MOTION FOR CLARIFICATION OF MISSISSIPPI
RULE 4.2 OF THE MISSISSIPPI RULES OF PROFESSIONAL CONDUCT**

Introduction

The Court should deny Plaintiff's Motion for Clarification of Rule 4.2 (ECF 335) and prohibit Plaintiff from communicating *ex parte* with the Community Mental Health Centers (CMHCs). Since the inception of this litigation, Plaintiff has treated the CMHCs as instrumentalities of the State of Mississippi within the definition of "public entity" under Title II of the Americans With Disabilities Act. The Court agreed with Plaintiff in its Opinion and Order (ECF 234) and held that the State is liable under Title II for the acts or omissions of the CMHCs. The Court further expressly included the CMHCs in the Remedial Order (ECF 278), although the CMHCs are not parties to this action. The Court nonetheless presumably intends to hold the State responsible for the CMHC's compliance with the Remedial Order. That being the case, the Court should prohibit Plaintiff from communicating *ex parte* with the CMHCs.

The parties previously disputed the application of Rule 4.2 of the Rules of Professional Conduct in this case. In October 2018, Judge Ball issued an Order which held in pertinent part that Rule 4.2 prohibits Plaintiff from having *ex parte* communication with the following categories of persons:

- Any person whose act or omission in connection with the claims and allegations of the Complaint may be implied to the State of Mississippi for purposes of civil or criminal liability.

- Any person whose statements may be admissible against the State of Mississippi pursuant to Fed. R. Evid. 801(d)(2)(D).¹

Because the Court has previously held the State responsible for the acts, omissions, or statements of the CMHCs, and presumably intends to continue to do so in assessing the State's compliance with the Remedial Order, the Court should not allow Plaintiff to communicate *ex parte* with the CMHCs.

I. Plaintiff Should Not Be Permitted To Communicate *Ex Parte* With The CMHCs.

Title II defines "public entity" to mean "any State or local government" and "any department, agency, special purpose district, or other instrumentality of a State or States or local government."² Although the CMHCs are not parties to this action, Plaintiff has consistently taken the position that the State is responsible under Title II for the performance of the CMHCs because the CMHCs are instrumentalities of the State in delivering community-based services.

The Court agreed with Plaintiff. It found that the CMHCs are the entities that deliver community-based services in Mississippi.³ The Court further found that the CMHCs did not adequately deliver community-based services.⁴ The Court concluded that "[i]t is ultimately DMH's responsibility to manage the expansion of the community-based services at CMHCs,"⁵ which squarely put the State on the hook for the performance of the CMHCs.

The Court subsequently issued a Remedial Order (ECF 278). Although the CMHCs are not parties to this action, the Remedial Order provides that "each CMHC shall be the entity in its region responsible for preventing unnecessary hospitalizations."⁶ The Remedial Order mentions the CMHCs at least twenty times, requires the CMHCs to provide the community-based services

¹ ECF 128, Order at 6-7.

² 42 U.S.C. § 12131(1)(A)-(B).

³ ECF 234, Opinion and Order at 16.

⁴ ECF 234, Opinion and Order at 19-26.

⁵ ECF 234, Opinion and Order at 28.

⁶ ECF 278, Remedial Order, ¶ 2.

enumerated in the Order, and imposes a host of other requirements on the CMHCs regarding medication access, diversion from State Hospitals, connecting individuals with SMI to care, discharge planning, and data collection.⁷

Plaintiff cannot have it both ways. It cannot, on the one hand, insist that the State is responsible under Title II for the performance of the CMHCs, while, on the other hand, claiming that the CMHCs are “stakeholders”⁸ that are unaffiliated with the State, thereby leaving Plaintiff free to communicate *ex parte* with the CMHCs. If the Court is going to hold the State responsible under Title II for whether the CMHCs fulfill the obligations that the Remedial Order imposes on them, then Plaintiff should not be permitted to communicate *ex parte* with the CMHCs.

In his Order regarding Rule 4.2 entered in October 2018, Judge Ball found that “[t]he State of Mississippi is the defendant, and it is represented by the Mississippi Attorney General’s Office. The Attorney General’s representation of Mississippi is not limited to Mississippi’s DMH and DOM. To the degree that this suit implicates the State of Mississippi, including its employees, the State is represented by the Mississippi Attorney General’s Office.”⁹ Because the Court held the State responsible for the performance of the CMHCs in its Opinion and Order and has expressly included the CMHCs in its Remedial Order, “this suit implicates the State of Mississippi” through the CMHCs. As Judge Ball held, “the State is represented by the Mississippi Attorney General’s Office.”¹⁰

Moreover, Judge Ball held that Rule 4.2 prohibits Plaintiff from having *ex parte* communication with the following categories of persons:

⁷ ECF 278, Remedial Order, ¶¶ 4-14, 17, and 20.

⁸ No purported “stakeholder” is mentioned in the Remedial Order other than the CMHCs. An alleged instrumentality of the State is not a “stakeholder” as Plaintiff is using that term.

⁹ ECF 128, Order at 2. Plaintiff sued the State of Mississippi as a whole as follows: “Defendant, State of Mississippi, is a ‘public entity’ within the meaning of the ADA, 42 U.S.C. § 12131(1), and is therefore subject to Title II of the ADA, 42 U.S.C. § 12131 *et seq.*, and its implementing regulations, 28 C.F.R. pt. 35.” ECF 1, Complaint, ¶ 23.

¹⁰ ECF 128, Order at 2.

- Any person whose act or omission in connection with the claims and allegations of the Complaint may be implied to the State of Mississippi for purposes of civil or criminal liability.
- Any person whose statements may be admissible against the State of Mississippi pursuant to Fed. R. Evid. 801(d)(2)(D).¹¹

If the Court intends to permit the acts or omissions of the CMHCs in connection with the Remedial Order to be implied to the State, or the statements of persons employed by the CMHCs to be admissible against the State pursuant to Fed. R. Evid. 801(d)(2)(D), then Rule 4.2 prohibits Plaintiff from communicating *ex parte* with the CMHCs. In other words, if the Court is going to hold the State responsible for the acts, omissions, or statements of the CMHCs in assessing the State's compliance with the Remedial Order, then the Court should not allow Plaintiff to communicate *ex parte* with the CMHCs.

Although Plaintiff repeatedly insists that the State does not represent the CMHCs, that misstates the issue. The Rule 4.2 issue is whether the Court's holding that the State is liable for the acts, omissions, or statements of the CMHCs "implicates the State of Mississippi." It plainly does. As Judge Ball held, "[t]o the degree that this suit implicates the State of Mississippi, including its employees, the State is represented by the Mississippi Attorney General's Office."¹² The State is represented by the Mississippi Attorney General's Office regarding the acts, omissions, or statements of the CMHCs insofar as those acts, omissions, or statements create liability for the State in this action. That is necessarily so if the State is to be held liable for the acts, omissions, or statements of non-named parties to this action – *i.e.*, the CMHCs. Again, Plaintiff cannot have it both ways. If the State is on the hook for the acts, omissions, or statements of the CMHCs, then Plaintiff cannot communicate *ex parte* with the CMHCs.

¹¹ ECF 128, Order at 6-7.

¹² ECF 128, Order at 2.

II. Plaintiff Rejected The State's Efforts To Resolve This Dispute Without Court Intervention.

This dispute arose because Plaintiff, with no notice to the State, planned to meet with the CMHCs to inform the CMHCs of their obligations under the Remedial Order. Because the CMHCs are being treated by Plaintiff and the Court as an instrumentality of the State within the meaning of Title II, Plaintiff should not be informing the CMHCs, *ex parte*, of their obligations under the Remedial Order.¹³

Nonetheless, the State proposed having a joint meeting with Plaintiff and the CMHCs where Plaintiff could explain its views of the obligations of the CMHCs under the Remedial Order. Plaintiff rejected that proposal. The State next proposed that if Plaintiff wanted to discuss the Remedial Order with the CMHCs, then Plaintiff should first notify the State of Plaintiff's intent to do so. Plaintiff rejected that proposal. The State next proposed that if Plaintiff wanted to meet with the CMHCs to discuss the Remedial Order, then Plaintiff should at the very least inform the CMHCs that Plaintiff did not notify the State of the proposed meeting. Plaintiff rejected that proposal too. It is the State's understanding that the CMHCs have assumed that Plaintiff notified the State before Plaintiff contacted the CMHCs to request a meeting. On information and belief, Plaintiff is not correcting the CMHCs misunderstanding about how Plaintiff is proceeding.

For the reasons stated in Judge Ball's Order (ECF 128), Plaintiff should not be permitted to have *ex parte* communications with the CMHCs. It is a soundbite to suggest that the State is not being transparent or is hiding something by resisting Plaintiff's *ex parte* communications with the CMHCs, but the reality is that Plaintiff seeks to hold the State liable for the acts, omissions, or statements of the CMHCs in assessing the State's compliance with the Remedial Order, while entirely excluding the State from Plaintiff's discussions with the CMHCs regarding that very

¹³ Indeed, given Plaintiff's position that the State is on the hook for the acts, omissions, or statements of the CMHCs, Plaintiff is *adverse* to the CMHCs.

Order. Accordingly, even if the Court permits Plaintiff to have *ex parte* communications with the CMHCs, and the CMHCs notify the State of any meetings or calls with Plaintiff, then the State intends to participate, unless the Court affirmatively prohibits the State from doing so.

Relief Requested

For these reasons, the Court should not permit Plaintiff to communicate *ex parte* with the CMHCs.

Dated: March 9, 2022.

Respectfully submitted,

PHELPS DUNBAR LLP

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CERTIFICATE OF SERVICE

I certify that on March 9, 2022, 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. A copy was also emailed to the Monitor.

/s/ James W. Shelson
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