MISSISSIPPI RULES OF CIVIL PROCEDURE

18. Joinder of Claims and Remedies.

19. Joinder of Persons Needed for Just Adjudication.

20. Permissive Joinder of Parties.

21. Misjoinder and Nonjoinder of Parties.

22. Interpleader.

23. [Class Actions] [Omitted].

23.1 [Derivative Actions By Shareholders] [Omitted].

23.2 [Actions Related to Unincorporated Associations] [Omitted].

24. Intervention.

25. Substitution of Parties.

26. General Provisions Governing Discovery.

27. Depositions Before Actions or Pending Appeal.

28. Persons Before Whom Depositions May Be Taken.

29. Stipulations Regarding Discovery Procedure.

30. Depositions Upon Oral Examination.

31. Depositions Upon Written Questions.

32. Use of Depositions In Court Proceedings.

33. Interrogatories to Parties.

34. Production of Documents and Things and Entry Upon Land For Inspection and Other Purposes.

35. Physical and Mental Examinations of Persons.

36. Requests for Admission.

37. Failure to Make Or Cooperate in Discovery: Sanctions.

38. Jury Trial of Right.

39. [Trial By Jury Or By The Court] [Omitted].

40. Assignment of Cases for Trial.

41. Dismissal of Actions.

42. Consolidation: Separate Trials.

43. Taking of Testimony.

44. Proof Of Documents.

44.1 [Determination of Foreign Law] [Omitted].

45. Subpoena.

46. Exceptions Unnecessary.

47. Jurors.

48. Juries and Jury Verdicts.

49. General Verdicts and Special Verdicts.

50. Motions For Directed Verdict and For Judgment Notwithstanding the Verdict.

51. Instructions to Jury.

52. Findings By The Court.

53. Masters, Referees and Commissioners.

54. Judgments; Costs.

55. Default.

56. Summary Judgment.

57. Declaratory Judgments.

58. Entry of Judgment.

59. New Trials; Amendment of Judgments.

60. Relief From Judgment or Order.

61. Harmless Error.

62. Stay of Proceedings To Enforce A Judgment.

63. Judge's Inability to Proceed.

64. Seizure of Person or Property.

65. Injunctions.

65.1 Security: Proceedings Against Sureties.

66. Receivers.

67. Deposit in Court.

68. Offer of Judgment.

69. Execution.

70. Judgment For Specific Acts; Vesting Title.

71. Process In Behalf Of and Against Persons Not Parties.

71A. [Eminent Domain] [Omitted].

72 TO 76. [Omitted].

MISSISSIPPI RULES OF CIVIL PROCEDURE

Adopted Effective January 1, 1982

ORDER ADOPTING THE MISSISSIPPI RULES OF CIVIL PROCEDURE

SUPREME COURT OF MISSISSIPPI

Pursuant to the inherent authority vested in this Court by the Constitution of the State of Mississippi, as discussed in *Cecil Newell, Jr. v. State of Mississippi*, 308 So. 2d 71 (Miss.1975), to promote justice, uniformity, and the efficiency of courts, the rules attached hereto are adopted and promulgated as Rules of Practice and Procedure in all Chancery, Circuit, and County Courts of this State in all civil actions filed on and after January 1, 1982, any and all statutes and court rules previously adopted to the contrary notwithstanding, and in the event of a conflict between these rules and any statute or court rule previously adopted these rules shall control.

The Clerk of this Court is authorized and directed to spread this order and the rules attached hereto at large on the minutes of the Court, and the Clerk is further authorized and directed to forward a certified copy thereof to West Publishing Company for publication in a forthcoming edition of Southern Reporter, Mississippi Cases, the official publication of decisions of this Court.

ORDERED, this the 26th day of May, 1981.

Neville Patterson,
Chief Justice
FOR THE COURT

ORDER REPEALING COMMENTS TO THE MISSISSIPPI RULES OF CIVIL PROCEDURE

SUPREME COURT OF MISSISSIPPI

This matter is before the en banc Court on the Motion for the Amendment of Comments to the Mississippi Rules of Civil Procedure filed by the Supreme Court Rules Advisory Committee. As created by order of this Court originally dated November 9, 1983, the Committee is composed of members who represent the bench, bar, and the law schools of this state. In keeping with its responsibilities and for the purpose of assisting the bench and bar, the Committee has promulgated the notes that follow the Court's rules. These notes, while not official comments of the Supreme Court, are the product of extensive research and review and have been vetted by the members of the Committee as well as other trial judges and practicing members of the bar. The Court expresses its sincere appreciation for the Committee's commitment, diligence, and hard work. Having carefully considered the motion and its attachments, the en banc Court finds that the motion should be granted to the extent provided in this order.

IT IS, THEREFORE, ORDERED that the current Comments to the Mississippi Rules of Civil Procedure are repealed effective July 1, 2014.

IT IS FURTHER ORDERED that the Advisory Committee Notes to the Mississippi Rules of Civil Procedure as contained in Exhibit "A" are approved for publication with the Mississippi Rules of Civil Procedure effective July 1, 2014.

IT IS FURTHER ORDERED that the Clerk of this Court shall spread this order upon the minutes of the Court and shall forthwith forward a true certified copy hereof to West Publishing Company for publication as soon as practical in the advance sheets of *Southern Reporter, Third Series (Mississippi Edition)* and in the next edition of *Mississippi Rules of Court.*

SO ORDERED, this the 9th day of June, 2014.

William L. Waller, Jr.,
Chief Justice
FOR THE COURT

CHAPTER I. SCOPE OF RULES - ONE FORM OF ACTION

RULE 1. SCOPE OF RULES

These rules govern procedure in the circuit courts, chancery courts, and county courts in all suits of a civil nature, whether cognizable as cases at law or in equity, subject to certain limitations enumerated in Rule 81; however, even those enumerated proceedings are still subject to these rules where no statute applicable to the proceedings provides otherwise or sets forth procedures inconsistent with these rules. These rules shall be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action.

[Amended effective July 1, 2020.]

Advisory Committee Historical Note

Effective July 1, 2020, Rule 1 was amended to emphasize that the parties share responsibility with the court to employ the rules so as to secure the just, speedy and inexpensive resolution of every action. XX So. 3d XX (Miss. __).

Advisory Committee Notes

These rules are to be applied as liberally to civil actions as is judicially feasible, whether in actions at law or in equity. However, nothing in the rules should be interpreted as abridging or modifying the traditional separations of jurisdiction between the law courts and equity courts in Mississippi.

The salient provision of Rule 1 is the statement that "These rules shall be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action." There probably is no provision in these rules more important than this mandate; it reflects the spirit in which the rules were conceived and written and in which they should be interpreted. The primary purpose of procedural rules is to promote the ends of justice; these rules reflect the view that this goal can best be accomplished by the establishment of a single form of action, known as a "civil action," thereby uniting the procedures in law and equity through a simplified procedure that minimizes technicalities and places considerable discretion in the trial judge for construing the rules in a manner that will secure their objectives.

[Advisory Committee Note adopted effective July 1, 2014; amended effective July 1, 2020.]

RULE 2. ONE FORM OF ACTION

There shall be one form of action to be known as "civil action."

Advisory Committee Notes

Rule 2 does not affect the various remedies that previously have been available in the courts of Mississippi. The abolition of the forms of action furnishes a single, uniform procedure by which a litigant may present a claim in an orderly manner to a court empowered to give whatever relief is appropriate and just; the substantive and remedial principles that applied prior to the advent of these rules are not changed. What was an action at law before these rules is still a civil action founded on legal principles and what was a bill in equity before these rules is still a civil action founded upon equitable principles.

CHAPTER II. COMMENCEMENT OF ACTION: SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS

RULE 3. COMMENCEMENT OF ACTION

(a) Filing of Complaint. A civil action is commenced by filing a complaint with the court. A costs deposit shall be made with the filing of the complaint, such deposit to be in the amount required by the applicable Uniform Rule governing the court in which the complaint is filed.

The amount of the required costs deposit shall become effective immediately upon promulgation of the applicable Uniform Court Rule and its approval by the Mississippi Supreme Court.

(b) Motion for Security for Costs. The plaintiff may be required on motion of the clerk or any party to the action to give security within sixty days after an order of the court for all costs accrued or to accrue in the action. The person making such motion shall state by affidavit that the plaintiff is a nonresident of the state and has not, as affiant believes, sufficient property in this state out of which costs can be made if adjudged against him; or if the plaintiff be a resident of the state, that he has good reason to believe and does believe, that such plaintiff cannot be made to pay the costs of the action if adjudged against him. When the affidavit is made by a defendant it shall state that affiant has, as he believes, a meritorious defense and that the affidavit is not made for delay; when the affidavit is made by one not a party defendant it shall state that it is not made at the instance of a party defendant. If the security be not given, the suit shall be dismissed and execution issued for the costs that have accrued; however, the court may, for good cause shown, extend the time for giving such security.

(c) Proceeding In Forma Pauperis. A party may proceed in forma pauperis in accordance with sections 11-53-17 and 11-53-19 of the Mississippi Code Annotated. The court may, however, on the motion of any party, on the motion of the clerk of the court, or on its own initiative, examine the affiant as to the facts and circumstances of his pauperism.

(d) Accounting for Costs. Within sixty days of the conclusion of an action, whether by dismissal or by final judgment, the clerk shall prepare an itemized statement of costs incurred in the action and shall submit the statement to the parties or, if represented, to their attorneys. If a refund of costs deposit is due, the clerk shall include payment with the statement; if additional costs are due, a bill for same shall accompany the statement.

[Amended effective September 1, 1987; amended effective June 24, 1992; amended effective September 25, 2014.]

Advisory Committee Historical Note

Effective June 24, 1992, Rule 3(a) was amended to provide that before they are effective, the amounts of required costs deposits must be promulgated by Uniform Court Rule and approved by the Mississippi Supreme Court. 598-602 So. 2d XXI (West Miss. Cas. 1992).

Effective September 1, 1987, Rule 3(e) was amended by providing that the amount required as a deposit for filing suit shall be the amount required by the Uniform Rule governing the court in which the action is filed. 508-511 So. 2d XXV (West Miss. Cas. 1988).

Advisory Committee Notes

Rule 3(a) establishes a precise date for fixing the commencement of a civil action. The first step in a civil action is the filing of the complaint with the clerk or judge. Service of process upon the defendant is not essential to commencement of the action, but Rule 4(h) does require service of the summons and complaint within 120 days after the filing of the complaint.

Ascertaining the precise date of commencement is important in determining whether an action has been brought prematurely; whether it is barred by a statute of limitations; and which of two or more courts in which actions involving the same parties and issues have been instituted should retain the case for disposition, absent special considerations.

The provisions in Rule 3 pertaining to costs are intended to make uniform the assessing, accounting for, and funding of costs.

Rule 3(c) allows indigents to sue without depositing security for costs; however, the indigent affiant may be examined as to affiant's financial condition and the court may, if the allegation of indigency is false, dismiss the action.

RULE 4. SUMMONS

(a) Summons: Issuance. Upon filing of the complaint, the clerk shall forthwith issue a summons.

(1) At the written election of the plaintiff or the plaintiff's attorney, the clerk shall:

(A) Deliver the summons to the plaintiff or plaintiff's attorney for service under subparagraphs (c)(1) or (c)(3) or (c)(4) or (c)(5) of this rule.

(B) Deliver the summons to the sheriff of the county in which the defendant resides or is found for service under subparagraph (c)(2) of this rule.

(C) Make service by publication under subparagraph (c)(4) of this rule.

(2) The person to whom the summons is delivered shall be responsible for prompt service of the summons and a copy of the complaint. Upon request of the plaintiff, separate or additional summons shall issue against any defendants.

(b) Same: Form. The summons shall be dated and signed by the clerk, be under the seal of the court, contain the name of the court and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to appear and defend, and shall notify him that in case of his failure to do so judgment by default will be rendered against him for the relief demanded in the complaint. Where there are multiple plaintiffs or multiple defendants, or both, the summons, except where service is made by publication, may contain, in lieu of the names of all parties, the name of the first party on each side and the name and address of the party to be served. Summons served by process server shall substantially conform to Form 1A. Summons served by sheriff shall substantially conform to Form 1AA.

(c) Service:

(1) *By Process Server*. A summons and complaint shall, except as provided in subparagraphs (2) and (4) of this subdivision, be served by any person who is not a party and is not less than 18 years of age. When a summons and complaint are served by process server, an amount not exceeding that statutorily allowed to the sheriff for service of process may be taxed as recoverable costs in the action.

(2) *By Sheriff*. A summons and complaint shall, at the written request of a party seeking service or such party's attorney, be served by the sheriff of the county in which the defendant resides or is found, in any manner prescribed by subdivision (d) of this rule. The sheriff shall mark on all summons the date of the receipt by him, and within thirty days of the date of such receipt of the summons the sheriff shall return the same to the clerk of the court from which it was issued.

(3) *By Mail*.

(A) A summons and complaint may be served upon a defendant of any class referred to in paragraph (1) or (4) of subdivision (d) of this rule by mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to Form 1-B and a return envelope, postage prepaid, addressed to the sender.

(B) If no acknowledgment of service under this subdivision of this rule is received by the sender within 20 days after the date of mailing, service of such summons and complaint may be made in any other manner permitted by this rule.

(C) Unless good cause is shown for not doing so, the court shall order the payment of the costs of personal service by the person served if such person does not complete and return within 20 days after mailing the notice and acknowledgment of receipt of summons.

(D) The notice and acknowledgment of receipt of summons and complaint shall be executed under oath or affirmation.

(4) *By Publication*.

(A) If the defendant in any proceeding in a chancery court, or in any proceeding in any other court where process by publication is authorized by statute, be shown by sworn complaint or sworn petition, or by a filed affidavit, to be a nonresident of this state or not to be found therein on diligent inquiry and the post office address of such defendant be stated in the complaint, petition, or affidavit, or if it be stated in such sworn complaint or petition that the post office address of the defendant is not known to the plaintiff or petitioner after diligent inquiry, or if the affidavit be made by another for the plaintiff or petitioner, that such post office address is unknown to the affiant after diligent inquiry and he believes it is unknown to the plaintiff or petitioner after diligent inquiry by the plaintiff or

petitioner, the clerk, upon filing the complaint or petition, account or other commencement of a proceeding, shall promptly prepare and publish a summons to the defendant to appear and defend the suit. The summons shall be substantially in the form set forth in Form 1-C.

(B) The publication of said summons shall be made once in each week during three successive weeks in a public newspaper of the county in which the complaint or petition, account, cause or other proceeding is pending if there be such a newspaper, and where there is no newspaper in the county the notice shall be posted at the courthouse door of the county and published as above provided in a public newspaper in an adjoining county or at the seat of government of the state. Upon completion of publication, proof of the prescribed publication shall be filed in the papers in the cause. The defendant shall have thirty (30) days from the date of first publication in which to appear and defend. Where the post office address of a defendant is given, the street address, if any, shall also be stated unless the complaint, petition, or affidavit above mentioned, avers that after diligent search and inquiry said street address cannot be ascertained.

(C) It shall be the duty of the clerk to hand the summons to the plaintiff or petitioner to be published, or, at his request, and at his expense, to hand it to the publisher of the proper newspaper for publication. Where the post office address of the absent defendant is stated, it shall be the duty of the clerk to send by mail (first class mail, postage prepaid) to the address of the defendant, at his post office, a copy of the summons and complaint and to note the fact of issuing the same and mailing the copy, on the general docket, and this shall be the evidence of the summons having been mailed to the defendant.

(D) When unknown heirs are made parties defendant in any proceeding in the chancery court, upon affidavit that the names of such heirs are unknown, the plaintiff may have publication of summons for them and such proceedings shall be thereupon in all respects as are authorized in the case of a nonresident defendant. When the parties in interest are unknown, and affidavit of that fact be filed, they may be made parties by publication to them as unknown parties in interest.

(E) Where summons by publication is upon any unmarried infant, mentally incompetent person, or other person who by reason of advanced age, physical incapacity or mental weakness is incapable of managing his own estate, summons shall also be had upon such other person as shall be required to receive a copy of the summons under paragraph (2) of subdivision (d) of this rule.

(5) *Service by Certified Mail on Person Outside State*. In addition to service by any other method provided by this rule, a summons may be served on a person outside this state by sending a copy of the summons and of the complaint to the person to be served by certified mail, return receipt requested. Where the defendant is a natural person, the envelope containing the summons and complaint shall be marked "restricted delivery." Service by this method shall be deemed complete as of the date of delivery as evidenced by the return receipt or by the returned envelope marked "Refused."

(d) *Summons and Complaint: Person to Be Served*. The summons and complaint shall be served together. Service by sheriff or process server shall be made as follows:

(1) Upon an individual other than an unmarried infant or a mentally incompetent person,

(A) by delivering a copy of the summons and of the complaint to him personally or to an agent authorized by appointment or by law to receive service of process; or

(B) if service under subparagraph (1)(A) of this subdivision cannot be made with reasonable diligence, by leaving a copy of the summons and complaint at the defendant's usual place of abode with the defendant's spouse or some other person of the defendant's family above the age of sixteen years who is willing to receive service, and by thereafter mailing a copy of the summons and complaint (by first class mail, postage prepaid) to the person to be served at the place where a copy of the summons and of the complaint were left. Service of a summons in this manner is deemed complete on the 10th day after such mailing.

(2) (A) upon an unmarried infant by delivering a copy of the summons and complaint to any one of the following: the infant's mother, father, legal guardian (of either the person or the estate), or the person having care of such infant or with whom he lives, and if the infant be 12 years of age or older, by delivering a copy of the summons and complaint to both the infant and the appropriate person as designated above.

(B) upon a mentally incompetent person who is not judicially confined to an institution for the mentally ill or mentally deficient or upon any other person who by reason of advanced age, physical incapacity or mental weakness is incapable of managing his own estate by delivering a copy of the summons and complaint to such person and by delivering copies to his guardian (of either the person or the estate) or conservator (of either the person or the estate) but if such person has

no guardian or conservator, then by delivering copies to him and copies to a person with whom he lives or to a person who cares for him.

(C) upon a mentally incompetent person who is judicially confined in an institution for the mentally ill or mentally retarded by delivering a copy of the summons and complaint to the incompetent person and by delivering copies to said incompetent's guardian (of either the person or the estate) if any he has. If the superintendent of said institution or similar official or person shall certify by certificate endorsed on or attached to the summons that said incompetent is mentally incapable of responding to process, service of summons and complaint on such incompetent shall not be required. Where said confined incompetent has neither guardian nor conservator, the court shall appoint a guardian ad litem for said incompetent to whom copies shall be delivered.

(D) where service of a summons is required under (A), (B) and (C) of this subparagraph to be made upon a person other than the infant, incompetent, or incapable defendant and such person is a plaintiff in the action or has an interest therein adverse to that of said defendant, then such person shall be deemed not to exist for the purpose of service and the requirement of service in (A), (B) and (C) of this subparagraph shall not be met by service upon such person.

(E) if none of the persons required to be served in (A) and (B) above exist other than the infant, incompetent or incapable defendant, then the court shall appoint a guardian ad litem for an infant defendant under the age of 12 years and may appoint a guardian ad litem for such other defendant to whom a copy of the summons and complaint shall be delivered. Delivery of a copy of the summons and complaint to such guardian ad litem shall not dispense with delivery of copies to the infant, incompetent or incapable defendant where specifically required in (A), and (B) of this subparagraph.

(3) Upon an individual confined to a penal institution of this state or of a subdivision of this state by delivering a copy of the summons and complaint to the individual, except that when the individual to be served is an unmarried infant or mentally incompetent person the provisions of subparagraph (d)(2) of this rule shall be followed.

(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.

(5) Upon the State of Mississippi or any one of its departments, officers or institutions, by delivering a copy of the summons and complaint to the Attorney General of the State of Mississippi.

(6) Upon a county by delivering a copy of the summons and complaint to the president or clerk of the board of supervisors.

(7) Upon a municipal corporation by delivering a copy of the summons and complaint to the mayor or municipal clerk of said municipal corporation.

(8) Upon any governmental entity not mentioned above, by delivering a copy of the summons and complaint to the person, officer, group or body responsible for the administration of that entity or by serving the appropriate legal officer, if any, representing the entity. Service upon any person who is a member of the "group" or "body" responsible for the administration of the entity shall be sufficient.

(e) Waiver. Any party defendant who is not an unmarried minor or mentally incompetent may, without filing any pleading therein, waive the service of process or enter his or her appearance, either or both, in any action, with the same effect as if he or she had been duly served with process, in the manner required by law on the day of the date thereof. Such waiver of service or entry of appearance shall be in writing dated and signed by the defendant and duly sworn to or acknowledged by him or her, or his or her signature thereto be proven by two (2) subscribing witnesses before some officer authorized to administer oaths. Any guardian or conservator may likewise waive process on himself and/or his ward, and any executor, administrator, or trustee may likewise waive process on himself in his fiduciary capacity. However, such written waiver of service or entry of appearance must be executed after the day on which the action was commenced and be filed among the papers in the cause and noted on the general docket.

(f) Return. The person serving the process shall make proof of service thereof to the court promptly. If service is made by a person other than a sheriff, such person shall make affidavit thereof. If service is made under paragraph (c)(3) of this rule, return shall be made by the sender's filing with the court the acknowledgment received pursuant to such subdivision. If service is made under paragraph (c)(5) of this rule, the return shall be made by the sender's filing with the court the return receipt or the returned envelope marked "Refused." Failure to make proof of service does not affect the validity of the service.

(g) Amendment. At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly

appears that material prejudice would result to the substantial rights of the party against whom the process is issued.

(h) Summons: Time Limit for Service. If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion.

[Amended effective May 1, 1982; March 1, 1985; February 1, 1990; July 1, 1998; January 3, 2002.]

Advisory Committee Historical Note

Effective January 3, 2002, Rule 4(e) was amended to delete a prohibition against waiver of service of process by one convicted of a felony. 802-804 So.2d XVII (West Miss. Cases 2002).

Effective July 1, 1998, Rule 4(f) was amended to state that the person serving process shall promptly make proof of service thereof to the court.

Effective February 1, 1990, Rule 4(c)(4)(B) was amended by striking the word "calendar" following the word and figure "thirty (30)"; Rule 4(c)(4) was amended by adding subsection (E); Rule 4(c)(5) was amended by changing the title to reflect service by certified mail; Rule 4(d)(2)(A) was amended by substituting the word "person" for "individual" in reference to the one having care of the infant. 553-556 So. 2d XXXIII (West Miss. Cas. 1990).

Effective March 1, 1985, a new Rule 4 was adopted. 459-462 So. 2d XVIII (West Miss. Cas. 1985).

Effective May 1, 1982, Rule 4 was amended. 410-416 So. 2d XXI (West Miss. Cas. 1982).

Advisory Committee Notes

After a complaint is filed, the clerk is required to issue a separate summons for each defendant except in the case of summons by publication. The summons must contain the information required by Rule 4(b), which requires the summons to notify the defendant that, among other things, a failure to appear will result in a judgment by default. Although the

"judgment by default will be rendered" language may be an overstatement, the strong language is intended to encourage defendants to appear to protect their interests. Forms 1A, 1AA, 1B, and 1C are provided as suggested forms for the various summonses.

The summons and a copy of the complaint must then be served on each defendant. This rule provides for personal service, residence service, first-class mail and acknowledgement service, certified mail service, and publication service.

Personal service is authorized by Rule 4(d)(1)(A) and requires delivery of a copy of the complaint and the summons to the person to be served.

Residence service is authorized by Rule 4(d)(1)(B) and requires that a copy of the complaint and the summons be left at the defendant's usual place of abode with the defendant's spouse or other family member who is above the age of sixteen and who is willing to accept service. Residence service further requires that a copy of the summons and complaint be thereafter mailed to the defendant at the location where the complaint and summons were left.

Personal service and residence service may be made by a process server or the sheriff in the county where the defendant resides or can be found. A party using a process server may pay such person any amount that is agreed upon but only that amount statutorily allowed as payment to the sheriff under Mississippi Code Annotated section 25-7-19 (Supp. 2013) may be taxed as recoverable costs in the action. Summonses served by process servers should be in substantial conformity with Form 1A and summonses served by sheriffs should be in substantial conformity with Form 1AA.

First-class mail and acknowledgement service is authorized by Rule 4(c)(3). The plaintiff must mail the defendant a copy of the summons and complaint, two copies of a notice and acknowledgement conforming substantially to Form 1B, and a postage paid envelope addressed to the sender. Upon receipt, the defendant may execute the acknowledgement of service under oath or by affirmation. If the defendant fails to execute and return the acknowledgement of service in a timely fashion, the defendant may be ordered to pay the costs incurred by the plaintiff in serving the defendant by another method. This provision is intended to encourage a defendant to acknowledge service by first-class mail in order to avoid having to pay the costs that would otherwise be incurred by the plaintiff in serving that defendant. Execution and return of the acknowledgement of service does not operate as a waiver of objections to jurisdiction or venue. All jurisdictional and venue objections are preserved whether Form 1B is completed and returned from inside or outside the state. Although M.R.C.P. 4(c)(3) is modeled after Fed. R. Civ. P. 4(d), defendants who execute and return the acknowledgement of service under M.R.C.P. 4(c)(3) are

acknowledging actual service, whereas defendants who execute and return the waiver under Fed. R. Civ. P. 4(d) are waiving service.

Publication service is authorized by Rule 4(c)(4) and is limited to defendants in chancery court proceedings and other proceedings where service by publication is authorized by statute. Service by publication is further limited to defendants who are nonresidents or who cannot be found within the state after diligent inquiry. The requirements for service by publication are detailed in the rule and must be strictly followed; otherwise service is ineffective. *See Caldwell v. Caldwell*, 533 So. 2d 413 (Miss. 1988).

Certified mail service is authorized by Rule 4(c)(5) and is limited to persons outside the state. The plaintiff must send a copy of the summons and complaint to the person to be served by certified mail, return receipt requested. The Proof of Service must include as an attachment the signed return receipt or the return envelope marked "refused." Service upon a foreign corporation, partnership or unincorporated association is effective even if the certified mail is delivered to and signed for or refused by a person other than the addressee, if the person accepting delivery and signing or refusing delivery is an officer or employee of the defendant who is authorized to receive or who regularly receives certified mail. *See Flagstar Bank, FSB v. Danos,* 46 So. 3d 298 (Miss. 2010) (finding service by certified mail upon a foreign corporation effective where the plaintiff addressed the certified mail to the foreign corporation's registered agent for service of process and the certified mail was delivered to the proper address and signed for by the mail clerk rather than the registered agent). Service of process is not effective under Rule 4(c)(5) if the mailing is returned marked "unclaimed/refused", "unclaimed" or "undeliverable as addressed." *See Bloodgood v. Leatherwood,* 25 So. 3d 1047 (Miss. 2010).

Rule 4(d) identifies the person to be served with process when the defendant is: (i) a mentally competent married infant or a mentally competent adult; (ii) an unmarried infant; (iii) a mentally incompetent person who is not judicially confined to an institution for the mentally ill or mentally deficient; (iv) a mentally incompetent person who is judicially confined to an institution for the mentally ill or mentally deficient; (v) an individual confined to a penal institution of this state or a subdivision of this state; (vi) a domestic or foreign corporation, partnership or unincorporated association subject to a suit under a common name; (vii) the State of Mississippi or one of its departments, officers or institutions; (viii) a county; (ix) a municipal corporation; or (x) any other governmental entity.

Rule 4(e) provides for waiver of service of the summons and complaint. A waiver must be executed after the day on which the action was commenced and thus may be executed without a summons having been issued.

Rule 4(f) provides that the person serving the process shall promptly file a return of service with the court. For first-class mail and acknowledgement service, proof of service is to be made by filing a copy of the executed acknowledgement of service. For certified mail service, proof of service is to be made by filing the return receipt or the envelope marked "Refused." The purpose of the requirement for prompt filing of the proof of service is to enable the defendant to verify the date of service by examining the proof of service in the court records.

Rule 4(h) provides that if service is not made upon a defendant within 120 days after the filing of the complaint, the claims against that defendant will be dismissed without prejudice absent good cause for the failure to timely serve the defendant. If service cannot be made within the 120-day period, it is clearly advisable to move the court within the original time period for an extension of time in which to serve the defendant. If the motion for extension of time is filed within the 120-day time period, the time period may be extended for "cause shown" pursuant to Rule 6(b)(1). If a motion for extension of time is filed outside of the original 120-day time period, the movant must show "good cause" for the failure to timely serve the defendant pursuant to Rule 4(h). *See Johnson v. Thomas,* 982 So. 2d 405 (Miss. 2008).

RULE 5. SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

(a) Service: When Required. Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided in Rule 4 for service of summons. In an action begun by seizure of property, in which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim, or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.

(b) (1) Service: How Made. Whenever under these rules service is required or permitted to be made upon a party who is represented by an attorney of record in the proceedings, the service shall be made upon such attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him; or by transmitting it to him by electronic means; or by mailing it to him at his last known address, or if no address is known, by leaving it with the clerk of the court, or by transmitting it to the clerk by electronic means. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by electronic means is complete when the electronic equipment being used by the attorney or party being served acknowledges receipt of the material. If the equipment used by the attorney or party being served does not automatically acknowledge the transmission, service is not complete until the sending party obtains an acknowledgment from the recipient. Service by mail is complete upon mailing.

(2) Electronic Court System Service: How Made. Where a court has, by local rule, adopted the Mississippi Electronic Court System, service which is required or permitted under these rules shall be made in conformity with the Mississippi Electronic Court System procedures.

(c) Service: Numerous Defendants. In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service

of the pleadings of the defendants and replies thereto need not be made as between the defendants, and that any cross-claim, counter-claim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) Filing. All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter but, unless ordered by the court, discovery papers need not be filed until used with respect to any proceeding. Proof of service of any paper shall be upon certificate of the person executing same.

(e) (1) Filing With the Court Defined. The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk.

(**2) Electronic Filing with Court Defined.** A court may, by local rule, allow pleadings and other papers to be filed, signed, or verified by electronic means in conformity with the Mississippi Electronic Court System procedures. Pleadings and other papers filed electronically in compliance with the procedures are written papers for purposes of these rules.

[Amended effective March 1, 1989; Amended effective January 8, 2009, for the purpose of establishing a pilot program for Mississippi Electronic Court System.]

Advisory Committee Historical Note

Effective March 1, 1989, Rule 5(b) and Rule 5(e) were amended by authorizing the service and filing of pleadings and documents by electronic means. 536-538 So. 2d XXI (West Miss. Cas. 1989).

Advisory Committee Notes

Rule 5 provides an expedient method of exchanging written and electronic communications between parties and an efficient system of filing papers with the clerk. This rule presupposes that the court has already gained jurisdiction over the parties. A "pleading subsequent to the original complaint," which asserts a claim for relief against a person over whom the court has not at the time acquired jurisdiction, must be served upon such person

along with a copy of a summons in the same manner as the copy of the summons and complaint is required to be served upon the original defendants.

A motion which may be heard ex parte is not required to be served, but should be filed; see also Rule 81(b). The enumeration of papers in Rule 5(a) which are required to be served is not exhaustive; also included are affidavits in support of or in opposition to a motion, Rule 6(d), and a motion for substitution of parties, Rule 25.

An electronic case management system and electronic filing system, known as the Mississippi Electronic Court System (MEC) is optional for the chancery, circuit and county courts; however, the procedures of the MEC must be followed where a court has adopted and implemented the MEC by local rule. Therefore, to the extent the MEC procedures address service and filing of pleadings and other papers, the procedures should be followed to satisfy Rule 5(e) and Rule 5(b). For purposes of Rule 5(e), the MEC procedures provide reasonable exceptions to the requirement of electronic filing. See, Mississippi Supreme Court Website.

Although service must be made within the times prescribed, filing is permitted to be made within a reasonable time thereafter. Instances requiring the pleading to be filed before it is served include Rule 3 (complaint) and any other pleading stating a claim for relief which is necessary to serve with a summons. Pursuant to Rule 5(c) (numerous defendants) the filing of a pleading, coupled with service on the plaintiff, is notice to the parties. Rule 65(b) requires temporary restraining orders to be filed forthwith in the clerk's office.

To obtain immediate court action under Rule 5(e), a party may file papers with the judge, if the latter permits, and obtain such order as the judge deems proper. Rule 5(e) should be read in conjunction with Rules 77(a) (courts always open), 77(b) (trials and hearings; orders in chambers), and 77(c) (clerk's office and orders by clerk).

Rule 5(b) has no application to service of summons; that subject is completely covered by Rule 4 and Rule 81(d).

RULE 5.1. PRIVACY PROTECTION FOR FILINGS MADE WITH THE COURT

Beginning July 1, 2016, all courts and offices of a circuit or chancery clerk that maintain electronic storage or electronic filing of documents, as defined under section 9-1-51 of the Mississippi Code, and make those documents accessible online must conform with the privacy provisions of the Administrative Procedures for Mississippi Electronic Courts—specifically, Sections 5 and 9 therein.

RULE 6. TIME

(a) Computation. In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, as defined by statute, or any other day when the courthouse or the clerk's office is in fact closed, whether with or without legal authority, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, a legal holiday, or any other day when the courthouse or the clerk's office is closed. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. In the event any legal holiday falls on a Sunday, the next following day shall be a legal holiday.

(b) Enlargement. When by these rules or by notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefore is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), 59(d), 59(e), 60(b), and 60(c) except to the extent and under the conditions therein stated.

(c) Unaffected by Expiration of Term. The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court. The existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in a civil action consistent with these rules.

(d) Motions. A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than five days before the time fixed for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), opposing affidavits may be served not later than one day before the hearing, unless the court permits them to be served at some other time.

(e) Additional Time After Service by Mail. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three

days shall be added to the prescribed period. This subdivision does not apply to responses to service of summons under Rule 4.

[Amended effective March 1, 1989; amended effective June 24, 1992; amended effective July 1, 2008.]

Advisory Committee Historical Note

Effective June 24, 1992, Rule 6(a) was amended to provide that the legal holidays which cause a period of time to be enlarged are those defined by statute. 598-602 So. 2d XXII-XXIII (West Miss. Cas. 1992).

Effective March 1, 1989, Rule 6(a) was amended to abrogate the inclusion of time periods established by local court rules. 536-538 So. 2d XXI (West Miss. Cas. 1989).

Advisory Committee Notes

It is not uncommon for clerks' offices and courthouses to be closed occasionally during what are normal working periods, whether by local custom or for a special purpose, such as attendance at a funeral. Rule 6(a) was drafted to obviate any harsh result that may otherwise ensue when an attorney, faced with an important filing deadline, discovers that the courthouse or the clerk's office is unexpectedly closed.

Rule 6(b) gives the court wide discretion to enlarge the various time periods both before and after the actual termination of the allotted time, certain enumerated cases being excepted. A court cannot extend the time: (1) for filing of a motion for judgment notwithstanding the verdict pursuant to Rule 50(b); (ii) for filing a motion to amend the court's findings pursuant to Rule 52(b); (iii) for filing a motion for new trial pursuant to Rule 59(b); (iv) for filing a motion to alter or amend the judgment pursuant to Rule 60(b); (vi) for filing a motion to reconsider a court order transferring a case to another court pursuant to Rule 60(c); or (vii) for entering a *sua sponte* order requiring a new trial pursuant to Rule 59(d).

Importantly, such enlargement is to be made only for cause shown. If the application for additional time is made before the period expires, the request may be made ex parte; if it is made after the expiration of the period, notice of the motion must be given to other parties and the only cause for which extra time can be allowed is "excusable neglect."

Rule 6(c) does not abolish court terms; it merely provides greater flexibility to the courts in attending the myriad functions they must perform, many of which were heretofore

possible only during term time. The rule is also consistent with the provisions elsewhere herein that prescribe a specific number of days for taking certain actions rather than linking time expirations to the opening day, or final day, or any other day of a term of court; e.g., Rule 6(d) (motions and notices of hearings thereon to be served not less than five days before time fixed for hearing), and Rule 12(a) (defendant to answer within thirty days after service of summons and complaint).

CHAPTER III. PLEADINGS AND MOTIONS

RULE 7. PLEADINGS ALLOWED; FORM OF MOTIONS

(a) Pleadings. There shall be a complaint and an answer; a reply to a counter-claim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who is not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

(b) Motions and Other Papers.

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(2) The rules applicable to captions, signing, or other matters of form of pleadings apply to all motions and other papers provided for by these rules.

(c) Size of Paper. All pleadings, motions and other papers, including depositions, shall be made on 8 1/2" by 11" paper. The format for all depositions shall comply with the Guidelines for Court Reporters as provided in Mississippi Supreme Court Rule 11.

(d) Demurrers, Pleas, etc., Abolished. Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used.

Advisory Committee Historical Note

Effective November 19, 1992, Rule 7(c) was redesignated Rule 7(d), and a new Rule 7(c), requiring letter size paper for all pleadings, motions and other papers was adopted. 606-607 So. 2d XIX-XX (West Miss. Cas. 1993).

RULE 8. GENERAL RULES OF PLEADING

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counter-claim, cross-claim, or third-party claim, shall contain

(1) a short and plain statement of the claim showing that the pleader is entitled to relief, and,

(2) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

(b) Defenses: Form of Denials. A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials or designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all of its averments, he may do so by general denial subject to the obligations set forth in Rule 11.

(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counter-claim or a counter-claim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been proper designation.

(d) Effect of Failure to Deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damages, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) Pleading to Be Concise and Direct: Consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has, regardless of consistency. All statements shall be made subject to the obligations set forth in Rule 11.

(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice.

(g) Pleadings Shall Not Be Read or Submitted. Pleadings shall not be carried by the jury into the jury room when they retire to consider their verdict, except insofar as a pleading or portion thereof has been admitted in evidence.

(h) Disclosure of Minority or Legal Disability. Every pleading or motion made by or on behalf of a person under legal disability shall set forth such fact unless the fact of legal disability has been disclosed in a prior pleading or motion in the same action or proceeding.

Advisory Committee Notes

Rule 8 allows claims and defenses to be stated in general terms so that the rights of the client are not lost by poor drafting skills of counsel. Under Rule 8(a), "it is only necessary that the pleadings provide sufficient notice to the defendant of the claims and grounds upon which relief is sought." *See DynaSteel Corp. v. Aztec Industries, Inc.,* 611 So. 2d 977 (Miss. 1992). A plaintiff must set forth direct or inferential fact allegations concerning all elements of a claim. *See Penn. Nat'l Gaming, Inc. v. Ratliff,* 954 So. 2d 427, 432 (Miss. 2005). Motions or pleadings seeking modification of child custody must include an allegation that a material change has occurred which adversely affects the child or children. It is not sufficient to allege that an adverse change will occur if the modification is not granted. *See, e.g., McMurry v. Sadler,* 846 So. 2d. 240, 244 (Miss. Ct. App. 2002). In cases involving the joinder of multiple plaintiffs, the complaint must contain the allegations identifying by name the defendant or defendants against whom each plaintiff asserts a claim, the alleged harm caused by specific defendants as to each plaintiff, and the location at which and time period during which the harm was caused. *See 3M Co. v. Glass,* 917 So. 2d 90, 92 (Miss. 2005);

Harold's Auto Parts, Inc. v. Mangialardi, 889 So. 2d 493, 495 (Miss. 2004). Failure to provide this "core information" is a violation of Rules 8 and 11. Plaintiffs in such cases must also plead sufficient facts to support joinder. *Glass,* 917 So. 2d at 93; *Mangialardi,* 889 So. 2d at 495.

Rule 8(c)'s requirement that defendants plead affirmative defenses when answering is intended to give fair notice of such defenses to plaintiffs so that they may respond to such defenses. Just as Rule 8(a) requires only that the plaintiff give the defendant notice of the claims, Rule 8(c) requires only that the defendant give the plaintiff notice of the defense. "A defendant's failure to timely and reasonably raise and pursue the enforcement of any affirmative defense or other affirmative matter or right which would serve to terminate or stay the litigation, coupled with active participation in the litigation process, will ordinarily serve as a waiver." *Kimball Glassco Residential Ctr., Inc. v. Shanks,* 64 So. 3d 941, 945 (Miss. 2011) (citing *MS Credit Ctr., Inc. v. Horton,* 926 So. 2d 167, 180 (Miss. 2006)).

The list of affirmative defenses in Rule 8(c) is not intended to be exhaustive. A defense is an affirmative defense if the defendant bears the burden of proof. *See Natchez Elec. & Supply Co., Inc. v. Johnson,* 968 So. 2d 358, 361 (Miss. 2007). "A matter is an 'avoidance or affirmative defense' only if it assumes the plaintiff proves everything he alleges and asserts, even so, the defendant wins. Conversely, if, in order to succeed in the litigation, the defendant depends upon the plaintiff failing to prove all or part of his claim, the matter is not an avoidance or an affirmative defense. A defendant does not plead affirmatively when he merely denies what the plaintiff has alleged." *Hertz Commercial Leasing Div. v. Morrison,* 567 So. 2d 832, 835 (Miss. 1990).

Examples of some affirmative defenses or matters of avoidance that are not enumerated in Rule 8(c) but which have been recognized by the Supreme Court include: the failure of a foreign limited liability corporation transacting business in the state to register to do business as a prerequisite to maintaining an action in state court as required by Mississippi Code Annotated section 79-29-1007(1) (Supp. 2011) (*see Loggers, L.L.C. v. 1 Up Technologies, L.L.C.,* 50 So. 3d 992, 993 (Miss. 2011)); immunity under the Mississippi State Tort Claims Act (*see Price v. Clark,* 21 So. 3d 509, 524 (Miss. 2009)); failure to comply with the requirement of a certificate of expert consultation in medical malpractice cases as required by Mississippi Code Annotated section 11-1-58 (Supp. 2011) (*see Meadows v. Blake,* 36 So. 3d 1225, 1232-33 (Miss. 2010)); plaintiff's non-compliance with the 90-day notice requirement contained in Mississippi Code Annotated section 11-46-11(1) (Supp. 2011) (s*ee Stuart v. University of Miss. Med. Ctr.,* 21 So. 3d 544, 549-50 (Miss. 2009)); the assertion of the right to arbitrate (*see Ms. Credit Ctr., Inc. v Horton,* 926 So. 2d 167, 179 (Miss. 2006)); apportionment of fault pursuant to Mississippi Code Annotated section 85-5-7 (Supp. 2011) (*see Eckmann v. Moore,* 876 So. 2d 975, 989 (Miss. 2004)); argument that a

contractual acceleration clause is an un-enforceable penalty (*see Hertz Comm'l Leasing Div. v. Morrison,* 567 So. 2d 832, 834 (Miss. 1990)); the failure of a foreign corporation transacting business in this state to obtain a certificate of authority as prerequisite to maintaining an action in this state as required by Mississippi Code Annotated section 79-4-15.02 (Supp. 2011) (*see Bailey v. Georgia Cotton Goods Co.,* 543 So. 2d 180, 182-83 (Miss. 1989)); election of remedies (s*ee O'Briant v. Hull,* 208 So. 2d 784, 785 (Miss. 1968)); adverse possession as a defense to neighboring landowner's actions (*see Charlot v. Henry,* 45 So. 3d 1237, 1243-44 (Miss. Ct. App. 2010)); the defense of condonation in a divorce case (*see Ashburn v. Ashburn,* 970 So. 2d 204, 212-13 (Miss. Ct. App. 2007)).

A party may be denied leave to amend its answer to include an affirmative defense if that affirmative defense has been waived. *See Hutzel v. City of Jackson,* 33 So. 3d 1116, 1122 (Miss. 2010).

RULE 9. PLEADING SPECIAL MATTERS

(a) Capacity. The capacity in which one sues or is sued must be stated in one's initial pleading.

(b) Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other conditions of mind of a person may be averred generally.

(c) Conditions Precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

(d) Official Document or Act: Ordinance or Special Statute. In pleading an official document or official act it is sufficient to aver that the document was issued or the act was done in compliance with the law. In pleading an ordinance of a municipality or a county, or a special, local, or private statute or any right derived therefrom, it is sufficient to identify specifically the ordinance or statute by its title or by the date of its approval, or otherwise.

(e) Judgment. In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.

(f) Time and Place. For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) Special Damage. When items of special damage are claimed, they shall be specifically stated.

(h) Fictitious Parties. When a party is ignorant of the name of an opposing party and so alleges in his pleading, the opposing party may be designated by any name, and when his true name is discovered the process and all pleadings and proceedings in the action may be amended by substituting the true name and giving proper notice to the opposing party.

(i) Unknown Parties in Interest. In an action where unknown proper parties are interested in the subject matter of the action, they may be designated as unknown parties in interest.

Advisory Committee Notes

A party desiring to raise an issue as to the legal existence, capacity, or authority of a party must assert such in the answer. If lack of capacity appears affirmatively on the face of the complaint, the defense may be raised by a motion pursuant to Rule 12(b)(6) or Rule 12(c).

"Circumstances" in Rule 9(b) refers to matters such as the time, place and contents of the false representations, in addition to the identity of the person who made them and what the person obtained as a result.

Rule 9(g) requires a detailed pleading of special damages and only a general pleading of general damages. General damages are damages that are typically caused by, and flow naturally from, the injuries alleged. Special damages are damages that are unusual or atypical for the type of claim asserted. Special damages are required to be pled with specificity so as to give the defendant notice of the nature of the alleged damages. Special damages include, but are not limited to, consequential damages, damages for lost business profit, and punitive damages. *See Puckett Machinery Co. v. Edwards,* 641 So. 2d 29, 37-38 (Miss. 1994) (consequential damages must be plead with specificity); *Lynn v. Soterra, Inc.*, 802 So. 2d 162, 169 (Miss. Ct. App. 2001) (damages for lost business profit caused by defendant's blocking of a road are likely special damages). If claimant fails to plead special damages with specificity, an award for such damages may be reversed. The requirement that special damages must be stated with specificity will be waived if special damages are tried by the express or implied consent of the parties pursuant to Rule 15(b).

RULE 10. FORM OF PLEADINGS

(a) Caption; Names of Parties. Every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number, and a designation as in Rule 7(a). In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

(b) Paragraphs; Separate Statement. The first paragraph of a claim for relief shall contain the names and, if known, the addresses of all the parties. All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and the paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

(c) Adoption by Reference; Exhibits. Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

(d) Copy Must Be Attached. When any claim or defense is founded on an account or other written instrument, a copy thereof should be attached to or filed with the pleading unless sufficient justification for its omission is stated in the pleading.

[Amended effective April 13, 2000.]

Advisory Committee Historical Note

Effective April 13, 2000, Rule 10(d) was amended to suggest, rather than require that documents on which a claim or defense is based be attached to a pleading. 753-745 So. 2d XVII (West Miss. Cas. 2000.)

Advisory Committee Notes

Failure to comply with the requirements of Rule 10(b) is not ground for dismissal of the complaint or striking the answer. Instead, the court, upon a motion or on its own, may order a party to amend the pleading so as to comply with the provisions of Rule 10(b). *See,*

e.g., 3M Co. v. Glass, 917 So. 2d 90, 92-94 (Miss. 2005); *Harold's Auto Parts, Inc. v. Mangialardi,* 889 So. 2d 493, 494-95 (Miss. 2004).

RULE 11. SIGNING OF PLEADINGS AND MOTIONS

(a) Signature Required. Every pleading or motion of a party represented by an attorney shall be signed by at least one attorney of record in that attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign that party's pleading or motion and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney constitutes a certificate that the attorney has read the pleading or motion; that to the best of the attorney's knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. The signature of an attorney who is not regularly admitted to practice in Mississippi, except on a verified application for admission pro hac vice, shall further constitute a certificate by the attorney that the foreign attorney has been admitted in the case in accordance with the requirements and limitations of Rule 46(b) of the Mississippi Rules of Appellate Procedure.

(b) Sanctions. If a pleading or motion is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false, and the action may proceed as though the pleading or motion had not been served. For wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted. If any party files a motion or pleading which, in the opinion of the court, is frivolous or is filed for the purpose of harassment or delay, the court may order such a party, or his attorney, or both, to pay to the opposing party or parties the reasonable expenses incurred by such other parties and by their attorneys, including reasonable attorneys' fees.

[Amended effective March 13, 1991; amended effective January 16, 2003]

Advisory Committee Historical Note

Effective January 16, 2003, Rule 11(a) was amended to provide that the signature of a foreign attorney certifies compliance with MRAP 46(b) and to make other editorial changes. ____ So. 2d ____ (West Miss. Cases 2003).

Effective March 13, 1991, Rule 11(b) was amended to provide for sanctions against a party, his attorney or both. 574-576 So. 2d XXI (West Miss. Cas. 1991).

Advisory Committee Notes

Good faith and professional responsibility are the bases of Rule 11. Rule 8(b), for instance, authorizes the use of a general denial "subject to the obligations set forth in Rule 11," meaning only when counsel can in good faith fairly deny all the averments in the adverse pleading should he do so.

Verification will be the exception and not the rule to pleading in Mississippi. No pleading or petition need be verified or accompanied by affidavit unless there is a specific provision to that effect in a rule or statute. *See, e.g.,* M.R.C.P. 27(a) and 65.

The final sentence of Rule 11(b) is intended to ensure that the trial court has sufficient power to deal forcefully and effectively with parties or attorneys who may misuse the liberal, notice pleadings system effectuated by these rules. The Rule authorizes a court to award a party reasonable attorneys' fees and expenses when an adverse party "files a motion or pleading which, in the opinion of the court, is frivolous or is filed for the purpose of harassment or delay." Thus, Rule 11 provides two alternative grounds for the imposition of sanctions—the filing of a frivolous motion or pleading, and the filing of a motion or pleading for the purpose of harassment or delay. *See Nationwide Mut. Ins. Co. v. Evans,* 553 So. 2d 1117, 1120 (Miss. 1989). Although a finding of bad faith is necessary to sustain the imposition of sanctions based on purposeful harassment or delay, a finding of bad faith is not necessary to sustain the imposition of sanctions based upon frivolous pleadings or motions. A pleading or motion is frivolous "only when, objectively speaking, the pleader or movant has no hope of success." *See In re Spencer,* 985 So. 2d 330, 339 (Miss. 2008). A pleading is "frivolous" if its "insufficiency…is so manifest upon a bare inspection of the pleadings, that the court or judge is able to determine its character without argument or research." *In re Estate of Smith,* 69 So. 3d 1, 6 (Miss. 2011). A defensive pleading is not frivolous unless "conceding it to be true does not, taken as a whole, contain any defense to any part of complainant's cause of action and its insufficiency as a defense is so glaring that the Court can determine it upon a bare inspection without argument." *In re Estate of Smith,* 69 So. 3d at 6.

Sanctions against a party are improper in cases where the party relied strictly on advice of counsel and could not be expected to know whether the complaint was supported by law, where the party relied on advice of counsel in filing the pleading and played no significant role in prosecution of the action; or where the party was unaware and lacked responsibility for any bad faith harassment or delay. *See Stevens v. Lake,* 615 So. 2d 1177, 1184 (Miss. 1993).

The Litigation Accountability Act also authorizes a court to impose sanctions upon attorneys and/or parties who assert "any claim or defense that is without substantial justification, or …was interposed for delay or harassment." Miss. Code Ann. §11-55-5 (Supp. 2011). "Without substantial justification" is defined as any claim that is "frivolous, groundless in fact or in law, or vexatious, as determined by the court." Miss. Code Ann. §11-55-3(a) (Supp. 2011). "Frivolous" as used in the Act means the same thing as "frivolous" as used in Rule 11: a claim or defense made 'without hope of success.'" *See In re Spencer,* 985 So. 2d 330, 338 (Miss. 2008).

RULE 12. DEFENSES AND OBJECTIONS -- WHEN AND HOW PRESENTED -- BY PLEADING OR MOTION -- MOTION FOR JUDGMENT ON THE PLEADINGS

(a) When Presented. A defendant shall serve his answer within thirty days after the service of the summons and complaint upon him or within such time as is directed pursuant to Rule 4. A party served with a pleading stating a cross-claim against him shall serve an answer thereto within thirty days after the service upon him. The plaintiff shall serve his reply to a counter-claim in the answer within thirty days after service of the answer or, if a reply is ordered by the court, within thirty days after service of the order, unless the order otherwise directs. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court:

(1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within ten days after notice of the court's action;

(2) if the court grants a motion for a more definite statement, the responsive pleading shall be served within ten days after the service of the more definite statement.

The times stated under this subparagraph may be extended, once only, for a period not to exceed ten days, upon the written stipulation of counsel filed in the records of the action.

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counter-claim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

(1) Lack of jurisdiction over the subject matter,

(2) Lack of jurisdiction over the person,

(3) Improper venue,

(4) Insufficiency of process,

(5) Insufficiency of service of process,

(6) Failure to state a claim upon which relief can be granted,

(7) Failure to join a party under Rule 19.

No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56; however, if on such a motion matters outside the pleadings are not presented, and if the motion is granted, leave to amend shall be granted in accordance with Rule 15(a).

(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56; however, if on such a motion matters outside the pleadings are not presented, and if the motion is granted, leave to amend shall be granted in accordance with Rule 15 (a).

(d) Preliminary Hearings. The defenses specifically enumerated (1) through (7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment on the pleadings (subdivision (c) of this rule), shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) Motion for More Definite Statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within ten days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) Motion to Strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within thirty days after the service of the pleading upon him or upon the court's own initiative at any

time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) Consolidation of Defenses in Motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

(h) Waiver or Preservation of Certain Defenses.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by a motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15 (a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion that the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action or transfer the action to the court of proper jurisdiction.

Advisory Committee Notes

The motion for a more definite statement requires merely that—a more definite statement—and not evidentiary details. The motion will lie only when a responsive pleading is required, and is one remedy for a vague or ambiguous pleading. A defendant may also file a Rule 12(b)(6) motion as a means of challenging a vague or ambiguous pleading.

Ordinarily, Rule 12(f) will require only the objectionable portion of the pleadings to be stricken, and not the entire pleading. Motions going to redundant or immaterial allegations, or allegations of which there is doubt as to relevancy, should be denied, the issue to be decided being whether the allegation is prejudicial to the adverse party. Motions to strike a defense for insufficiency should, if granted, be granted with leave to amend.

Rule 12(g) provides that a party making a pre-answer motion pursuant to Rule 12 may join with such motion any other available Rule 12 pre-answer motions. If a party makes a Rule 12 pre-answer motion and omits an available Rule 12 defense or objection, the party may only raise such omitted defense or objection as allowed by Rule 12(h)(2). Rule 12(h)(2) allows a party to raise the defense of failure to state a claim and/or the defense of failure to join a party indispensable under Rule 19 by asserting such defenses in the answer, by raising such defenses in a motion for judgment on the pleadings, or by raising such defenses at the trial on the merits. Rule 12(g) encourages a party to consolidate all available Rule 12 motions so as to avoid successive motions.

Rule 12(h)(1) states that certain specified defenses which are available to a party when the party makes a pre-answer motion, but which are omitted from the pre-answer motion, are waived. The specified defenses include: (1) lack of personal jurisdiction; (2) improper venue; (3) insufficiency of process; and (4) insufficiency of service of process. In addition, Rule 12(h)(1) further provides that if a party answers rather than filing a pre-answer motion, the party must raise any of these specified defenses in the answer or an amended answer made as a matter of course pursuant to Rule 15(a) to avoid waiver of such defenses.

Under Rule 12(h)(3) a question of subject matter jurisdiction may be presented at any time, either by motion or answer. Further, it may be asserted as a motion for relief from a final judgment under Rule 60(b)(4) or may be presented for the first time on appeal. The provision directing a court lacking subject matter jurisdiction to transfer the action to a court having jurisdiction preserves the traditional Mississippi practice of transferring actions between the circuit and chancery courts, as provided by Miss. Const. §§157 (all causes that may be brought in the circuit court whereof the chancery court has jurisdiction shall be transferred to the chancery court) and 162 (all causes that may be brought in chancery court whereof the circuit court has exclusive jurisdiction shall be transferred to the circuit court), but not reversing for a court's improperly exercising its jurisdiction, Miss. Const. §147.

RULE 13. COUNTER-CLAIM AND CROSS-CLAIM

(a) Compulsory Counter-claims. A pleading shall state as a counter-claim any claim which at the time of serving the pleading the pleader has against any opposing party if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction. But the pleader need not state the claim if:

(1) at the time the action was commenced the claim was the subject of another pending action; or

(2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counter-claim under this Rule 13; or

(3) the opposing party's claim is one which an insurer is defending.

In the event an otherwise compulsory counter-claim is not asserted in reliance upon any exception stated in paragraph (a), re-litigation of the claim may nevertheless be barred by the doctrines of res judicata or collateral estoppel by judgment in the event certain issues are determined adversely to the party electing not to assert the claim.

(b) Permissive Counter-Claims. A pleading may state as a counter-claim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

(c) Counter-Claim Exceeding Opposing Claim. A counter-claim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

(d) Counter-Claim Against the State of Mississippi. These rules shall not be construed to enlarge beyond the limits fixed by law the right to assert counter-claims or to claim credits against the State of Mississippi, a political subdivision, or an officer in his representative capacity or agent of either.

(e) Counter-Claim Maturing or Acquired After Pleading. A claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counter-claim by supplemental pleading.

(f) Omitted Counter-Claim. When a pleader fails to set up a counter-claim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counter-claim by amendment on such terms as the court deems just.

(g) Cross-Claim Against Co Party. A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counter-claim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of the claim asserted in the action against the cross-claimant.

(h) Claims Exceeding Court's Jurisdiction. Upon the filing in the county court by any party of a counter-claim or cross-claim which exceeds the jurisdictional limits of that court, and upon the motion of all parties filed within twenty days after the filing of such counter-claim or cross-claim, the county court shall transfer the action to the circuit or chancery court wherein the county court is situated and which would otherwise have jurisdiction.

(i) Joinder of Additional Parties. Persons other than those made parties to the original action may be made parties to a counter-claim or cross-claim in accordance with the provisions of Rules 19 and 20.

(j) Separate Trials; Separate Judgment. If the court orders separate trials as provided in Rule 42(b), judgment on a counter-claim or cross-claim may be rendered in accordance with the terms of Rule 54(b) when the court has jurisdiction so to do, even if the claims of the opposing parties have been dismissed or otherwise disposed of.

(k) Appealed Actions. When an action is commenced in the justice court or in any other court which is not subject to these rules and from which an appeal for a trial de novo lies to a court subject to these rules, any counter-claim made compulsory by subdivision (a) of this rule shall be stated as an amendment to the pleading within thirty days after such appeal has been perfected or within such further time as the court may allow; and other counter-claims and cross-claims shall be permitted as in an original jurisdiction action. When a counter-claim or cross-claim is asserted by a defendant in such an appealed case, the defendant shall not be limited in amount to the jurisdiction of the lower court but shall be permitted to claim and recover the full amount of its claim irrespective of the jurisdiction of the lower court.

Advisory Committee Notes

The purpose of Rule 13 is to grant the court broad discretion to allow claims to be joined in order to expedite the resolution of all the controversies between the parties in one suit and to eliminate the inordinate expense occasioned by circuity of action and multiple litigation.

Subject to the exceptions stated in Rule 13(a), counterclaims are compulsory if they arise out of the same transaction or occurrence that is the subject matter of the opposing party's claim. Compulsory counterclaims are so closely related to the claims already raised, that they can be adjudicated in the same action without creating confusion and should be adjudicated in the same action so as to avoid unnecessary expense and duplicative litigation. Rule 13 generally requires compulsory counterclaims to be asserted in the pending litigation to avoid waiver.

All other counterclaims are permissive and may be asserted by the defending party. If trying the permissive counterclaim in the same case as the original claim is tried will create confusion, prejudice, unnecessary delay or increased costs, the court has the discretion to order that the counterclaim be tried separately pursuant to Rule 42(b).

Pursuant to Rule 13(g), a party may assert a cross-claim against a co-party if the cross-claim arises out of the same transaction or occurrence that is the subject matter of the complaint or a counterclaim thereto or relates to any property that is the subject matter of the complaint. Cross-claims may be derivative claims that assert that the party against whom the cross-claim is asserted is or may be liable to the cross-claimant for all or part of the claim against the cross-claimant. Pursuant to Rule 13, cross-claims are permissive rather than compulsory.

A party asserting a counterclaim or cross-claim may join additional parties as defendants to the counterclaim or cross-claim pursuant to Rules 19 and 20.

RULE 14. THIRD-PARTY PRACTICE

(a) When Defendant May Bring in Third Party. After commencement of the action and upon being so authorized by the court in which the action is pending on motion and for good cause shown, a defending party may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counter-claims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counter-claims and cross-claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant.

(b) When Plaintiff May Bring in Third Party. When a counter-claim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

(c) [Admiralty and Maritime Claims] [Omitted].

[Former Rule 14 deleted effective May 1, 1982; new Rule 14 adopted effective July 1, 1986.]

Advisory Committee Historical Note

Effective July 1, 1986, a new Rule 14 was adopted. 486-490 So. 2d XVII (West Miss. Cas. 1986).

Effective May 1, 1982, Rule 14 was abrogated. 410-416 So. 2d XXI (West Miss. Cas. 1982).

Advisory Committee Notes

It is essential that the third-party claim be for some form of derivative or secondary liability of the third-party defendant to the third-party plaintiff. Impleader is not available for the assertion of an independent action by the defendant against a third party, even if the claim arose out of the same transaction or occurrence as the main claim. Once a third-party claim is properly asserted, however, the third-party plaintiff may assert whatever additional claims the third-party plaintiff has against the third-party defendant under Rule 18(a).

The requirement that the third-party claim be for derivative or secondary liability may be met by, for example, an allegation of a right of indemnity (contractual or otherwise), contribution, subrogation, or warranty. The rules does not, however create any such rights. It merely provides a procedure for expedited consideration of these rights where they are available under substantive law. An insured party has a derivative claim for indemnity against the insured party's liability insurer, and may implead the party's liability insurer, if the insured is being sued for damages allegedly covered by the liability policy and the insurer is disclaiming coverage pursuant to the liability policy.

A defendant who is subject to joint and several liability for a plaintiff's damages may have a claim against joint tortfeasors for contribution. Generally, in Mississippi, liability for damages imposed in civil cases based upon "fault" is several only and not joint and several, thereby obviating the need or basis for contribution claims. Mississippi Code Annotated section 85-5-7(4), however, provides that '[j]oint and several liability shall be imposed on all who consciously and deliberately pursue a common plan or design to commit a tortuous act, or who actively take part in it." The statute further provides that "[a]ny person held jointly and severally liable under [such] section shall have a right of contribution from his fellow defendants acting in concert." Thus, Mississippi law grants a defendant who has been held jointly and severally liable for acting in concert a right of contribution against co-defendants who were also acting in concert.

A first-party insurer against loss, sued by its policyholder for such loss, has a derivative claim for subrogation against, and may implead the person who allegedly caused the loss, where a right of subrogation would arise from the insurer's payment of the insured plaintiff's claim.

Because the rule expressly allows third-party claims against one who "may be liable," it is not an objection to implead that the third party's liability is contingent on the original plaintiff's recovery against the defendant/third-party plaintiff.

M.R.C.P. 14 differs from Fed. R. Civ. P. 14 in that M.R.C.P. 14 requires a defending party to obtain authorization from the court based upon a showing of good cause before such defending party may serve a summons and third-party complaint upon a nonparty. Pursuant to Fed. R. Civ. P. 14, a defending party must obtain leave of court only if it is filing a third-party complaint more than 14 days after serving its original answer.

RULE 15. AMENDED AND SUPPLEMENTAL PLEADINGS

(a) Amendments. A party may amend a pleading as a matter of course at any time before a responsive pleading is served, or, if a pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within thirty days after it is served. On sustaining a motion to dismiss for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6), or for judgment on the pleadings, pursuant to Rule 12(c), leave to amend shall be granted when justice so requires upon conditions and within time as determined by the court, provided matters outside the pleadings are not presented at the hearing on the motion. Otherwise a party may amend a pleading only by leave of court or upon written consent of the adverse party; leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within ten days after service of the amended pleading, whichever period may be longer, unless the court otherwise orders.

(b) Amendment to Conform to the Evidence. When issues not raised by the pleadings are tried by expressed or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the maintaining of the action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence. The court is to be liberal in granting permission to amend when justice so requires.

(c) Relation Back of Amendments.

(1) Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

(2) An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by Rule 4(h) for service of the summons and complaint, the party to be brought in by amendment:

(a) has received such notice of the institution of the action that the party will not be prejudiced in maintaining the party's defense on the merits, and

(b) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

(3) An amendment pursuant to Rule 9(h) is not an amendment changing the party against whom a claim is asserted and such amendment relates back to the date of the original pleading.

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions, occurrences, or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

[Amended effective July 1, 1998; amended effective April 17, 2003 to allow amendments on dismissal under Rule 12(b)(6) or judgment on the pleadings under Rule 12(c) where the court determines that justice so requires; amended effective July 1, 2020.]

Advisory Committee Historical Note

Effective July 1, 1998, Rule 15(c) was amended to state that the relation back period includes the time permitted for service of process under Rule 4(h).

Effective July 1, 2020, the subsections within Rule 15 (c) were reorganized and renumbered.

Advisory Committee Notes

Mississippi Rule 15(a) varies from Federal Rule 15(a) in that the federal rule permits a party to amend the pleading only once as a matter of course. The Mississippi rule places no limit on the number of such amendments.

If a party files an amended pleading without leave of court when leave of court was

required by M.R.C.P. 15(a), such amendment is improper and the amended pleading will be struck. *See D.P. Holmes Trucking, LLC v. Butler*, 94 So. 3d 248, 255 (Miss. 2012).

An amended complaint that adds additional defendants must also comply with M.R.C.P. 21. *See Veal v. J.P. Morgan Tr. Co., N.A.*, 955 So. 2d 843, 847 (Miss. 2007) ("Where . . . the amendment sought is to add new defendants, Mississippi Rule of Civil Procedure 21 is applicable, and requires an order from the court to add a new defendant").

An amended pleading adding a new claim or defense among existing parties relates back to the original pleading when the claim or defense in the amended pleading arises from the same conduct, transaction or occurrence set forth in the original pleading.

An amended pleading changing the name of the defending party relates back to the original pleading if the requirements of M.R.C.P. 15(c)(1) and (2) are met.

An amendment substituting a named party for a fictitious party pursuant to M.R.C.P. 9(h) relates back only if the plaintiff exercised reasonable diligence to discover the true identity of the fictitious party. *See Bedford Health Properties, LLC v. Estate of Williams ex rel Hawthorne*, 946 So. 2d 335, 342 (Miss. 2006).

An amended pleading adding an additional defendant does not relate back to the original pleading unless: (i) it is an amendment changing the defending party's name and the requirements of M.R.C.P. l5(c)(1) and (2) are met; or (ii) is an amendment substituting a named defendant for a fictitious defendant pursuant to M.R.C.P. 9(h) and the reasonable diligence standard is met.

[Advisory Committee Note adopted effective July 1, 2014; amended effective July 1, 2020.]

RULE 16. PRE-TRIAL PROCEDURE

In any action the court may on its own motion or on the motion of any party, and shall on the motion of all parties, direct the attorneys for the parties to appear before it at least twenty days before the case is set for trial for a conference to consider and determine:

(a) The possibility of settlement of the action;

(b) the simplification of the issues;

(c) the necessity or desirability of amendments to the pleadings;

(d) itemizations of expenses and special damages;

(e) the limitation of the number of expert witnesses;

(f) the exchange of reports of expert witnesses expected to be called by each party;

(g) the exchange of medical reports and hospital records, but only to the extent that such exchange does not abridge the physician-patient privilege;

(h) the advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(i) the imposition of sanctions as authorized by Rule 37;

(j) the possibility of obtaining admissions of fact and of documents and other exhibits which will avoid unnecessary proof;

(k) in jury cases, proposed instructions, and in non-jury cases, proposed findings of fact and conclusions of law, all of which may be subsequently amended or supplemented as justice may require;

(l) such other matters as may aid in the disposition of the action.

The court may enter an order reciting the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any other matters considered, and limiting issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered shall control the subsequent course of the action, unless modified at the trial to prevent manifest injustice.

[Amended effective March 1, 1989; April 13, 2000.]

Advisory Committee Historical Note

Effective April 13, 2000, Rule 16 was amended to allow the conference to be held pursuant to the court's motion. 753-754 So. 2d. XVII (West Miss. Cas.. 2000.)

Effective March 1, 1989, Rule 16 was amended to abrogate provisions for a pretrial calendar. 536-538 So. 2d XXI (West Miss. Cas. 1989).

RULE 16A. MOTIONS FOR RECUSAL OF JUDGES

Motions seeking the recusal of judges shall be timely filed with the trial judge and shall be governed by procedures set forth in the Uniform Rules of Circuit and County Court Practice and the Uniform Rules of Chancery Court Practice.

[Adopted, April 4, 2002.]

Advisory Committee Historical Note [Rule 16A]

Effective April 4, 2002, Rule 16A and the Comment were adopted. 813-815 So. 2d LXXXI (West Miss. Cases 2002).

CHAPTER IV. PARTIES

RULE 17. PARTIES PLAINTIFF AND DEFENDANT; CAPACITY

(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his representative capacity without joining with him the party for whose benefit the action is brought. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

(b) Subrogation Cases. In subrogation cases, regardless of whether subrogation has occurred by operation of law, assignment, loan receipt, or otherwise, if the subrogor no longer has a pecuniary interest in the claim the action shall be brought in the name of the subrogee. If the subrogor still has a pecuniary interest in the claim, the action shall be brought in the names of the subrogor and the subrogee.

(c) Infants or Persons Under Legal Disability. Whenever a party to an action is an infant or is under legal disability and has a representative duly appointed under the laws of the State of Mississippi or the laws of a foreign state or country, the representative may sue or defend on behalf of such party. A party defendant who is an infant or is under legal disability and is not so represented may be represented by a guardian ad litem appointed by the court when the court considers such appointment necessary for the protection of the interest of such defendant. The guardian ad litem shall be a resident of the State of Mississippi, shall file his consent and oath with the clerk, and shall give such bond as the court may require. The court may make any other orders it deems proper for the protection of the defendant. When the interest of an unborn or unconceived person is before the court, the court may appoint a guardian ad litem for such interest. If an infant or incompetent person does not have a duly appointed representative, he may sue by his next friend.

(d) Guardian Ad Litem; How Chosen. Whenever a guardian ad litem shall be necessary, the court in which the action is pending shall appoint an attorney to serve in that capacity. In all cases in which a guardian ad litem is required, the court must ascertain a reasonable fee or compensation to be allowed and paid to such guardian ad litem for his service rendered in such cause, to be taxed as a part of the cost in such action.

(e) Public Officers. When a public officer sues or is sued in his official capacity, he may be described as a party by his official title rather than by name; but the court may require his name to be added.

RULE 18. JOINDER OF CLAIMS AND REMEDIES

(a) Joinder of Claims. A party asserting a claim to relief as an original claim, counter-claim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims as he has against an opposing party.

(b) Joinder of Remedies. Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties.

Advisory Committee Notes

Rule 18(a) eliminates any restrictions on claims that may be joined in actions in the courts of Mississippi. Rule 18(a) permits legal and equitable claims or any combination of them to be joined in one action; a party may also assert alternative claims for relief, consistency among the claims not being necessary; consequently, an election of remedies or theories will not be required at the pleading stage of litigation.

Since Rule 18(a) deals only with the scope of joinder at the pleading stage and not with questions of trial convenience, jurisdiction, or venue, a party should be permitted to join all claims against an opponent as a matter of right. The rule proceeds on the theory that no inconvenience can result from the joinder of any two or more matters in the pleadings, but only from trying two or more matters together, if at all.

RULE 19. JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION

(a) Persons to Be Joined if Feasible. A person who is subject to the jurisdiction of the court shall be joined as a party in the action if:

(1) in his absence complete relief cannot be accorded among those already parties, or

(2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant or, in a proper case, an involuntary plaintiff.

(b) Determination by Court Whenever Joinder Not Feasible. If a person as described in subdivision (a) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: First, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1) through (2) who are not joined, and the reasons why they are not joined.

Advisory Committee Notes

Compulsory joinder is an exception to the general practice of giving the plaintiff the right to decide who shall be parties to a law suit; although a court must take cognizance of this traditional prerogative in exercising its discretion under Rule 19, plaintiff's choice will have to be compromised when significant countervailing considerations make the joinder of particular absentees desirable.

There are at least four main questions to be considered under Rule 19: first, the plaintiff's interest in having a forum; second, the defendant's wish to avoid multiple litigation, inconsistent relief, or sole responsibility for a liability shared with another; third, the interest of an outsider whom it would have been desirable to join; fourth, the interest of the courts and the public in complete, consistent, and efficient settlement of controversies. This list is by no means exhaustive or exclusive; pragmatism controls.

There is no precise formula for determining whether a particular nonparty must be joined under Rule 19(b). The decision has to be made in terms of the general policies of avoiding multiple litigation, providing the parties with complete and effective relief in a single action, and protecting the absent persons from the possible prejudicial effect of deciding the case without them. Account also must be taken of whether other alternatives are available to the litigants. By its very nature Rule 19(b) calls for determinations that are heavily influenced by the facts and circumstances of individual cases.

RULE 20. PERMISSIVE JOINDER OF PARTIES

(a) Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences, and if any question of law or fact common to all these persons will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences, and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

(b) Separate Trials. The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom the party asserts no claim and who asserts no claim against the party, and may order separate trials or make other orders to prevent delay or prejudice.

[Amended February 20, 2004 to make rule gender neutral.]

Advisory Committee Notes

Rule 20(a) permits joinder in a single action of all persons asserting or defending against a joint, several or alternative right to relief that arises out of the same transaction or occurrence or series of transactions or occurrences and presents a common question of law or fact. The phrase "transaction or occurrence" requires that there be a distinct litigable event linking the parties. Rule 20(a) simply establishes a procedure under which several parties' demands arising out of the same litigable event may be tried together, thereby avoiding the unnecessary loss of time and money to the court and the parties that the duplicate presentation of the evidence relating to facts common to more than one demand for relief would entail.

Joinder of parties under Rule 20(a) is not unlimited as is joinder of claims under Rule 18(a). Rule 20(a) imposes two specific requisites to the joinder of parties: (1) a right to relief must be asserted by or against each plaintiff or defendant relating to or arising out of the same transaction, occurrence, or the same series of transactions or occurrences; and (2) some question of law or fact common to all the parties will arise in the action. Both of these requirements must be satisfied in order to sustain party joinder under Rule 20(a). *See American Bankers, Inc. of Florida v. Alexander,* 818 So. 2d 1073, 1078 (Miss.

2001). However, even if the transaction requirement cannot be satisfied, there always is a possibility that, under the proper circumstances, separate actions can be instituted and then consolidated for trial under Rule 42(a) if there is a question of law or fact common to all the parties. *See Stoner v. Colvin,* 236 Miss. 736, 748, 110 So. 2d 920, 924 (1959) (courts of general jurisdiction have inherent power to consolidate actions when called for by the circumstances). If the criteria of Rule 20 are otherwise met, the court should consider whether different injuries, different damages, different defensive postures and other individualized factors will be so dissimilar as to make management of cases consolidated under Rule 20 impractical. *See Demboski v. CSX Transp., Inc.,* 157 F.R.D. 28 (S.D. Miss. 1994) cited with approval in *Illinois Cen. R.R. Co. v. Travis*, 808 So. 2d 928, 934 (Miss. 2002).

In order to allow the court to make a prompt determination of whether joinder is proper, the factual basis for joinder should be fully disclosed as early as practicable, and motions questioning joinder should be filed, where possible, sufficiently early to avoid delays in the proceedings.

RULE 21. MISJOINDER AND NONJOINDER OF PARTIES

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

Advisory Committee Notes

Rule 21 applies, for example, when: (1) the joined parties do not meet the requisites of Rule 20; (2) no relief has been demanded from one or more of the parties joined as defendants; (3) no claim for relief is stated against one or more of the defendants; (4) one of several plaintiffs does not seek any relief against the defendant and is without any real interest in the controversy.

Rules 17 and 19 should be used as reference points for what is meant by nonjoinder in Rule 21. Thus, Rule 21 simply describes the procedural consequences of failing to join a party as required in Rules 17 and 19.

RULE 22. INTERPLEADER

(a) Plaintiff or Defendant. Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counter-claim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20.

(b) Release From Liability; Deposit or Delivery. Any party seeking interpleader, as provided in subdivision (a) of this rule, may deposit with the court the amount claimed, or deliver to the court or as otherwise directed by the court, the property claimed, and the court may thereupon order such party discharged from liability as to such claims and the action shall continue as between the claimants of such money or property.

Advisory Committee Notes

The protection afforded by interpleader takes several forms. Most significantly, it prevents a stakeholder from being obligated to determine at his peril which claimant has the better claim and, when the stakeholder himself has no interest in the fund, forces the claimants to contest what essentially is a controversy between them without embroiling the stakeholder in the litigation over the merits of the respective claims. Even if the stakeholder denies liability, either in whole or in part to one or more of the claimants, interpleader still protects him from the vexation of multiple suits and the possibility of multiple liability that could result from adverse determinations in different courts. Thus, interpleader can be employed to reach an early and effective determination of disputed questions with a consequent saving of trouble and expense for the parties. As is true of the other liberal joinder provisions in these rules, interpleader also benefits the judicial system by condensing numerous potential individual actions into a single comprehensive unit, with a resulting savings in court time and energy.

Interpleader also can be used to protect the claimants by bringing them together in one action and reaching an equitable division of a limited fund. This situation frequently arises when the insurer of an alleged tortfeasor is faced with claims aggregating more than its liability under the policy. Were an insurance company required to await reduction of claims to judgment, the first claimant to obtain such judgment or to negotiate a settlement might appropriate all or a disproportionate share of the fund before his fellow claimants were able

to establish their claim. The difficulties such a race to judgment poses for the insurer, and the unfairness which may result to some claimants, are among the principal evils the interpleader device is intended to remedy.

An additional advantage of interpleader to the claimant is that it normally involves a deposit of the disputed funds or property in court, thereby eliminating much of the delay and expense that often attends the enforcement of a money judgment.

The primary test for determining the propriety of interpleading the adverse claimants and discharging the stakeholder is whether the stakeholder legitimately fears multiple vexations directed against a single fund.

Ordinarily, interpleader is conducted in two "stages." In the first, the court hears evidence to determine whether the plaintiff is entitled to interplead the defendants. In the second stage, a determination is made on the merits of the adverse claims and, if appropriate, on the rights of an interested stakeholder.

After the stakeholder has paid the disputed funds into court, or given bond therefor, and the claimants have had notice and an opportunity to be heard, the court determines whether the stakeholder is entitled to interpleader relief. If so, the court will enter an order requiring the claimants to interplead and, if the stakeholder is disinterested, discharging the stakeholder from the proceeding and from further liability with regard to the interpleader fund. The court may also permanently enjoin the claimants from further harassing the stakeholder with the claims or judicial proceedings.

There is, however, no inflexible rule that the proceeding must be divided into two stages. The entire action may be disposed of at one time in cases where, for example, the stakeholder has not moved to be discharged or has remained in the action by reason of an interest therein. There may even be a third stage, in the event that the second stage determination leaves unresolved some further dispute, either between the stakeholder and the prevailing claimant or among the prevailing claimants.

Trial during stages later than the first is also appropriate for counterclaims raised by the claimants, such as those alleging an independent liability, and for cross-claims between claimants which are held appropriate for resolution in the course of the interpleader proceedings.

RULE 23. CLASS ACTIONS [OMITTED]

RULE 23.1 DERIVATIVE ACTIONS BY SHAREHOLDERS [OMITTED]

RULE 23.2 ACTIONS RELATING TO UNINCORPORATED ASSOCIATIONS [OMITTED]

RULE 24. INTERVENTION

(a) Intervention of Right. Upon timely application, anyone shall be permitted to intervene in an action:

(1) when a statute confers an unconditional right to intervene; or

(2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action:

(1) when a statute confers a conditional right to intervene; or

(2) when an applicant's claim or defense and the main action have a question of law or fact in common.

When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency, or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be

accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute gives a right to intervene.

(d) Intervention by the State. In any action (1) to restrain or enjoin the enforcement, operation, or execution of any statute of the State of Mississippi by restraining or enjoining the action of any officer of the State or any political subdivision thereof, or the action of any agency, board, or commission acting under state law, in which a claim is asserted that the statute under which the action sought to be restrained or enjoined is to be taken is unconstitutional, or (2) for declaratory relief brought pursuant to Rule 57 in which a declaration or adjudication of the unconstitutionality of any statute of the State of Mississippi is among the relief requested, the party asserting the unconstitutionality of the statute shall notify the Attorney General of the State of Mississippi within such time as to afford him an opportunity to intervene and argue the question of constitutionality.

Advisory Committee Notes

Rule 24 requires the court to balance the interests of the would-be intervenor against the burdens such intervention might pose on those already parties or on the judicial system's economic and efficient disposition of the case. If one of the criteria for intervention as a matter of right is met and the would-be intervenor files a timely application for intervention, intervention shall be allowed. *See Dare v. Stoke*, 62 So. 3d 958, 959 (Miss. 2011). A trial court has discretion when ruling on a timely motion to permissively intervene and "may permissively grant or deny a motion to intervene, provided there is a common question of law or fact and the motion was timely filed." *See Madison HMA, Inc. v. St. Dominic-Jackson Mem'l Hosp.,* 35 So. 3d 1209, 1215 (Miss. 2010).

Applications to intervene as of right pursuant to Rule 24(a) or to permissively intervene pursuant to Rule 24(b) must be timely. The rule does not set out any specific time limits. Instead, trial courts are to weigh the following four factors when determining timeliness: "(1) the length of time during which the would-be intervenor actually knew or should have known of his interest in the case before he petitioned for leave to intervene; (2) the extent of the prejudice that the existing parties to the litigation may suffer as a result of the would-be intervenor's failure to apply for intervention as soon as he actually knew or reasonably should have known of his interest in the case; (3) the extent of the prejudice that the would-be intervenor may suffer if his petition for leave to intervene is denied; and (4) the existence of unusual circumstances mitigating either for or against a determination that the application is timely." *See Hood ex rel. State Tobacco Litigation,* 958 So. 2d 790, 806 (Miss. 2007). The determination of whether an application to intervene is timely is committed to the discretion of the trial court and will not be overturned on appeal absent an abuse of discretion.

RULE 25. SUBSTITUTION OF PARTIES

(a) Death.

(1) If a party dies and the claim is not thereby extinguished, the court shall, upon motion, order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of summons. The action shall be dismissed without prejudice as to the deceased party if the motion for substitution is not made within ninety days after the death is suggested upon the record by service of a statement of the fact of the death as herein provided for the service of the motion.

(2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiff or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

(b) Legal Disability. If a party comes under a legal disability the court upon motion served as provided in subdivision (a) of this rule may allow the action to be continued by or against his representative.

(c) Transfer of Interest. In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule.

(d) Public Officers; Death or Separation From Office. When a public officer is a party to an action in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

Advisory Committee Notes

The suggestion of death does not have to identify the decedent's successors or representatives to be substituted as the real party in interest. *See Clark v. Knesal,* 113 So. 3d

531, 536 (Miss. 2013). Although the rule requires that service of the suggestion of death upon non-parties be accomplished in accordance with Rule 4, the rule does not indicate which non-parties must be served with the suggestion of death so as to trigger the ninety-day time period. Interested non-parties whose rights may be cut off by the ninety-day limits must be served. *See Hurst v. SW Miss. Legal Servs.,* 610 So. 2d 374, 386 (1992) (defendant's failure to serve the named executrix of the deceased plaintiff's estate with the suggestion of death rendered the suggestion of death ineffective even though the executrix may have had actual notice of the suggestion of death); *Knesal,* 113 So. 3d at 537 (defendant/counter-plaintiff who was properly served with the suggestion of death could not argue that the failure to serve the plaintiff/counter-defendant's non-party successors rendered the suggestion invalid because: (i) the failure to serve the plaintiff/counter-defendant's non-party successors did not affect the defendant/counter-plaintiff's opportunity to file a motion to substitute; and (ii) service upon the decedent's successor was impossible because there was no existing estate or personal representative upon whom the suggestion of death could have been served). The rule contains no restriction on who may file and serve the suggestion of death; the decedent's lawyer may file and serve it. *Id.* at 538.

The general provisions of Rule 6(b) apply to motions to substitute; accordingly, the court may extend the period for substitution if timely requested. Similarly, the court may allow substitution to be made after expiration of the ninety-day period on a showing that the failure to act earlier was the result of excusable neglect. *See Knesal,* 113 So. 3d at 539.

If the named plaintiff was deceased at the time the original complaint was filed, then the original complaint is null and void and the real party in interest cannot be substituted as the proper plaintiff because a valid action was never commenced.

CHAPTER V. DEPOSITIONS AND DISCOVERY

RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY

(a) Discovery Methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; and requests for admission. Unless the court orders otherwise under subdivisions (c) or (d) of this rule, the frequency of use of these methods is not limited.

(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the issues raised by the claims or defenses of any party. The discovery may include the existence, description, nature, custody, condition and location of any books, documents, electronically stored information, or other tangible things; and the identity and location of persons (i) having knowledge of any discoverable matter or (ii) who may be called as witnesses at the trial. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) Insurance Agreements. A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

(3) Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including that party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of that party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. Rule 37(a)(4) applies to

the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is: (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) Trial Preparations: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under subsection (b)(1) of this rule may be obtained only as follows:

(A) (i) A requesting party may, through interrogatories, require any other party to identify any witness whom the responding party expects to call as a witness at trial to present evidence under Mississippi Rule of Evidence 702, 703, or 705.

(ii) If such witness has been retained or specially employed to provide expert testimony, the requesting party may, through interrogatories, require the responding party to state the subject matter on which the expert is expected to testify; the substance of the facts and opinions to which the expert is expected to testify; a summary of the grounds for each opinion; the facts or data considered by the witness in forming the opinions, regardless of when and how the facts or data were made known to the witness; any exhibits that will be used to summarize or support the opinions; the witness's qualifications, including a list of all publications authored by the witness in the previous ten years; a list of cases in which, during the previous ten years, the witness testified as an expert at trial or by deposition; and, for retained experts, a statement of the compensation to be paid for the study and testimony in the case.

(iii) If such witness has not been retained or specially employed to provide expert testimony, the requesting party may, through interrogatories, require the responding party to state the subject matter on which the witness is expected to present evidence under Mississippi Rule of Evidence 702, 703, or 705; and a summary of the facts and opinions to which the witness is expected to testify.

(iv) A party may depose any person who has been identified as a witness who will present evidence at trial under Mississippi Rule of Evidence 702, 703 or, 705. Such expert depositions shall not be taken until the party desiring to depose such expert has received interrogatory responses concerning such expert's expected testimony.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial only upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Rule 26(b)(3) protects drafts of any interrogatory responses required under Rule 26(b)(4)(A)(ii) or other expert disclosures regardless of the form in which the draft is recorded.

(D) Rule 26(b)(3) protects communications between the party's lawyer or representative of the lawyer and any expert witness who has been retained or specially employed to present evidence at trial under Mississippi Rules of Evidence 702, 703 or 705, regardless of the form of the communications, except to the extent that the communications: (i) relate to compensation for the expert's study or testimony; (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or (iii) identify assumptions that the party's attorney provided and that the expert relied upon in forming the opinions to be expressed. For purposes of this rule, a "representative of the lawyer" is one employed by the lawyer to assist the lawyer in the rendition of professional legal services.

(E) Unless manifest injustice would result, the court shall require the party taking the deposition of an opposing party's expert who has been specially retained or employed to present expert testimony at trial to pay the expert a reasonable fee for time spent giving deposition testimony and a reasonable fee for up to two hours actually spent preparing for such deposition. With respect to discovery obtained under subsection (b)(4)(B) of this rule, the court shall require the party seeking discovery: (i) to pay the expert a reasonable fee for time spent in responding to such discovery; and (ii) to pay the party who retained or specially employed the expert a fair portion of the fees and expenses reasonably incurred by such party in obtaining the facts and opinions from the expert.

(5) *Specific Limitations on Discovery of Electronically Stored Information.* A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the concerns of Rule 26(d)(2). The court may specify conditions for the discovery. Such conditions may include: (i) limiting the frequency or extent of electronic discovery; (ii) requiring the discovery to be conducted in stages with progressive showings by the requesting party of a need for additional information; (iii) limiting the sources of electronically stored information to be accessed or searched; (iv) limiting the amount or type of electronically stored information to be produced; (v) modifying the form in which the electronically stored information is to be produced; (vii) requiring a sample production of some of the electronically stored information to determine whether additional production is warranted; and (vii) allocating to the requesting party some or all of the cost of producing electronically stored information that is not reasonably accessible because of undue burden or cost.

(6) *Claiming Privilege or Protecting Trial-Preparation Materials.*

(A) *Information Withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must: (i) expressly make the claim; and (ii) describe the nature of the documents, communications, electronically stored information, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) *Information Produced.* If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(c) Discovery Conference. At any time after the commencement of the action, the court may hold a conference on the subject of discovery, and shall do so if requested by any party. The request for discovery conference shall certify that counsel has conferred, or made reasonable effort to confer, with opposing counsel concerning the matters set forth in the request, and shall include:

1. a statement of the issues to be tried;

2. a plan and schedule of discovery;

3. limitations to be placed on discovery, if any; and

4. other proposed orders with respect to discovery.

Any objections or additions to the items contained in the request shall be served and filed no later than ten days after service of the request.

Following the discovery conference, the court shall enter an order fixing the issues; establishing a plan and schedule of discovery; setting limitations upon discovery, if any; and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the case.

Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by Rule 16.

The court may impose sanctions for the failure of a party or counsel without good cause to have cooperated in the framing of an appropriate discovery plan by agreement. Upon a showing of good cause, any order entered pursuant to this subdivision may be altered or amended.

(d) Protective Orders.

(1) *In General.* Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending, or in the case of a deposition the court that issued a subpoena therefor, may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including, but not limited to, one or more of the following:

(A) that the discovery not be had;

(B) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(C) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(D) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(E) that discovery be conducted with no one present except persons designated by the court;

(F) that a deposition after being sealed is to be opened only by order of the court;

(G) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

(H) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court;

(I) that payment of some or all of the expenses attendant upon such deposition or other discovery device be made by the party seeking same.

(2) *Limiting Discovery.* In determining whether to enter an order limiting the frequency or extent of discovery, the court may consider, among other things, whether the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome or less expensive; whether the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; and whether the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount

in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving those issues.

(3) *Ordering Discovery.* If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery.

(4) *Awarding Expenses.* Rule 37(a)(4) applies to the award of expenses incurred in relation to the motion.

(e) Sequence and Timing of Discovery. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(f) Supplementation of Responses.

(1) *In General.* A party who has made an expert disclosure or who has responded to an interrogatory, request for production, or request for admission must supplement or correct its disclosure or response:

(A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(B) as ordered by the court.

(2) *Expert Witness.* With respect to any expert witness who has been retained or specially employed to present evidence at trial under Mississippi Rules of Evidence 702, 703, or 705, the party's duty to supplement in a timely manner extends to information included in any disclosure of that expert's expected testimony, including information given in response to an expert interrogatory, information provided in an expert disclosure, and information given during an expert's deposition.

(g) Signing Discovery Requests, Responses, and Objections.

(1) *Signature Required: Effect of Signature.* Every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name—or by the party personally, if unrepresented—and must state the signer's address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry, with respect to a discovery request, response, or objection, it is:

(A) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(B) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(C) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(2) *Failure to Sign.* Other parties have no duty to act on an unsigned reguest, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

(3) *Sanction for Improper Certification.* If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

Advisory Committee Historical Note

Effective January 1, 2020, M.R.C.P. 26 was amended so as to include subparagraph (g).

Effective January 1, 2020, Rule 26(b) was amended. Rule 26(b)(4) was amended so as to provide for two-tiered discovery regarding witnesses who will offer expert testimony at trial. The amended rule authorizes more detailed interrogatories concerning expert witnesses who are retained or specially employed and more general interrogatories concerning other witnesses who will provide expert testimony. The amendment also authorizes depositions of any witness who will provide expert testimony at trial. Rule 26(b) was amended so that certain communications between a party and a party's expert who has been retained or specially employed to provide expert testimony at trial are deemed trial preparation material. Rule 26(b)(5) governing discovery of electronically stored information was amended so as to refer to "electronically stored information" rather than "data or information in electronic or magnetic form." The amendment also provides a nonexhaustive list of the types of conditions a judge may place on electronic discovery. Rule 26(b) was further amended so as to include subsection (6), which requires a responding party to generally describe information withheld from discovery based an allegation of privilege or trial preparation material and established a process to deal with inadvertent production of privileged or trial preparation material.

Effective May 29, 2003, Rule 26(b) was amended by adding subsection (5) governing discovery of data or information in electronic or magnetic form.

Effective April 13, 2000, Rule 26(c) was amended to allow the court on its own motion to convene a discovery conference, 753-754 So. 2d XVII (West Miss. Cas. 2000).

Effective March 13, 1991, Rule 26(b)(1)(ii) was amended to delete the oral testimony of witnesses from the listing of matter that might be discovered by a party. Rule 26(d) was amended to provide that in the case of depositions protective orders might be made by the court that issued a subpoena therefor. 574-576 So. 2d XXIII (West Miss. Cas. 1991).

Effective March 1, 1989, Rule 26(b)(1) and Rule 26(f)(1) were amended to provide for the identification of (and supplementation of the prior identification of) those, in addition to experts, who may be called as witnesses at the trial. 536-538 So. 2d XXIV (West Miss. Cas. 1989).

Advisory Committee Notes

Rule 26(b)(2) limits discovery to "any matter, not privileged, which is relevant to the issues raised by the claims or defenses of any party." Earlier precedent authorized discovery of any matter, not privileged, relevant to the "subject matter" of the case. The current rule limiting discovery to the issues raised by any claim or defense was intended to narrow the scope of discovery.

Rule 26(b)(4)(A) establishes a two-tiered procedure for discovery concerning witnesses who will provide expert testimony at trial. With respect to retained and specially employed expert witnesses who are expected to testify at trial, the rule authorizes more detailed interrogatories than those permitted concerning other expert witnesses expected to testify at trial because a party can expect retained and specially employed expert witnesses to fully cooperate during discovery and trial. Thus, the rule authorizes interrogatories requesting not only a statement of the opinions the expert is expected to offer and the basis and reasons therefore, but also a statement of the facts and data considered, not just those relied upon, by the expert as well as information concerning the witness's qualifications, publications and previous expert testimony. Although Rule 26(b)(4)(A)(ii) authorizes interrogatories concerning exhibits that will be used to support or illustrate a retained or specially employed expert witness's opinion expected to be offered at trial, a complete response to such an interrogatory may not be possible until closer to trial because some such exhibits may not be created until they are actually needed for trial. Thus, a response or supplemented response concerning such exhibits should not be deemed untimely if it was reasonably made in advance of trial. Rule 26(b)(4)(A)(iii) establishes a more limited scope for interrogatories concerning expert witnesses who were not retained or specially employed but who are expected to testify at trial. Treating physicians and public accident investigators will often offer expert testimony at trial even though they have not been retained or specially employed by a party. The more limited duty to respond to interrogatories concerning this category of experts is based upon the recognition that some such witnesses may not fully cooperate with the party who intends to call them at trial thereby making it difficult or impossible for the party intending to call such witness at trial to fully and adequately respond to interrogatories requesting the more detailed information that is discoverable with respect to retained or specially employed expert witnesses expected to testify at trial. A response

under Rule 26(b)(4)(A)(iii) is sufficient if it gives reasonable notice of the expert's testimony, taking into account the limitations of the party's knowledge of the facts known by and the opinions held by the expert.

Rule 26(b)(4)(C) & (D) grant trial preparation material or "work product" protection to draft responses to expert interrogatories, drafts of expert disclosures, and certain communications between the lawyer and the expert (or between the representative of the lawyer and the expert) in an effort to avoid costly, and oftentimes inefficient, discovery and to encourage more open and robust communication between the attorney and expert so that the attorney and expert may come to a better mutual understanding of the case. The protection is not absolute. Discovery may be had in the three excepted areas. In addition, pursuant to Rule 26(b)(3), a party may overcome the trial preparation material protection by showing a substantial need for the material in preparation of the case and an inability to obtain the substantial equivalent without undue hardship. The protection is not meant to foreclose inquiry into whether the expert explored other theories in the case at hand; whether the expert has ever explored other theories that were not explored in the case at hand, and if so why such theories were not explored in the case at hand; whether the expert considered any facts which were not relied upon and, if so, why such facts were not relied upon; whether any tests were run or models developed other than those disclosed in interrogatory responses and the results of such tests and/or models; and whether anybody other than the party's attorney provided support or participation in framing the opinion.

Rule 26(b)(5) governs discovery of electronically stored information and provides that a party may initially refuse to produce electronically stored information from a source that is not reasonably accessible because of undue burden or cost. The rule further provides, however, that a court may grant a motion to compel discovery from such sources upon a showing of good cause after taking into account factors such as the burden, expense and likely benefit of such discovery. The rule explicitly authorizes a court to order the requesting party to pay for some or all of the costs associated with discovery of electronically stored information from a source that is not reasonably accessible.

Rule 26(b)(6) requires a party withholding information based on a claim of privilege or trial preparation material to generally describe such information so as to enable the requesting party to assess the claim. It also establishes a procedure to govern inadvertent disclosure of privileged or trial preparation material.

Rule 26(c) authorizes the court to hold a discovery conference and thereafter enter an order governing discovery. The rule grants the court discretion to limit discovery and to allocate some or all of the expense of discovery to the requesting party when appropriate.

Rule 26(d) grants a court discretion to enter a protective order, among other things, prohibiting or limiting discovery after considering factors such as burden, cost, and likely benefit of such discovery.

Rule 26(f) imposes a duty to supplement. The duty to supplement, while imposed on a party, applies whether the additional or corrective information is learned by the client or by the attorney. Supplementations need not be made as each new item of information is learned but should be made at appropriate intervals during the discovery period, and with special promptness as the trial date approaches. It may be useful for any scheduling order to specify the time or times when supplementations should be made. The obligation to supplement responses to formal discovery requests applies to interrogatories, requests for production, and requests for admissions, but not ordinarily to deposition testimony. However, with respect to retained or specially employed experts, changes in the opinions expressed by the expert, whether in response to an interrogatory, an expert disclosure, or a deposition, are subject to a duty of supplemental disclosure. The obligation to supplement applies whenever a party learns that its prior disclosures or responses are in some material respect incomplete or incorrect. There is, however, no obligation to provide supplemental or corrective information that has been otherwise made known to the parties in writing or during the discovery process, as when a witness not previously disclosed is identified during the taking of a deposition or when an expert during a deposition corrects information contained in an earlier report.

M.R.C.P. 26(g) imposes an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37. In addition. Rule 26(g) is designed to curb discovery abuse by explicitly encouraging the imposition of sanctions. The subdivision provides a deterrent to both excessive discoverv and evasion bv imposing a certification requirement that obliges each attorney to stop and think about the legitimacy of a discovery request, a response thereto, or an obiection. The term “response” includes answers to interrogatories and to requests to admit as well as responses to production requests.

If primary responsibility for conducting discovery is to continue to rest with the litigants, they must be obliged to act responsibly and avoid abuse. Although the certification duty requires the lawyer to pause and consider the reasonableness of his request, response, or objection, it is not meant to discourage or restrict necessary and legitimate discovery. The rule simply requires that the attorney make a reasonable inquiry into the factual basis of his response, request, or objection.

The duty to make a “reasonable inquiry” is satisfied if the investigation undertaken by the attorney and the conclusions drawn therefrom are reasonable under the circumstances. It is an objective standard similar to the one imposed by Rule 11. In making the inquiry, the attorney may rely on assertions bv the client and on communications with other counsel in the case as long as that reliance is appropriate under the circumstances. Ultimately, what is reasonable is a matter for the court to decide on the totality of the circumstances.

M.R.C.P. 26(g) does not require the signing attorney to certify the truthfulness of the client’s factual responses to a discovery request. Rather, the signature certifies that the lawyer has made a reasonable effort to assure that the client has provided all the information and documents available to him that are responsive to the discovery demand Thus, the lawyer’s certification under M.R.C.P. 6(g) should be distinguished from the requirement that a responding party must sign interrogatory responses under oath pursuant to M.R.C.P. 33(b).

Nor does the rule require a party or an attorney to disclose privileged communications or work product in order to show that a discovery request, response, or objection is substantially justified. The signing requirement means that every discovery request, response, or objection should be grounded on a theory that is reasonable under the precedents or a good faith belief as to what should be the law. This standard is heavily dependent on the circumstances of each case. The certification speaks as of the time it is made. The duty to supplement discovery responses continues to be governed by M.R.C.P. 26(e).

The premise of Rule 26(g) is that imposing sanctions on attorneys who fail to meet the rule's standards will significantly reduce abuse by imposing disadvantages therefor. The rule mandates that sanctions be imposed on attorneys who fail to meet the standards established in the first portion of Rule 26(g). The nature of the sanction is a matter of judicial discretion to be exercised in light of the particular circumstances. The sanctioning process must comport with due process requirements. The kind of notice and hearing required will depend on the facts of the case and the severity of the sanction being considered. To prevent the proliferation of the sanction procedure and to avoid multiple hearings, discovery in any sanction proceeding normally should be permitted only when it is clearly required by the interests of justice. In most cases the court will be aware of the circumstances and only a brief hearing should be necessary.

RULE 27. DEPOSITIONS BEFORE ACTION OR PENDING APPEAL

(a) Before Action.

(1) Petition. A person who desires to perpetuate his own testimony or that of another person regarding any matter that may be cognizable in any court of this state may file a verified petition in the circuit or chancery court in the county of the residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show: (1) that the petitioner expects to be a party to an action cognizable in a court of this state but is presently unable to bring it or cause it to be brought, (2) the subject matter of the expected action and his interest therein, (3) the facts which he desires to establish by the proposed testimony and his reasons for desiring to perpetuate it, (4) the names or a description of the persons he expects will be adverse parties and their addresses so far as known, and (5) the names and addresses of the persons to be examined and the substance of the testimony which he expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

(2) Notice and Service. The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least twenty days before the date of hearing the notice shall be served in the same manner for service of summons; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided by law, an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent.

(3) Order and Examination. If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with these rules; and the court may make orders of the character provided for by Rule 34. For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

(4) Use of Deposition. If a deposition to perpetuate testimony is taken under these rules, it may be used in any action involving the same subject matter subsequently brought in a circuit, chancery or county court in accordance with Rule 32(a).

(b) Pending Appeal. If an appeal has been taken from a judgment of a court, or before the taking of an appeal if the time therefor has not expired, the court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the court. In such case the party who desires to perpetuate the testimony may make a motion in the court for leave to take the depositions, upon the same notice and service thereof as if the action were pending in the court. The motion shall show (1) the names and addresses of persons to be examined and the substance of the testimony which he expects to elicit from each; (2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may make orders of the character provided for by Rule 34, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in the court.

(c) Perpetuation by Action. This rule does not limit the power of a court to entertain an action to perpetuate testimony.

RULE 28. PERSONS BEFORE WHOM DEPOSITIONS MAY BE TAKEN

(a) Within the United States. Within the United States or within a territory or insular possession subject to the dominion of the United States, depositions shall be initiated by an oath or affirmation administered to the deponent by an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, or by a person specially appointed by the court in which the action is pending.

(b) In Foreign Countries. In a foreign country, depositions may be taken: (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (2) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of his commission to administer any necessary oath and take testimony, or (3) pursuant to a letter rogatory. A commission or a letter rogatory shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed To the Appropriate Authority in (here name the country). Evidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

(c) Disqualification for Interest. No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action.

RULE 29. STIPULATIONS REGARDING DISCOVERY PROCEDURE

Unless the court orders otherwise, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify the procedures provided by these rules for other methods of discovery, except that stipulations extending the time for any form of discovery must have court approval if extension would interfere with the time set for completing discovery, for hearing a motion, or for trial.

[Amended effective October 7, 2021.]

Advisory Committee Historical Note

Effective October 7, 2021, M.R.C.P. 29 was amended so as to authorize the parties to stipulate to extensions of time for any form of discovery without court approval unless such extension would interfere with a court-ordered discovery deadline, a hearing date, or trial.

RULE 30. DEPOSITIONS UPON ORAL EXAMINATION

(a) When Depositions May Be Taken. After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of thirty days after service of the summons upon any defendant, except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is given under subsection (b)(2) of this rule. The attendance of witnesses may be compelled by subpoena. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(b) Notice of Examination: General Requirements; Special Notice; Non-Stenographic Recording; Production of Documents and Things; Deposition of Organization.

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice. A notice may provide for the taking of testimony by telephone. If necessary, however, to assure a full right of examination of any deponent, the court in which the action is pending may, on motion of any party, require that the deposition be taken in the presence of the deponent.

(2) Leave of court is not required for the taking of a deposition by plaintiff if the notice: (A) states that the person to be examined is about to go out of the state and will be unavailable for examination unless his deposition is taken before expiration of the thirty-day period, and (B) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and his signature constitutes a certification by him that to the best of his knowledge, information, and belief the statement and supporting facts are true.

If a party shows that when he was served with notice under this subsection (b)(2) he was unable through the exercise of diligence to obtain counsel to represent him at the taking of the deposition, the deposition may not be used against him.

(3) The court may for cause shown enlarge or shorten the time for taking the deposition.

(4) The notice of deposition required under (1) of this subsection (b) may provide that the testimony be recorded by other than stenographic means, in which event the notice shall designate the manner of recording and preserving the deposition. A court may require that the deposition be taken by stenographic means if necessary to assure that the recording be accurate. A motion by a party for such an order shall be addressed to the court in which the action in pending; a motion by a witness for such an order may be addressed to the court in the district where the deposition is taken.

(5) The notice to a party deponent may be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 34 shall apply to the request.

(6) A party may in his notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subsection (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

(7) For purposes of this Rule, and Rules 28(a), 37(a)(1), 37(b)(1), and 45(b), a deposition shall be deemed to be taken in the county where the deponent is physically present to answer questions propounded to him.

(c) Examination and Cross-Examination; Record of Examination; Objections. Examination and cross-examination of witnesses may proceed as permitted at the trial. The testimony of the witness shall be recorded either stenographically or as provided in subsection (b)(4) of this rule. If requested by one of the parties, the testimony shall be transcribed upon the payment of the reasonable charges therefor. All objections made at the time of the examination to the qualifications of the person taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted upon the transcription or recording. Evidence objected to shall be taken subject to the objections. An objection must be stated concisely and in a nonargumentative and nonsuggestive manner. A person may instruct a

deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion to limit or terminate the deposition under M.R.C.P. 30(d). In lieu of participating in the oral examination, parties may serve written questions on the party taking the deposition, who shall propound them to the witness and *See* that the answers thereto are recorded verbatim.

(d) Motion to Terminate or Limit Examination. At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending may order the officer conducting the examination to cease forthwith from taking the deposition or may limit the scope and manner of the taking of the deposition as provided in Rule 26(d). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. Rule 37(a)(4) applies to the award of expenses incurred in relation to the motion.

(e) Submission to Witness; Changes; Signing. When the testimony is taken by stenographic means, or is recorded by other than stenographic means as provided in subsection (b)(4) of this rule, and if the transcription or recording thereof is to be used at any proceeding in the action, such transcription or recording shall be submitted to the witness for examination, unless such examination is waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the transcription or stated in a writing to accompany the recording, together with a statement of the reasons given by the witness for making them. Notice of such changes and reasons shall promptly be served upon all parties by the party taking the deposition. The transcription or recording shall then be affirmed in writing as correct by the witness, unless the parties by stipulation waive the affirmation. If the transcription or recording is not affirmed as correct by the witness within thirty days of its submission to him, the reasons for the refusal shall be stated under penalty of perjury on the transcription or in a writing to accompany the recording by the party desiring to use such transcription or recording. The transcription or recording may then be used fully as though affirmed in writing by the witness, unless on a motion to suppress under Rule 32(d)(4) the court holds that the reasons given for the refusal to affirm require rejection of the deposition in whole or in part.

(f) Certification; Exhibits; Copies; Notice of Filing.

(1) When a deposition is stenographically taken, the stenographic reporter shall certify, under penalty of perjury, on the transcript that the witness was sworn in his presence and that the transcript is a true record of the testimony given by the witness. When a deposition is recorded by other than stenographic means as provided in subsection 30(b)(4) of this Rule, and thereafter transcribed, the person transcribing it shall certify, under penalty of perjury, on the transcript that he heard the witness sworn on the recording and that the transcript is a correct writing of the recording. A deposition so certified shall be considered prima facie evidence of the testimony of the witness.

(2) Documents and things produced for inspection during the examination of the witness, shall, upon the request of a party, be marked for identification and annexed to the deposition, and may be inspected and copied by any party. Whenever the person producing materials desires to retain the originals, he may substitute copies of the originals, or afford each party an opportunity to make copies thereof. In the event the original materials are retained by the person producing them, they shall be marked for identification and the person producing them shall afford each party the subsequent opportunity to compare any copy with the original. He shall also be required to retain the original materials for subsequent use in any proceeding in the same action. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

(3) Upon payment of reasonable charges therefor, the stenographic reporter, or in the case of a deposition taken pursuant to subsection 30(b)(4) of this rule, the party taking the deposition shall furnish a copy of the deposition to any party or to the deponent.

(4) If all or part of the deposition is filed with the court, the party making the filing shall give prompt notice thereof to all other parties.

(g) Failure to Attend or to Serve Subpoena; Expenses.

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other

party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

(h) Expenses Generally Not Treated as Court Costs. No part of the expenses of taking depositions, other than the serving of subpoenas, shall be adjudged, assessed or taxed as court costs.

[Amended effective March 1, 1989; July 1, 1997; October 7, 2021.]

Advisory Committee Historical Note

Effective July 1, 1997, Rule 30(b)(7) was amended to correct the reference to Rule 45. 689-692 So. 2d XLIX (West Miss. Cas. 1997).

Effective March 1, 1989, Rule 30 was amended to abrogate the requirement that the party taking a deposition out of state pay certain expenses of the other party incident thereto. 536-538 So. 2d XXV (West Miss. Cas. 1989).

Effective October 7, 2021, M.R.C.P. 30(c) was amended to require that obiections be stated concisely and non-argumentatively and to specify the limited instances in which a deponent may be instructed not to answer a question.

[Amended effective July 1, 1997; October 7, 2021.]

RULE 31. DEPOSITIONS UPON WRITTEN QUESTIONS

(a) Serving Questions; Notice. After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon written questions. The attendance of witnesses may be compelled by the use of subpoena as provided by law. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating (1) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs, and (2) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with Rule 30(b)(6).

Within thirty days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within ten days after being served with cross questions, a party may serve redirect questions upon all other parties. Within ten days after being served with redirect questions, a party may serve recross questions upon all other parties. The court may for cause shown enlarge or shorten the time.

(b) Officer to Take Responses and Prepare Record. A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 30(c), (e), and (f), to take the testimony of the witness in response to the questions and to prepare, certify, and file or mail the deposition, attaching, thereto the copy of the notice and the questions received by him.

RULE 32. USE OF DEPOSITIONS IN COURT PROCEEDINGS

(a) Use of Depositions. At the trial or upon the hearing of a motion of an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness, or for any other purpose permitted by the Mississippi Rules of Evidence.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party, may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (A) that the witness is dead; or (B) that the witness is at a greater distance than one hundred miles from the place of trial or hearing, or is out of the state, unless it appears that the absence of the witness was procured by the party offering the deposition; or (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (E) that the witness is a medical doctor or (F) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be so used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

Substitution of parties does not affect the right to use depositions previously taken; and, when an action in any court has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor. A deposition previously taken may also be used as permitted by the Mississippi Rules of Evidence.

(b) Objections to Admissibility. Subject to the provisions of Rule 28(b) and subsection (d)(3) of this rule, objection may be made at the trial or hearing to receive in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

[Amended effective October 21, 1999.]

(c) [Abrogated].

(d) Effect of Errors and Irregularities in Depositions.

(1) As to Notice. All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(2) As to Disqualification of Officer. Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) As to Taking of Deposition.

(A) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of the parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereof is made at the taking of the deposition.

(C) Objections to the form of written questions submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within five days after service of the last questions authorized.

(4) As to Completion and Return of Deposition. Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified,

sealed, endorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

[Amended effective January 10, 1986; March 1, 1989.]

Advisory Committee Historical Note

Effective March 1, 1989, Rule 32 was amended by providing that the deposition of a medical doctor may be used by any party for any purpose. 536-538 So. 2d XXV (West Miss. Cas. 1989).

Effective January 10, 1986, Rule 32 was amended by deleting references to the Mississippi Rules of Evidence; and Rule 32(c) [Effect of Taking or Using Depositions] was abrogated. 478-481 So. 2d XXIII (West Miss. Cas. 1986).

Advisory Committee Notes

M.R.E. 801(d)(1)(A) defines a prior inconsistent statement given under oath as non-hearsay. M.R.E. 801(d)(1)(A) applies when a witness testifies at trial in a manner that is inconsistent with a previous sworn statement. The previous sworn statement, which may have been made during a deposition, is non-hearsay, and is admissible at trial, assuming no other evidentiary rule bars its introduction. *See Craft v. State,* 656 So. 2d 1156, 1164 (Miss. 1995).

M.R.E. 804(b)(1) permits the introduction of deposition testimony by a witness who is unavailable at trial. Though the deposition of the unavailable witness need not have been taken in the same proceeding as that in which it is offered, the party against whom the deposition testimony is being offered, must have had an opportunity and similar motive to develop the testimony. *See Naylor v. State,* 759 So. 2d 406, 410-11 (Miss. 2000).

If a deposition is offered into evidence at trial, the offering party's attorney is responsible for providing the court with a written transcript of the deposition. In addition, if an audio or video recording of the deposition is played for the jury at trial, the offering party must also provide the court with a true and correct copy of such audio or video recording. If the entire deposition is not admitted into evidence, the attorneys for both parties should ensure that the court reporter is given an accurate record indicating the specific portions of the deposition that are introduced into evidence at trial. Such record should refer to the page and line numbers of the written transcript of the deposition. In addition, the attorneys for both

parties should ensure that the court reporter complies with M.R.A.P. Appendix III, governing the manner in which trial transcripts are to be prepared and filed.

A deposition admissible pursuant to M.R.C.P. 32 does not have to meet the requirements for admissibility pursuant to M.R.E. 804.

[Advisory Committee Note adopted effective July 1, 2014; amended effective January 16, 2020.]

RULE 33. INTERROGATORIES TO PARTIES

(a) Availability; Procedures for Use. Any party may serve as a matter of right upon any other party written interrogatories not to exceed thirty in number to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Each interrogatory shall consist of a single question. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. Leave of court, to be granted upon a showing of necessity, shall be required to serve in excess of thirty interrogatories.

(b) Answers and Objections

(1) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for the objection and shall answer to the extent the interrogatory is not objectionable.

(2) The answers are to be signed by the person making them, and the objections signed by the attorney making them.

(3) The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within thirty days after the service of the interrogatories, except that a defendant may serve answers or objections within forty-five days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time.

(4) All grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown.

(5) The party submitting the interrogatories may move for an order under Rule 37 (a) with respect to any objection to or other failure to answer an interrogatory.

(c) Scope; Use at Trial. Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the extent permitted by the rules of evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the

application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time.

(d) Option to Produce Business Records. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit, or inspection of such business records, or from a compilation, abstract, or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could and to afford to the party serving the interrogatory reasonable opportunity to examine, audit, or inspect such records and to make copies, compilations, abstracts, or summaries. The specification provided shall include sufficient detail to permit the interrogating party to identify readily the individual documents from which the answer may be ascertained.

[Amended effective April 13, 2000; October 11, 2021.]

Advisory Committee Historical Note

Effective April 13, 2000, Rule 33 was amended to require parties to produce all nonobjectionable information and to clearly state the ground for objection to each interrogatory. 753-754 So. 2d XVII (West Miss.Cas. 2000).

Effective October 11, 2021, Rule 33(d) was amended to require a party who chooses to respond to an interrogatory by producing business records to specify the records from which each response may be ascertained in sufficient detail so that the requesting party may locate and identify the records as readily as the responding party could.

Advisory Committee Notes

The thirty interrogatories permitted as a matter of right are to be computed by counting each distinct question as one of the thirty, even if labeled a sub-part, subsection, threshold question, or the like. In areas well suited to non-abusive exploration by interrogatory, such as inquiries into the names and locations of witnesses, or the existence, location, and custodians of documents or physical evidence, greater leniency may be appropriate in construing several questions as one interrogatory.

Rule 33(b)(4) requires that the grounds for any objection be stated with specificity. "'General objections' applicable to each and every interrogatory…are clearly outside the bounds of this rule." *See Ford Motor Co. v. Tennin*, 960 So. 2d 379 (Miss. 2007). If an interrogatory is only partially objectionable, the responding party shall clearly indicate the extent to which the interrogatory is objectionable and the basis for the partial objection. The responding party must also fully respond to the extent the interrogatory is not objectionable. If, for example, an interrogatory seeking information about 30 facilities is deemed objectionable, but an interrogatory seeking information about 10 facilities would not have been objectionable, the interrogatory should be answered with respect to the 10 facilities, and the grounds for the objection to providing the information with respect to the remaining facilities should be stated specifically.

RULE 34. PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES

(a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents or electronically stored information (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably useable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody, or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26 (b).

(b) Procedure.

(i) *Requests*. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The request may specify the form or forms in which electronically stored information is to be produced.

(ii) *Responses and Objections*.

(A) *Time to Respond*. The party upon whom the request is served shall serve a written response within thirty days after the service of the request, except that a defendant may serve a response within forty-five days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time.

(B) *Responding to Each Item*. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the grounds for objection shall be stated with specificity, including the reasons. The responding party may state that it will produce copies of documents or of electronically

stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.

(C) *Objections*. An objection must state whether any responsive materials are being withheld on the basis of the objection. An objection to a part of a request must specify the part and permit inspection of the rest.

(D) *Responding to a Request for Production of Electronically Stored Information*. The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form - or if no form was specified in the request - the responding party must state the form or forms it intends to use. Pursuant to Rule 26(b)(5), a responding party may also object to production of electronically stored information that is not reasonably accessible because of undue burden or cost.

(E) *Producing the Documents or Electronically Stored Information*. When producing documents, the producing party shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request that call for their production. If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms. A party need not produce the same electronically stored information in more than one form.

(F) *Motion to Compel*. The party submitting the request may move for an order to compel discovery under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

(c) Persons Not Parties. As provided in Rule 45, a party may compel a nonparty to produce documents and tangible things or to permit inspection.

[Amended effective July 1, 2013, to address production of electronically stored information; amended effective October 7, 2021.]

Advisory Committee Historical Note

Effective July 1, 2013, MRCP 34 was amended to specifically authorize a party to request any other party to produce electronically stored information. The amendment

established the procedure for requesting production of electronically stored information and the procedure for objecting to such a request.

Effective October 7, 2021, M.R.C.P. 34 was amended. M.R.C.P. 34(b) was subdivided and captions were added. In addition, the amendment requires an objecting party to state the objection with specificity, including the reasons for the objection, and to indicate whether any materials are being withheld based upon the objection. M.R.C.P. 34(c) was amended to include a reference to M.R.C.P. 45.

RULE 35. PHYSICAL AND MENTAL EXAMINATION OF PERSONS

(a) Order for Examination.

When the mental or physical condition (including the blood group) of a party or of a person in the custody or under the legal control of a party is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made. A party or person may not be required to travel an unreasonable distance for an examination. The party requesting the examination shall pay the examiner and shall advance all necessary expenses to be incurred by the party or person in complying with the order.

(b) Report of Examiner.

(1) If requested by the party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to the requesting party a copy of the detailed written report of the examiner setting out the examiner's findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition unless, in the case of a report of examination of a person not a party, the party shows that the party is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if an examiner fails or refuses to make a report the court may exclude the examiner's testimony if offered at trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege the party may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine the party in respect of the same mental or physical condition.

(3) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examiner or the taking of a deposition of the examiner in accordance with

the provisions of any other rule.

(c) Limited Applicability to Actions Under Title 93 of the Mississippi Code of 1972. This rule does not apply to actions under Title 93 of the Mississippi Code of 1972, except in the discretion of the Chancery Judge.

[Adopted effective January 16, 2003.]

Advisory Committee Historical Note

Effective January 16, 2003, Rule 35 was adopted to allow a court to order a physical or mental examination of a person for good cause on motion. ___ So.2d ____ (West Miss. Cases ___).

RULE 36. REQUESTS FOR ADMISSION

(a) Request for Admission. A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons upon that party.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within thirty days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of forty-five days after service of the summons upon him. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to Rule 37(c), deny the matter or set forth reasons why he cannot admit or deny it.

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this section, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pre-trial conference or at a designated time prior to trial. Rule 37(a)(4) applies to the award of expenses incurred in relation to the motion.

(b) Effect of Admission. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission.

Subject to the provisions governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.

Advisory Committee Notes

The purpose of Rule 36 is to identify and establish facts that are not in dispute. *DeBlanc v. Stancil,* 814 So. 2d 796, 802 (Miss. 2002). "[T]he requests must be reasonable and must be unambiguous. A request is ambiguous if the request is subject to more than one reasonable interpretation. The purpose of requests for admissions is to narrow and define issues for trial." *See Haley v. Harbin,* 933 So. 2d 261, 262-63 (Miss. 2005). "Requests for admissions 'should not be of such great number and broad scope as to cover all the issues [even] of a complex case, and [o]bviously…should not be sought in an attempt to harass an opposing party.'" *See Haley,* 933 So. 2d at 263.

Rule 36 will be enforced according to its terms; matters admitted or deemed admitted upon the responding party's failure to timely respond are conclusively established unless the court, within its discretion, grants a motion to amend or withdraw the admission. "Any admission that is not amended or withdrawn cannot be rebutted by contrary testimony or ignored by the court even if the party against whom it is directed offers more credible evidence." *DeBlanc*, 814 So. 2d at 801 (citing 7 James W. Moore, et al., Moore's Federal Practice ¶36.03[2], at 36 (3d ed. 2001)). However, in the matter of child custody, the trial court may, as justice requires, allow the withdrawal of the issue admitted. *Gilcrease v. Gilcrease,* 918 So. 2d 854 (Miss. Ct. App. 2005).

The rule sets out a two-pronged test that trial courts may use when determining whether to grant a motion to withdraw or amend an admission. Courts may consider whether "presentation of the merits…will be subserved [by amendment or withdrawal] and whether the party who obtained the admission has satisfied the court that withdrawal or amendment would prejudice him or her…. [A] trial court 'may,' but is not required to, consider the two-pronged test in denying a motion to withdraw or amend." *See Young v. Smith,* 67 So. 3d 732, 740 (Miss. 2011).

Generally, a party has no knowledge concerning the authenticity or admissibility of the opposing party's medical records and, therefore, has no obligation to admit the authenticity or admissibility of such documents absent proper authentication of such records

in accordance with M.R.E. 901 or 902 and proper demonstration that such records are records of regularly conducted activity pursuant to M.R.E. 803(6). *See Rhoda v. Weathers,* 87 So. 3d 1036 (Miss. 2012).

RULE 37. FAILURE TO MAKE OR COOPERATE IN DISCOVERY: SANCTIONS

(a) Motion for Order Compelling Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make discovery in an effort to obtain it without court action.

(1) Appropriate Court. An application for an order may be made to the court in which the action is pending.

(2) Motion. If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rules 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(d).

(3) Evasive or Incomplete Answer. For purposes of this section, an evasive or incomplete answer is to be treated as a failure to answer.

(4) Award of Expenses of Motion. If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the movant filed the motion before attempting in good faith to obtain the discovery without court action, the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion,

including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expense unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to Comply With Order.

(1) Sanctions by Court. If a deponent fails to be sworn or to answer a question after being directed to do so by the court, the failure may be considered a contempt of court.

(2) Sanctions by Court in Which Action Is Pending.

(A) *For Not Obeying a Discovery Order*. If a party or an officer, director, or managing agent of a party or a person designated under Rules 30(b)(6) or 31(a) to testify in behalf of a party fails to obey an order to provide or permit discovery, including an order made under subsection (a) of this rule, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(i) an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(ii) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(iii) an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(iv) in lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders.

(B) *For Not Producing a Person for Examination*. If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for examination, the court may issue any of the orders listed in Rule 37(b)(2)(A)(i)-(iii), unless the disobedient party shows that it cannot produce the other person.

(C) *Payment of Expenses*. In lieu of any of the foregoing orders or in addition, thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) Expenses on Failure to Admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable under Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rules 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subsections (b)(2)(A)(i), (ii), or (iii) of this rule. A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subsection may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order under Rule 26(d).

(e) Additional Sanctions. In addition to the application of those sanctions, specified in Rule 26(d) and other provisions of this rule, the court may impose upon any party or counsel such sanctions as may be just, including the payment of reasonable expenses and

attorneys' fees, if any party or counsel (i) fails without good cause to cooperate in the framing of an appropriate discovery plan by agreement under Rule 26(c), or (ii) otherwise abuses the discovery process in seeking, making or resisting discovery.

[Amended effective February 20, 2023.]

Advisory Committee Historical Note

Effective February 20, 2023, M.R.C.P. 37 was amended so as to require a party to confer in good faith with the opposing party before moving to compel. In addition, the amendment specifies the sanctions for failing to produce a person for examination pursuant to Rule 35.

CHAPTER VI. TRIALS

RULE 38. JURY TRIAL OF RIGHT

(a) Right Preserved. The right of trial by jury as declared by the Constitution or any statute of the State of Mississippi shall be preserved to the parties inviolate.

(b) Waiver of Jury Trial. Parties to an action may waive their rights to a jury trial by filing with the court a specific, written stipulation that the right has been waived and requesting that the action be tried by the court. The court may, in its discretion, require that the action be tried by a jury notwithstanding the stipulation of waiver.

RULE 39. TRIAL BY JURY OR BY THE COURT [OMITTED]

RULE 40. ASSIGNMENT OF CASES FOR TRIAL

(a) Methods. Courts shall provide for placing of actions upon the trial calendar

(1) without request of the parties; or

(2) upon request of a party and notice to the other parties; or,

(3) in such other manner as the court deems expedient.

Prior to the calling of a case for trial, the parties shall be afforded ample opportunity, in the sound discretion of the court, for completion of discovery.

(b) Notice. The court shall provide by written direction to the clerk when a trial docket will be set. The clerk shall at least five (5) days prior to the date on which the trial docket will be set notify all attorneys and parties without attorneys having cases upon the trial calendar of the time, place, and date when said docket shall be set. All cases shall be set on the trial docket at least twenty (20) days before the date set for trial unless a shorter period is agreed upon by all parties or is available under Rule 55. The trial docket shall be prepared by the clerk at the time actions are set for trial and shall state the case to be tried, the date of trial, the attorneys of record in the case, and the place of trial. Additionally, said trial docket shall reflect such attorneys of record and parties representing themselves as were present personally or by designee when the trial docket was set. The clerk shall within three (3) days after a case has been placed on the trial docket notify all parties who were not present personally or by their attorney of record at the docket setting as to their trial setting. Notice shall be by personal delivery or by mailing of a notice within said three (3) day period. Matters in which a defendant is summoned to appear and defend at a time and place certain pursuant to Rule 81 or in which a date, time and place for trial have been previously set shall not be governed by this rule.

(c) Trial by Agreement. Parties, including those who are in a representative or fiduciary capacity, may waive any waiting period imposed by these rules or statute and agree to a time and place for trial.

[Amended effective July 1, 1986; September 1, 1987; March 1, 1989.]

Advisory Committee Historical Note

Effective March 1, 1989, Rule 40(a) was amended by abrogating reference to local rules. 536-538 So. 2d XXX (West Miss. Cas. 1989).

Effective September 1, 1987, Rule 40 was amended by adding subsection (c) providing for the scheduling of trials by agreement of the parties. 508-511 So. 2d XXVIII (West Miss. Cas. 1987).

Effective July 1, 1986, Rule 40(b) was amended by substantially rewriting it to shorten the time period provided for giving interested attorneys and parties notice of the setting of the trial docket; to provide for at least twenty days between the time of the setting of a case on the docket and the time of the trial; to provide for certain information to be recorded on the docket; and for other purposes. 486-490 So. 2d XXI (West Miss. Cas. 1986).

Advisory Committee Notes

The twenty-day waiting period is inapplicable to hearings conducted by the court in connection with default judgments under Rule 55.

RULE 41. DISMISSAL OF ACTIONS

(a) Voluntary Dismissal Effect Thereof.

(1) By Plaintiff By Stipulation. Subject to the provisions of Rule 66, or of any statute of the State of Mississippi, and upon the payment of all costs, an action may be dismissed by the plaintiff without order of court:

(i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs; or

(ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action.

Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice.

(2) By Order of Court. Except as provided in paragraph (a)(1) of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counter-claim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action may be dismissed but the counter-claim shall remain pending for adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court may then render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court may make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any other dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

(c) Dismissal of Counter-claim, Cross-Claim or Third-Party Claim. The provisions of this rule apply to the dismissal of any counter-claim, cross-claim, or third-party

claim. A voluntary dismissal by the claimant alone pursuant to paragraph (a)(1) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) Dismissal on Clerk's Motion.

(1) Notice. In all civil actions wherein there has been no action of record during the preceding twelve months, the clerk of the court shall mail notice to the attorneys of record that such case will be dismissed by the court for want of prosecution unless within thirty days following said mailing, action of record is taken or an application in writing is made to the court and good cause shown why it should be continued as a pending case. If action of record is not taken or good cause is not shown, the court shall dismiss each such case without prejudice. The cost of filing such order of dismissal with the clerk shall not be assessed against either party.

(2) Mailing Notice. The notice shall be mailed in every eligible case not later than thirty days before June 15 and December 15 of each year, and all such cases shall be presented to the court by the clerk for action therein on or before June 30 and December 31 of each year. These deadlines shall not be interpreted as a prohibition against mailing of notice and dismissal thereon as cases may become eligible for dismissal under this rule. This rule is not a limitation upon any other power that the court may have to dismiss any action upon motion or otherwise.

(e) Cost of Previously Dismissed Action. If a plaintiff whose action has once been dismissed in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

Advisory Committee Notes

After the court clerk has given notice pursuant to Rule 41(d), a party seeking to avoid dismissal for lack of prosecution must either take some "action of record" or apply in writing to the court and demonstrate good cause for continuing the case. Rule 41(d) does not define what constitutes "an action of record." *See Ill. Central R.R. Co. v. Moore,* 99 So. 2d 723, 726 (Miss. 2008). Pleadings, discovery requests, and deposition notices are "actions of record." *Id.* at 728. An *ex parte* letter to the court clerk simply requesting that the case remain on the court's active docket is not an application in writing that demonstrates good cause. *Id.* at 729-730. Rather than writing a letter to the clerk, a party should file a written motion with the court that complies with Rule 7(b)(1) and that demonstrates good cause, and should serve

such motion in accordance with M.R.C.P. 5. *Id.* at 727-730. *But see Cucos, Inc. v. McDaniel,* 938 So. 2d 238, 247 (Miss. 2006) (finding that the trial court did not abuse its discretion in considering the plaintiff's attorney's letter to the clerk requesting that the case remain on the court's active docket as sufficient to prevent dismissal where:…(i) the court held a hearing and the plaintiff's lawyer also represented he was trying to schedule conferences so that defense counsel could talk to plaintiff's expert witnesses in an effort to facilitate settlement; (ii) local practice was to treat such letters as sufficient; and (iii) the plaintiff was not served with a proper copy of the order of dismissal). Generally, compliance with local practice that is inconsistent with the Mississippi Rules of Civil Procedure will not, standing alone, be sufficient to prevent dismissal. *See Ill. Central R.R. Co. v. Moore,* 994 So. 2d 723, 728 (Miss. 2008).

RULE 42. CONSOLIDATION: SEPARATE TRIALS

(a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(b) Separate Trial. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counter-claim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counter-claims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by Section 31 of the Mississippi Constitution of 1890.

(c) Counties Within a Single Circuit or Chancery Court District. When civil actions involving common questions of fact or law are pending in different counties of a single Circuit or Chancery Court district, such actions may be consolidated for coordinated or consolidated pretrial proceedings and, if the actions do not involve trials by jury, may be consolidated for all purposes. All judges presiding over the cases to be consolidated must agree to the consolidation and to the judge who will preside over the cases for the purposes stated herein. For the purposes of this rule, "pretrial proceedings" means all matters presented to the judge prior to trial except dispositive motions.

[Amended February 20, 2004 to correct scrivener's error; amended effective September 25, 2014.]

RULE 43. TAKING OF TESTIMONY

(a) Form and Admissibility. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules or the Mississippi Rules of Evidence.

(b) Affirmation in Lieu of Oath. Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.

(c) Evidence on Motions. When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.

(d) Interpreters. The court may appoint an interpreter of its own selection and may assess reasonable compensation. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct and may be taxed ultimately as costs, in the discretion of the court. However, in the event and to the extent that such interpreters are required to be provided under the provisions of the Americans with Disabilities Act, 42 U.S. C. § 12131, *et seq.* or under rules or regulations promulgated pursuant thereto, such compensation and other costs of compliance shall be paid by the county in which the court sits, and shall not be taxed as costs.

[Amended effective January 10, 1986; amended June 5, 1997; amended effective July 1, 2020.]

Advisory Committee Historical Note

Effective July 1, 2020, Rule 43 was amended to re-designate former Rule 43(d) [Affirmation in Lieu of Oath] as Rule 43(b); to re-designate former Rule 43(e) [Evidence on Motions] as Rule 43(c); and to re-designate former Rule 43(f) [Interpreters] as Rule 43(d).

Effective July 1, 1998, Rule 43(f) [Interpreters] was amended in regard to compliance with the Americans with Disabilities Act, 42 U.S.C. § 12131, et seq.

Effective January 10, 1986, Rule 43(a) was amended to provide that testimony may be taken other than in open court, as provided by the Mississippi Rules of Evidence, and to delete references to the admissibility of evidence; Rule 43(b) [Mode and Order of Interrogation], and Rule 43(c) [Record of Excluded Evidence] were abrogated. 478-481 So. 2d XXVII (West Miss. Cas. 1986).

Advisory Committee Notes

The admission of telephonic testimony in lieu of a personal appearance in open court by the witness is within the sound discretion of the trial court. *See Byrd v. Nix,* 548 So. 2d 1317 (Miss. 1989) (interpreting M.R.C.P. 43(a) and M.R.E. 611(a)).

RULE 44. PROOF OF DOCUMENTS

(a) Authentication.

(1) *Domestic*. An official record kept within the United States or any state, district, commonwealth, territory, or insular possession thereof, or within the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by a person purporting to be the officer having the legal custody of the record, or his deputy. If the official record is kept outside the State of Mississippi, the copy shall be accompanied by a certificate under oath of such person that he is the legal custodian of such record and that the record is kept pursuant to state law.

(2) *Foreign*. A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof, or a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the attesting person or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation. A final certification may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (i) admit an attested copy without final certification or (ii) permit the foreign official record to be evidenced by an attested summary with or without a final certification.

(b) Lack of Record. A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in subdivision (a)(1) of this rule in the case of a domestic record, or complying with the requirements of subdivision (a)(2) of this rule for a summary in the case of a foreign record, is admissible as evidence that the records contain no such record or entry.

(c) This rule does not prevent the proof of official records or of entry or lack of entry therein by any other method authorized by law.

Advisory Committee Notes

Even though a document has been authenticated as required by this rule, it may still be excluded from evidence if, for example, it is irrelevant, or is hearsay, or is otherwise

objectionable. For additional evidentiary rules concerning authentication, see M.R.E. 901-903.

The methods of authentication authorized by Rule 44 are additional and supplementary; they are not exclusive of other methods made available by Mississippi law. A party desiring to introduce an official record in evidence has the option of proceeding under Rule 44 or under any other applicable provision of law.

Rule 44(a)(1) deals with two types of official documents; those kept within the state and those kept without the state. A copy of the document need only be attested in the former case, certified under oath in the latter.

RULE 44.1 DETERMINATION OF FOREIGN LAW [OMITTED]

Advisory Committee Notes

Mississippi Code Annotated §13-1-149 (1972) provides that courts shall take judicial notice of all foreign law.

RULE 45. SUBPOENA

(a) Form; Issuance.

(1) Every subpoena shall:

(A) state the name of the court from which it was issued;

(B) state the title of the action;

(C) command each person to whom it is directed to attend and give testimony, or to produce and permit inspection and copying of designated books, documents, electronically stored information, or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified;

(D) set forth the text of subdivisions (d) and (e) of this rule; and

(E) include a certificate of service.

A command to produce or to permit inspection may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(2) Subpoenas for attendance at a trial or hearing, for attendance at a deposition, and for production or inspection shall issue from the court in which the action is pending.

(3) In the case of discovery to be taken in foreign litigation, the subpoena shall be issued by a clerk of a court for the county in which the discovery is to be taken. The foreign subpoena shall be submitted to the clerk of court in the county in which discovery is sought to be conducted in this state. When a party submits a foreign subpoena to a clerk of court in this state, the clerk, in accordance with that court's procedure, shall promptly issue a subpoena for service upon the person to which the foreign subpoena is directed.

The subpoena under subsection (3) must incorporate the terms used in the foreign subpoena and it must contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and any party not represented by counsel.

A subpoena issued by a clerk of court under subsection (3) must otherwise be issued and served in compliance with the rules of this state. An application to the court for a protective order or to enforce, quash or modify a subpoena issued by a clerk of court under subsection (3) must comply with the rules of this state and be submitted to the issuing court in the county in which discovery is to be conducted.

(4) The clerk shall issue a subpoena signed and sealed but otherwise in blank, to a party requesting it, who shall fill it in before service. An attorney, as an officer of the court, may also issue and sign a subpoena in any action pending in a court of this State if the attorney is: (i) admitted to practice in this State or has been admitted *pro hac vice* in the pending action; and is (ii) counsel of record in the pending action. A subpoena issued by an attorney as the officer of the court shall include the attorney's name, address, email address and phone number and shall indicate whether the attorney represents the plaintiff, defendant or third-party defendant.

(5) Once a subpoena has been issued and filled out, a copy of such subpoena shall be immediately served upon each party in accordance with M.R.C.P. 5, even though the subpoena itself has not yet been served.

(b) Place of Examination. A resident of the State of Mississippi may be required to attend a deposition, production or inspection only in the county wherein he resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of the court. A non-resident of this state subpoenaed within this state may be required to attend only in the county wherein he is served, or at such other convenient place as is fixed by an order of the court.

(c) Service.

(1) A subpoena may be served by a sheriff, or by his deputy, or by any other person who is not a party and is not less than 18 years of age, and his return endorsed thereon shall be prima facie proof of service, or the person served may acknowledge service in writing on the subpoena. Service of the subpoena shall be executed upon the witness personally. Except when excused by the court upon a showing of indigence, the party causing the subpoena to issue shall tender to a non-party witness at the time of service the fee for one day's attendance plus mileage allowed by law. When the subpoena is issued on behalf of the State of Mississippi or an officer or agency thereof, fees and mileage need not be tendered in advance.

(2) Proof of service shall be promptly made by filing with the clerk of the court from which the subpoena was issued a statement, certified by the person who made the service,

setting forth the date and manner of service, the county in which it was served, the names of the persons served, and the name, address and telephone number of the person making the service. A copy of such proof of service shall be immediately served upon all parties in accordance with M.R.C.P. 5.

(d) Protection of Persons Subject to Subpoenas.

(1) In General.

(A) On timely motion, the court from which a subpoena was issued shall quash or modify the subpoena if it (i) fails to allow reasonable time for compliance; (ii) requires disclosure of privileged or other protected matter and no exception or waiver applies, (iii) designates an improper place for examination, or (iv) subjects a person to undue burden or expense.

(B) If a subpoena (i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or (ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, the court may order appearance or production only upon specified conditions.

(2) Subpoenas for Production or Inspection.

(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents, electronically stored information, or tangible things, or to permit inspection of premises need not appear in person at the place of production or inspection unless commanded by the subpoena to appear for deposition, hearing or trial. Unless for good cause shown the court shortens the time, a subpoena for production or inspection shall allow not less than ten days for the person upon whom it is served to comply with the subpoena. Absent order of the court, production or inspection shall not be made until the tenth day after the date of service of the subpoena on the recipient and this shall be conspicuously noted on the face of the subpoena. A subpoena commanding production or inspection will be subject to the provisions of Rule 26(d).

(B) The person to whom the subpoena is directed may, within ten days after the service thereof or on or before the time specified in the subpoena for compliance, if such time is less than ten days after service, serve upon the party serving the subpoena written objection to inspection or copying of any or all of the designated materials, or to inspection of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the material except pursuant to an order of the court from which the

subpoena was issued. The party serving the subpoena may, if objection has been made, move at any time upon notice to the person served for an order to compel the production or inspection.

(C) The court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (I) quash or modify the subpoena if it is unreasonable or oppressive, or (ii) condition the denial of the motion upon the advance by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

(e) Duties in Responding to Subpoena.

(1) Producing Documents or Electronically Stored Information.

(A) Documents.

A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(B) Form for Producing Electronically Stored Information Not Specified.

If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) Electronically Stored Information Produced in Only One Form.

The person responding need not produce the same electronically stored information in more than one form.

(D) Inaccessible Electronically Stored Information.

The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery, motion for a protective order, or motion to quash, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(5). The court may specify conditions for the discovery, including those listed in Rule 26(b)(5).

(2) Claiming Privilege or Protection.

(A) Information Withheld.

When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(B) Information Produced.

If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(f) Sanctions. On motion of a party or of the person upon whom a subpoena for the production of books, papers, documents, electronically stored information, or tangible things is served and upon a showing that the subpoena power is being exercised in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the party or the person upon whom the subpoena is served, the court in which the action is pending shall order that the subpoena be quashed and may enter such further orders as justice may require to curb abuses of the powers granted under this rule. To this end, the court may impose an appropriate sanction**.**

(g) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued.

[Amended effective March 13, 1991; July 1, 1997; July 1, 1998; amended effective July 1, 2009 to provide a procedure for foreign subpoenas. This provision shall take effect and be in force from and after July 1, 2009, and applies to requests for discovery in cases pending on July 1, 2009; amended effective July 1, 2013 to authorize a subpoena for electronically stored information; amended effective February 22, 2023, to authorize attorneys to issue subpoenas, to require immediate service of the subpoena upon parties once it has been filled

out, and to prohibit production and inspection until the tenth day after service of the subpoena on the recipient.]

Advisory Committee Historical Note

Effective March 13, 1991, Rule 45(c) was amended to require the party causing a subpoena to issue to tender to a non-party witness the fee for one day's attendance plus mileage allowed by law. Rule 45(e) was amended by deleting the provision for tendering the fee for one day's attendance plus the mileage allowed by law to certain witnesses when subpoenaed. Rule 45(d) was amended to provide that when a deposition is to be taken on foreign litigation the subpoena shall be issued by the clerk for the county in which the deposition is to be taken. 574-576 So. 2d XXIV-XXV (West Miss. Cas. 1991).

Effective July 1, 1997 a new Rule 45 was adopted.

Effective July 1, 2013, Rule 45 was amended to specifically authorize a subpoena to command the person to whom it is directed to produce and permit inspection and copying of electronically stored information. The same amendment also established a procedure to be used when privileged or trial-preparation material is inadvertently disclosed.

Effective February 22, 2023, Rule 45(a) was amended to permit an attorney admitted to practice in Mississippi, as an officer of the court, to issue subpoenas in a Mississippi case in which he or she is counsel of record. The amendment also authorizes attorneys who have been admitted *pro hac vice* and who are counsel of record in a Mississippi case to issue subpoenas. The amended rule requires that a copy of all subpoenas be served on all parties as soon as the subpoena form has been filled out even though the subpoena itself has not yet been served at that time. Once a subpoena has been served the serving party is required to promptly file a proof of service with the clerk and immediately serve a copy of the proof of service on all parties. Rule 45(d)(2)(A) was amended to prohibit production or inspection of documents until the tenth day after service of the subpoena on the subpoena recipient. This is meant to give persons other than the subpoena recipient an opportunity to move to quash or modify the subpoena. If the documents or objects are produced before the ten days has passed, the attorney receiving said documents should hold them under seal until the ten-day period has expired.

Advisory Committee Notes

A "foreign subpoena" means a subpoena issued under authority of a court of record of a foreign jurisdiction. "Foreign jurisdiction" means a state other than this state. Litigants in a foreign jurisdiction who desire to obtain a subpoena to depose a Mississippi resident, to

obtain records within Mississippi, or to inspect premises within Mississippi should follow the procedure established in Mississippi Code Annotated section 11-59-1 et. seq. See the exclusion in M.R.A.P. 46(b)(11)(i) for Admission of Foreign Attorneys Pro Hac Vice.

Rule 45(c)(1) regarding advance payment to non-parties of statutory witness fees and mileage is complementary to Mississippi Code Annotated §§25-7-47 through 25-7-59 (1972).

Rule 45(d)(2) is intended to ensure that there be no confusion as to whether a person not a party in control, custody, or possession of discoverable evidence may be compelled to produce such evidence without being sworn as a witness and deposed. The force of a subpoena for production of documentary evidence generally reaches all documents under the control of the person ordered to produce, saving questions of privilege or unreasonableness.

RULE 46. EXCEPTIONS UNNECESSARY

A formal exception to a ruling or order is unnecessary. When the ruling or order is requested or made, a party need only state the action that it wants the court to take or objects to, along with the grounds for the request or objection. Failing to object does not prejudice a party who had no opportunity to do so when the ruling or order was made.

RULE 47. JURORS

(a) Examination of Jurors. Any person called as a juror for the trial of any cause shall be examined under oath or upon affirmation as to his qualifications. The court may permit the parties or their attorneys to conduct the examination of the prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties of their attorneys to supplement the examination by further inquiry.

(b) Selection of Jurors; Jury Service. Jurors shall be drawn and selected for jury service as provided by statute.

(c) Challenges. In actions tried before a 12-person jury, each side may exercise four peremptory challenges. In actions tried before a 6-person jury, each side may exercise two peremptory challenges. Where one or both sides are composed of muliple parties, the court may allow challenges to be exercised separately or jointly, and may allow additional challenges; provided, however, in all actions the number of challenges allowed for each side shall be identical. Parties may challenge any juror for cause.

(d) Alternate Jurors. The trial judge may, in his discretion, direct that one or two jurors in addition to the regular panel be called and empaneled to sit as alternate jurors. Alternate jurors, in the order in which they are called, shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges for cause, shall take the same oath and shall have the same functions, powers, facilities, and privileges as the regular jurors. Each party shall be allowed one peremptory challenge to alternate jurors in addition to those provided by subdivision (c) of this rule. The additional peremptory challenges provided for herein may be used against an alternate juror only, and other peremptory challenges, provided by subdivision (c) of this rule, may not be used against an alternate juror.
[Amended effective June 24, 1992.]

Advisory Committee Historical Note

Effective June 24, 1992, Rule 47 was amended to provide that the court may allocate peremptory challenges to a side, rather than to a party, and, in the case of multiple parties on a side, may allow them to be exercised jointly or separately, and may allow additional peremptory challenges. 598-602 So. 2d XXIII (West Miss. Cas. 1992).

Advisory Committee Notes

Rule 47(c) provides that each side may exercise peremptory challenges to prospective jurors. Under the liberal provisions of these rules for joinder of claims and parties, problems may arise where there are multiple parties comprising a side. In such cases, it is implicit that the court may apportion the challenges among the parties comprising that side when they cannot agree on the apportionment themselves.

For additional guidelines concerning the method by which peremptory challenges shall be exercised, see the Uniform Rules of Circuit and County Court Practice.

RULE 48. JURIES AND JURY VERDICTS

(a) Circuit and Chancery Courts. Jurors in circuit and chancery court actions shall consist of twelve persons, plus alternates as provided by Rule 47(d). A verdict or finding of nine or more of the jurors shall be taken as the verdict or finding of the jury.

(b) County Court. Juries in county court actions shall consist of six persons, plus alternates as provided by Rule 47(d). A verdict or finding of five or more of the jurors shall be taken as the verdict or finding of the jury.

RULE 49. GENERAL VERDICTS AND SPECIAL VERDICTS

(a) General Verdicts. Except as otherwise provided in this rule, jury determination shall be by general verdict. The remaining provisions of this rule should not be applied in simple cases where the general verdict will serve the ends of justice.

(b) Special Verdict. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

(c) General Verdict Accompanied by Answers to Interrogatories. The court, in its discretion, may submit to the jury, together with instructions for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered consistent with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

(d) Court to Provide Attorneys With Questions. In no event shall the procedures of subdivisions (b) or (c) of this rule be utilized unless the court, within a reasonable time before final arguments are made to the jury, provides the attorneys for all parties a copy of the written questions to be submitted to the jury.
[Amended effective March 1, 1989.]

Advisory Committee Historical Note

Effective March 1, 1989, Rule 49 was amended to provide for a General Verdict Accompanied by Answers to Interrogatories in jury trials. 536-538 So. 2d XXVI-XXVII (West Miss. Cas. 1989).

Advisory Committee Notes

Rule 49 authorizes three types of verdicts—a general verdict, a special verdict, and a general verdict accompanied by answers to interrogatories. Trial judges have broad discretion to use special verdicts or general verdicts accompanied by answers to interrogatories. *W.J. Runyon & Son, Inc. v. Davis,* 605 So. 2d 38, 49 (Miss. 1992).

A general verdict is a single determination that disposes of the entire case, whereas a special verdict requires the jury to decide specific factual issues. Special verdicts are appropriate in complicated cases where their use might assist in focusing the jury's attention on the specific relevant factual issues or cases in which jury bias or prejudice might arise. *Thompson v. Dung Thi Hoang Nguyen,* 86 So. 3d 232, 240 (Miss. 2012). If the special verdict submitted to the jury omits a fact issue raised by the pleadings or evidence, the parties will be deemed to have waived their right to jury trial on such issue unless jury trial on such issue is demanded before the case is submitted to the jury. In the absence of such a demand, the trial court may make the requisite factual findings.

A court may also submit a general verdict with written interrogatories about specific factual issues to the jury. If the general verdict and interrogatory answers are consistent, the court shall enter judgment reflecting the verdict and answers. If the interrogatory answers are internally consistent but one or more answers is inconsistent with the general verdict, the court may enter judgment based upon the answers despite their inconsistency with the general verdict, instruct the jury to further consider its verdict and answers, or order a new trial. When one of the interrogatory answers is inconsistent with another answer and also inconsistent with the general verdict, the court shall instruct the jury to further consider its verdict and answers or order a new trial.

A special verdict or general verdict with interrogatories directing the jury to separate economic and non-economic damages is necessary if a defendant is going to seek application of statutory caps on non-economic damages. *See, e.g., Intown Lessee Assocs., LLC v. Howard,* 67 So. 3d 711, 723-24 (Miss. 2011). Similarly, a special verdict or a general verdict with interrogatories may be useful in a case in which the law authorizes allocation of fault among the parties determined to be at fault. A special verdict or a general verdict with answers to interrogatories may also be useful in cases involving novel or uncertain law. If

the trial court is reversed on appeal, the special verdict or interrogatory answers may make retrial unnecessary if they contain sufficient factual findings on the relevant issues.

RULE 50. MOTIONS FOR A DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT

(a) Motion for Directed Verdict: When Made; Effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted without having reserved the right to do so and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

(b) Motion for Judgment Notwithstanding the Verdict. Not later than ten days after entry of judgment in accordance with a verdict, a party may file a motion to have the verdict and any judgment entered thereon set aside; or if a verdict was not returned, a party, within ten days after the jury has been discharged, may file a motion for judgment. If no verdict was returned the court may direct the entry of judgment or may order a new trial.

(c) Conditional Rulings on Grant of Motion.

(1) If the motion for judgment notwithstanding the verdict provided for in subdivision (b) of this rule is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for a judgment notwithstanding the verdict may file a motion for a new trial pursuant to Rule 59 not later than ten days after entry of the judgment notwithstanding the verdict.

(d) Denial of Motion. If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on the motion may, as appellee, assert grounds entitling him to a new trial on the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the

judgment nothing in this rule precludes it from determining that the appellee is entitled to a new trial or from directing the trial court to determine whether a new trial shall be granted.

[Amended effective July 1, 1994; July 1, 1997.]

Advisory Committee Historical Note

Effective July 1, 1997, Rule 50(b) was amended to clarify that Rule 50(b) motions must be filed not later than ten days after entry of judgment. 689-692 So. 2d XLIX (West Miss. Cas. 1997).

Effective July 1, 1994, Rule 50(b) was amended so that a motion for directed verdict is not a prerequisite to file a motion for judgment notwithstanding the verdict. 632-635 So.2d XXX-XXXI (West Miss.Cases 1994).

[Adopted August 21, 1996; amended effective July 1, 1997.]

Advisory Committee Notes

Rule 50 applies only in cases tried to a jury with power to return a binding verdict. Rule 50(a) enables the court to determine whether there is any question of fact to be submitted to the jury and whether any verdict other than the one directed would be erroneous as a matter of law; it is conceived as a device to save the time and trouble involved in a lengthy jury determination.

Rule 50(b) differs from its federal rule counterpart in that a motion for a directed verdict is no longer a prerequisite to file a motion for a judgment notwithstanding the verdict. *New Hampshire Ins. Co. v. Sid Smith & Associates, Inc.,* 610 So. 2d 340 (Miss. 1992).

A motion for judgment notwithstanding the verdict made pursuant to M.R.C.P. 50(b) must be filed within 10 days after entry of the judgment. The trial court has no authority or discretion to extend the 10-day time period. M.R.C.P. 6(b). A motion for a judgment notwithstanding the verdict is not appropriate for cases tried by a judge sitting without a jury. *See* M.R.C.P. 59(e).

RULE 51. INSTRUCTIONS TO JURY

(a) Procedural Instructions. At the commencement of and during the course of a trial, the court may orally give the jury cautionary and other instructions of law relating to trial procedure, the duty and function of the jury, and may acquaint the jury generally with the nature of the case.

(b) Substantive Instructions. Each party to an action may submit six instructions on the substantive law of the case. However, the court may permit the submission of additional instructions as justice requires. The court may instruct the jury of its own initiative.

(1) When Submitted. Instructions proposed by parties shall be submitted to the court at the pre-trial hearing as provided by Rule 16. In the event a pre-trial hearing is not conducted, proposed instructions shall be delivered to the court and counsel for all parties not later than twenty-four hours prior to the time the action is scheduled to be tried.

(2) Identification. The court's substantive instructions shall be numbered and prefixed with the letter C. Plaintiff's instructions shall be numbered and prefixed with the letter P. Defendant's instructions shall be numbered and prefixed with the letter D. In multi-party actions, Roman numerals shall be used to identify the proposed instructions of similarly aligned parties; the Roman numerals shall be placed after the alphabetical designation of P or D, as the case may be, and shall conform to the sequential listing of parties plaintiff or defendant as stated in the complaint.

Instructions shall not otherwise be identified with a party.

(3) **Objections**. No party may assign as error the granting or the denying of an instruction unless he objects thereto at any time before the instructions are presented to the jury; opportunity shall be given to make the objection out of the hearing of the jury. All objections shall be stated into the record and shall state distinctly the matter to which objection is made and the grounds therefor.

(c) **Instructions to be Written**. Except as allowed by Rule 51(a), all instructions shall be in writing.

(d) **When Read; Available to Counsel and Jurors.** Instructions shall be read by the court to the jury at the close of all the evidence and prior to oral argument; they shall be available to counsel for use during argument. Instructions shall be carried by the jury into the jury room when it retires to consider its verdict.

Advisory Committee Notes

It is the trial court's responsibility to properly instruct the jury. "[W]here under the evidence a party is entitled to have the jury instructed regarding a particular issue and where the party requests an instruction which for whatever reason is inadequate in form or content, the trial judge has the responsibility either to reform and correct the proffered instruction himself or to advise counsel on the record of the perceived deficiencies therein and to afford counsel a reasonable opportunity to prepare a new corrected instruction." *Mississippi Valley Silica Co., Inc. v. Eastman,* 92 So. 3d 666, 669 (Miss. 2012) (quoting *Byrd v. McGill*, 478 So. 2d 302, 303 (Miss. 1985)). See Rule 3.07 of the Uniform Circuit and County Court Rules for additional provisions governing jury instructions. See also Mississippi Model Jury Instructions of 2012 which were prepared by a commission appointed by the Mississippi Supreme Court. Although not formally adopted or approved by the Supreme Court of Mississippi, the "Plain Language Model Jury Instructions" have been placed on the Supreme Court website as an aid to trial judges and attorneys.

RULE 52. FINDINGS BY THE COURT

(a) Effect. In all actions tried upon the facts without a jury the court may, and shall upon the request of any party to the suit or when required by these rules, find the facts specially and state separately its conclusions of law thereon and judgment shall be entered accordingly.

(b) Amendment. Upon motion of a party filed not later than ten days after entry of judgment or entry of findings and conclusions, or upon its own initiative during the same period, the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may accompany a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised regardless of whether the party raising the question has made in court an objection to such findings or has filed a motion to amend them or a motion for judgment or a motion for a new trial.

[Amended effective, July 1, 1997.]

Advisory Committee Historical Note

Effective July 1, 1997, Rule 52(b) was amended to clarify that a motion to amend the trial court's findings must be filed not later that ten days after entry of judgment. 689 So. 2d XLIX (West Miss. Cas. 1997).

[Adopted effective July 1, 1997.]

Advisory Committee Notes

Rule 52(a) requires a trial court, in cases tried without a jury, to make specific findings of fact and conclusions of law when such findings and conclusions are requested by a party or when such findings and conclusions are required by the Mississippi Rules of Civil Procedure. In the absence of a party's request for such findings and conclusions or a rule requiring such findings and conclusions, the trial court "may" make such findings and conclusions. *See Gulf Coast Research Laboratory v. Amaraneni,* 722 So. 2d 530, 534-35 (Miss. 1998). The principal purpose of the rule is to provide the appellate court with a record regarding what the trial court did—the facts it found and the law it applied, in part so that the appellate court can refrain from deciding issues of fact and issues that were not decided by the trial court. *Tricon Metals & Services, Inc. v. Topp,* 516 So. 2d 236, 239 (Miss. 1987). "In cases of any significant complexity the word 'may' in Rule 52(a) should be construed to read 'generally should.' In other words, in cases of any complexity, tried upon the facts without

a jury, the Court generally should find the facts specially and state its conclusions of law thereon." *Id.* In contested complex cases, a trial court's "failure to make findings of ultimate fact and conclusions of law will generally be regarded as an abuse of discretion." *Id.* "[F]indings of fact by the chancellor, together with the legal conclusions drawn from those findings, are required [in cases involving the division of marital assets]." *Ferguson v. Ferguson,* 639 So. 2d 921, 929 (Miss. 1994).

General findings of fact and conclusions of law may technically comply with Rule 52's requirements despite a party's request for specific findings of fact and conclusions of law. *See Lowery v. Lowery,* 657 So. 2d 817, 819 (Miss. 1995) (citing *Century 21 Deep South Prop. v. Corson,* 612 So. 2d 359, 367 (Miss. 1992)). If a trial court fails to make even general findings of fact and conclusions of law when specific findings of fact and conclusions of law are requested by a party, remand to the trial court may be necessary unless the evidence is so overwhelming so as to make findings unnecessary. *See Lowery v. Lowery,* 657 So. 2d 817, 819 (Miss. 1995).

A trial court has discretion to adopt a party's proposed findings of fact and conclusions of law. *Rice Researchers, Inc. v. Hiter,* 512 So. 2d 1259, 1266 (Miss. 1987). A trial court's factual findings, even in cases where the trial court adopts verbatim a party's proposed findings of fact, will be reviewed for abuse of discretion. *Bluewater Logistics, LLC v. Williford,* 55 So. 3d 148, 157 (Miss. 2011).

See also the Uniform Chancery Court Rules regarding findings by the court.

RULE 53. MASTERS, REFEREES, AND COMMISSIONERS

(a) Appointment and Compensation. The court may appoint one or more persons in each county to be masters of the court, and the court in which any action is pending may appoint a special master therein. As used in these rules, the word "Master" includes a referee, an auditor, an examiner, a commissioner, and a special commissioner. The master shall receive a reasonable compensation for services rendered, as fixed by law or as allowed by the court and taxed in the costs and collected in the same manner as the fees of the clerk.

(b) Qualifications. The master shall be an attorney at law, authorized to practice law before all courts of the State of Mississippi. However, in extraordinary circumstances where the finding to be made is of a complex, technical, non legal nature, a person other than an attorney possessing the requisite qualifications of a person skilled in the field, area, or subject of the inquiry may be appointed as a master; additionally, persons other than attorneys may be appointed as special commissioners to conduct judicially-ordered sales and partitions of real or personal property.

(c) Reference: When Made. With the written consent of the parties, the court may refer any issue of fact or law to a master. Otherwise, a reference shall be made only upon a showing that some exceptional condition requires it.

(d) Powers. The order of reference to the master may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearing and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may require the production before him of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. He shall have the power to administer oaths, to take the examination of witnesses in cases pending in any court, to examine and report upon all matters referred to him, and to execute all decrees directed to him to be executed.

Masters shall have the power to direct the issuance of subpoenas for witnesses to attend before them to testify in any matter referred to them or generally in the cause. If any witness shall fail to appear, the master shall proceed by process to compel the witness to attend and give evidence.

(e) Proceedings. When a reference is made, the clerk shall forthwith furnish the master with a certified copy of the order of reference, which shall constitute sufficient certification of his authority. Upon receipt thereof, unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys which is to be held in any event within ten days following the date of the order of reference and shall notify the parties or their attorneys. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make his report. If a party fails to appear at the time and place appointed, the master may proceed ex parte or, in his discretion, may adjourn the proceedings to a future day, giving notice of same to the absent party.

(f) Statements of Account. The court may direct an account to be taken in any cause in vacation or in term, and when the master shall doubt as to the principles upon which the account shall be taken or as to the propriety of admitting any item of debit or credit claimed by either party, he may state in writing the points on which he shall doubt and submit same for decision to the court in vacation or in term.

(g) Report.

(1) *Contents and Filing*. The master shall prepare a report upon the matters submitted to him by the order of reference and, if required to make findings of fact and conclusions of law, he shall set them forth in the report. He shall file the report with the clerk of the court and, unless otherwise directed by the order of reference, shall file with it a transcript of the proceeding and of the evidence in the original exhibits. The clerk shall forthwith mail to all parties notice of the filing.

(2) *Acceptance and Objections*. The court shall accept the master's findings of fact unless manifestly wrong. Within ten days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as provided by Rule 6(d). The court after hearing may adopt the report or modify it or may reject it in whole or in any part or may receive further evidence or may recommit it with instructions.

(3) *Stipulation as to Findings*. The effect of a master's report is the same regardless of whether the parties have consented to the reference; however, when the parties stipulate that a master's finding of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

(4) *Draft Report*. Before filing his report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

(h) Bond; When Required. The court may require a special commissioner appointed to conduct a sale of any property to give bond in such penalty and with sufficient sureties to be approved as the court may direct, payable to the State of Mississippi, and conditioned to pay according to law all money which may come into his hands as such special commissioner. The bond shall be filed with the court. For any breach of its condition, execution may be issued on order of the court for the sum due. However, when the clerk of the court or the sheriff is appointed to make a sale and the order does not provide for a bond, the official bond of the clerk or the sheriff shall be held as security in the premises.

[Amended effective March 1, 1989; April 13, 2000.]

Advisory Committee Historical Note

Effective April 13, 2000, Rule 53(c) was amended to give the court discretion to appoint a master on the written consent of the parties without a showing of an exceptional condition. 753-754 So. 2d. XVII (West Miss.Cas. 2000).

Effective March 1, 1989, Rule 53 was amended to correct a typographical error. 536-538 So. 2d XXVII (West Miss. Cas. 1989).

CHAPTER VII. JUDGMENT

RULE 54. JUDGMENTS; COSTS

(a) Definitions. "Judgment" as used in these rules includes a final decree and any order from which an appeal lies.

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counter-claim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an expressed determination that there is no just reason for delay and upon an expressed direction for the entry of the judgment. In the absence of such determination and direction, any order or other form of decision, however designated which adjudicates fewer than all of the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Judgment Summarily Dismissing a Motion for Post-Conviction Collateral Relief. When a court summarily dismisses a motion for post-conviction collateral relief under section 99-39-11(2) of the Mississippi Code, the order must identify the files, records, transcripts, and correspondence the court relied on and direct that certified copies of those documents be placed in the motion cause number's file.

(d) Demand for Judgment; Relief to be Granted. A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. Every other final judgment should grant the relief to which each party is entitled if such relief is within the jurisdiction of the court to grant, even if the party has not demanded that relief in its pleadings.

(e) Costs. Except when express provision therefor is made in a statute, costs shall be allowed as of course to the prevailing party unless the court otherwise directs, and this provision is applicable in all cases in which the State of Misslssippi is a party plaintiff in civil actions as in cases of individual suitors. In all cases where costs are adjudged against any party who has given security for costs, execution may be ordered to issue against such security. Costs may be taxed by the clerk on one day's notice. On motions served within five days of the receipt of notice of such taxation, the action of the clerk may be reviewed by the court.

[Amended effective July 1, 2018; amended effective January 18, 2024.]

Advisory Committee Historical Note

Rule 54 was amended effective July l, 2018, to include a new subsection (c) concerning summary dismissals of motions for post-conviction collateral relief. What had previously been M.R.C.P. 54(c) [Demand for Judgment] is now M.R.C.P. 54(d). What had previously been M.R.C.P. 54(d) [Costs] is now M.R.C.P. 54(e).

Rule 54(d) was amended effective January 18, 2024, so as to remove the language providing that "final judgment shall not be entered for a monetary amount greater than that demanded in the pleadings." A claimant may recover more than the amount demanded in the pleadings upon proper proof at trial. Default judgments are still limited to the amount demanded in the pleadings.

Advisory Committee Notes

Although it is not specifically described in the rule itself, there are several different stages that lead to the creation of a judgment that is final and appealable. It is important to differentiate the various steps that are part of this process. The first distinction is between the adjudication, either by a decision of the court or a verdict of the jury, and the judgment that is entered thereon. The terms "decision" and "judgment" are not synonymous under these rules. The decision consists of the court's opinion which consists of findings of fact and conclusions of law; the rendition of judgment is the pronouncement of that decision and the act that gives it legal effect.

A second distinction that should be noted is between the judgment itself and the "filing," or the "entry," of the judgment. A judgment is the final determination of an action and thus has the effect of terminating the litigation; it is "the act of the court." "Filing" simply refers to the delivery of the judgment to the clerk for entry and preservation. The "entry" of the judgment is the ministerial notation of the judgment by the clerk of the court pursuant to Rules 58 and 79(a); however, it is crucial to the effectiveness of the judgment and for measuring the time periods for appeal and the filing of various motions.

Rule 54(b) is designed to facilitate the entry of a final judgment upon one or more but fewer than all the claims or as to one or more but fewer than all the parties in an action involving multiple claims or multiple parties, so as to enable the non-prevailing party to perfect an appeal as of right of a final judgment. Absent a certification under Rule 54(b), any order in a multiple-party or multiple-claim action that does not dispose of the entire action is interlocutory, even it if appears to adjudicate a separable portion of the controversy. Given

that separate, piecemeal appeals of interlocutory orders entered in a single action would usually be inefficient, parties may not appeal interlocutory orders as of right. Instead, a party may request the trial court to certify such an interlocutory order as final judgment pursuant to Rule 54(b), so that an appeal of right may be taken pursuant to M.R.A.P. 4, or, alternatively, a party may petition the Supreme Court for permission to appeal an interlocutory order pursuant to M.R.A.P. 5. If a party attempts to perfect an appeal as of right pursuant to M.R.A.P. 4 of an order that does not dispose of all the claims between the parties, such appeal will be dismissed for lack of jurisdiction unless the order appealed from has been properly certified as a final judgment pursuant to Rule 54(b). *See, e.g., Williams v. Delta Reg'l Med. Ctr.,* 740 So. 2d 284 (Miss. 1999).

Rule 54(b) gives a trial court discretion to certify an interlocutory order as a final judgment if the court determines that "there is no just reason for delay" of the appeal. Rule 54(b) certification should be reserved for cases in which delay of the appeal might prejudice a party. *See Cox v. Howard, Weil, Laboussie, Friedrichs, Inc.,* 512 So. 2d 897, 900 (Miss. 1987). Courts should grant Rule 54(b) certification "cautiously in the interest of sound judicial administration in order to preserve the established judicial policy against piecemeal appeals." *See Indiana Lumbermen's Mut. Ins. Co. v. Curtis Mathes, Mfg. Co.*, 456 So. 2d 750, 752-53 (Miss. 1984).

If the trial court chooses to certify an interlocutory order as a final judgment pursuant to Rule 54(b), it must do so in a definite, unmistakable manner. If the reasons for the Rule 54(b) certification are not clear from the record, the trial court should set forth its findings and reasons for certification. *See Cox,* 512 So. 2d at 900-01.

Rule 54(d) must be read in conjunction with Rule 8, which requires that every pleading asserting a claim include a demand for the relief to which the pleader believes himself entitled. Thus, Rule 54(d) applies to any demand for relief, whether made by defendant or plaintiff or presented by way of an original claim, counter-claim, cross-claim, or third-party claim. A default judgment may not extend to matters outside the issues raised by the pleadings or beyond the scope of the relief demanded; a judgment in a default case that awards relief that either is more than or different in kind from that requested originally is null and void and defendant may attack it collaterally in another proceeding.

Three related concepts should be distinguished in considering Rule 54(e): These are costs, fees, and expenses. Costs refer to those charges that one party has incurred and is permitted to have reimbursed by his opponent as part of the judgment in the action. Although costs has an everyday meaning synonymous with expenses, taxable costs under Rule 54(e) is more limited and represents those official expenses, such as court fees, that a court will assess against a litigant. Costs almost always amount to less than a successful litigant's total

expenses in connection with a law suit and their recovery is nearly always awarded to the successful party.

Fees are those amounts paid to the court or one of its officers for particular charges that generally are delineated by statute. Most commonly these include such items as filing fees, clerk's and sheriff's charges, and witnesses' fees. In most instances an award of costs will include reimbursement for the fees paid by the party in whose favor the cost award is made.

Expenses include all the expenditures actually made by a litigant in connection with the action. Both fees and costs are expenses but by no means constitute all of them. Absent a special statute or rule, or an exceptional exercise of judicial discretion, such items as attorney's fees, travel expenditures, and investigatory expenses will not qualify either as statutory fees or reimbursable costs. These expenses must be borne by the litigants.

[Advisory Committee Note adopted effective July 1, 2014.]

RULE 55. DEFAULT

(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.

(b) Judgment. In all cases the party entitled to a judgment by default shall apply to the court therefor. If the party against whom judgment by default is sought has appeared in the action, he (or if appearing by representative, his representative) shall be served with written notice of the application for judgment at least three days prior to the hearing of such application; however, judgment by default may be entered by the court on the day the case is set for trial without such three days' notice. If in order to enable the court to enter judgment or to carry it into effect it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearing with or without a jury, in the court's discretion, or order such references as it deems necessary and proper.

(c) Setting Aside Default. For good cause shown, the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

(d) Plaintiffs, Counter-Claimants, and Cross-Claimants. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counter-claim. In all cases a judgment by default is subject to the limitation of Rule 54(c).

(e) Proof Required Despite Default in Certain Cases. No judgment by default shall be entered against a person under a legal disability or a party to a suit for divorce or annulment of marriage unless the claimant establishes his claim or rights to relief by evidence, provided, however, that divorces on ground of irreconcilable differences may be granted pro confesso as provided by statute.

Advisory Committee Notes

Before a default judgment can be entered, the court must have jurisdiction over the party against whom the judgment is sought; which also means that the party must have been effectively served with process.

Entry of default for failure to plead or otherwise defend is not limited to situations involving a failure to answer a complaint, but applies to any of the pleadings listed in M.R.C.P. 7(a).

The words "otherwise defend" refer to a Rule 12(b)(6) motion. *See* M.R.C.P. Rule 12(b). The mere appearance by the defending party will not keep the party from being in default for failure to plead or otherwise defend, but if the party appears and indicates a desire to contest the action, the court can exercise its discretion and refuse to enter a default judgment. This approach is in line with the general policy that whenever there is doubt whether a default judgment should be entered, the court ought to allow the case to be tried on the merits.

Rule 55(a) does not represent the only source of authority in these rules for the entry of a default that may lead to judgment. For example, Rule 37(b)(2)(C) and Rule 37(d) both provide for the use of a default judgment as a sanction for violation of the discovery rules.

When the prerequisites of Rule 55(a) are satisfied, an entry of default shall be made by the clerk without any action being taken by the court. The clerk's function, however, is not perfunctory. Before the clerk can enter a default the clerk must examine the affidavits filed and be satisfied that the requirements of Rule 55(a) are met. *See* M.R.C.P. App. A, Forms 36, 37, and 38. These elements of default must be shown by affidavit or other competent proof.

The traditional requirement that "one had to file documents in or actually physically appear before a court" in order to make a Rule 55(b) appearance has been relaxed. If a party has made "an indicia of defense or denial of the allegations of the complaint," such party is entitled to written notice of the application for default judgment at least three days prior to the hearing on such application. *Wheat v. Eakin,* 491 So. 2d 523, 525 (Miss. 1986). "[I]nformal contacts between parties may constitute an appearance." *Holmes v. Holmes,* 628 So. 2d 1361, 1364 (Miss. 1993). The Mississippi Supreme Court has found an appearance when "the defendants either 1) served or sent a document to the plaintiff indicating in writing the defendant's intent to defend, 2) filed a document with the court indicating in writing the defendant's intent to defend, or 3) had counsel communicate to opposing counsel the defendant's intent to defend." *American States Ins. Co. v. Rogillio,* 10 So. 3d 463, 467 (Miss. 2009). A defendant who has filed an answer to the complaint but who has failed to file a timely answer to an amended complaint has entered an appearance for Rule 55(b) purposes. *See Chassaniol v. Bank of Kilmichael,* 626 So. 2d 127, 130-31 (Miss. 1993). A defendant whose attorney has written the plaintiff's attorney in a divorce case and informed him that the defendant desired to settle the case if possible but intended to defend if no settlement could be reached has entered an appearance for Rule 55(b) purposes. *See Holmes v. Holmes*,

628 So. 2d 1361, 1364 (Miss. 1993). A defendant who has served a motion to set aside the entry of default has entered an appearance for Rule 55(b) purposes. *See King v. Sigrest,* 641 So. 2d 1158, 1162 (Miss. 1994). A defendant, cannot, however, enter a Rule 55(b) appearance before the case has been commenced. *See Kumar v. Loper*, 80 So. 3d 808, 814 (Miss. 2012). The defendant bears the burden of proving that an appearance has been made. *See Dynasteel Corp. v. Aztec Indus., Inc.*, 611 So. 2d 977, 982 (Miss. 1992).

Although an appearance by a defending party does not immunize defendant from being in default for failure to plead or otherwise defend, it does entitle defendant to at least three days written notice of the application to the court for the entry of a judgment based on his default. This enables a defendant in default to appear at a subsequent hearing on the question of damages and contest the amount to be assessed against him. Damages must be fixed before an entry of default judgment and there is no estoppel by judgment until the judgment by default has been entered.

When a judgment by default is entered, it is treated as a conclusive and final adjudication of the issues necessary to justify the relief awarded and is given the same effect as a judgment rendered after a trial on the merits. A judgment entered pursuant to Rule 55(b) may be reviewed on appeal to the same extent as any other judgment; however, an order denying a motion for a default judgment is interlocutory and not appealable. M.R.C.P. 54(a).

After entry of default by the clerk, defendant has no further standing to contest the actual factual allegations of the plaintiff's claim for relief. If a defendant wishes an opportunity to challenge plaintiff's right to recover, a defendant's only recourse is to show good cause for setting aside the default under Rule 55(c) and, failing that, to contest the amount of recovery.

After entry of default by the clerk, the court must conduct an evidentiary hearing on the record to determine damages in cases in which the plaintiff seeks unliquidated damages. *Capitol One Services, Inc. v. Rawls,* 904 So. 2d 1010, 1018 (Miss. 2004). "[L]iquidated damages are set or determined by contract, while unliquidated damages are established by a verdict or award and cannot be determined by a fixed formula." *Id.* (quoting *Moeller v. American Guar. & Liab. Ins. Co.,* 812 So. 2d 953, 959-60 (Miss. 2002)). Pursuant to M.R.C.P. 54(c), a default judgment shall only order the type of relief sought in the demand for judgment (i.e., money damages, equitable relief, etc.), and shall not order money damages in an amount that exceeds the amount sought in the demand for judgment.

If a default has been entered, but a default judgment has not yet been entered, the defending party may move to set aside the entry of default "[f]or good cause shown" pursuant to M.R.C.P. 55(c). If a default judgment has been entered, the defendant may move

to set aside the default judgment pursuant to M.R.C.P. 60(b). The standard for setting aside an entry of default pursuant to M.R.C.P. 55(c) is more liberal than the standard for setting aside a default judgment pursuant to M.R.C.P. 60(b). *See King v. Sigrest,* 641 So. 2d 1158, 1162 (Miss. 1994).

RULE 56. SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counter-claim, or cross-claim, or to obtain a declaratory judgment may, at any time after the expiration of thirty days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counter-claim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least ten days before the time fixed for the hearing. The adverse party prior to the day of the hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone, although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered on the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matter stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided

in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(h) Costs to Prevailing Party When Summary Judgment Denied. If summary judgment is denied the court shall award to the prevailing party the reasonable expenses incurred in attending the hearing of the motion and may, if it finds that the motion is without reasonable cause, award attorneys' fees.

Advisory Committee Notes

It is important to distinguish between a Rule 56 motion for summary judgment, a Rule 12(b)(6) motion to dismiss for failure to state a claim, and a Rule 12(c) motion for judgment on the pleadings. When ruling on a Rule 56 motion for summary judgment, the trial court may "pierce the pleadings" and consider extrinsic evidence, such as affidavits, depositions, answers to interrogatories, and admissions. When ruling on a Rule 12(b)(6) motion to dismiss for failure to state a claim, the trial court may not "pierce the pleadings" and shall only consider the allegations contained in the pleading asserting the claim. Similarly, when ruling on a Rule 12(c) motion on the pleadings, the trial court shall only consider the allegations within the pleadings. If matters outside the pleadings are presented to and considered by the trial court in connection with a motion for judgment on the pleadings or a motion to dismiss for failure to state a claim, the trial court must treat the motion as one for summary judgment and give all parties a reasonable opportunity to present pertinent material. *See* M.R.C.P. 12(b) and (c).

A trial court need not make findings of fact when ruling on a motion for summary judgment because "a Rule 56 summary judgment hearing is not an action 'tried upon the facts without a jury' so as to trigger Rule 52 applicability." *See Harmon v. Regions Bank,* 961 So. 2d 693, 700 (Miss. 2007). *See also* Uniform Rules of Circuit and County Court Practice.

Although the Court has held that an affidavit is not always required to obtain relief under Rule 56(f), a party must "present specific facts why he cannot oppose the motion" and must specifically demonstrate "how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing." *Howarth v. M & H Ventures*, *LLC*, 237 So. 3d 107, 113 (Miss. 2007).

[Advisory Committee Note adopted effective July 1, 2014; amended effective January 16, 2020.]

RULE 57. DECLARATORY JUDGMENTS

(a) Procedure. Courts of record within their respective jurisdictions may declare rights, status, and other legal relations regardless of whether further relief is or could be claimed. The court may refuse to render or enter a declaratory judgment where such judgment, if entered, would not terminate the uncertainty or controversy giving rise to the proceeding.

The procedure for obtaining a declaratory judgment shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in actions where it is appropriate.

The court may order a speedy hearing of an action for declaratory judgment and may advance it on the calendar. The judgment in a declaratory relief action may be either affirmative or negative in form and effect.

(b) When Available.

(1) Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status or other legal relations thereunder.

(2) A contract may be construed either before or after there has been a breach thereof. Where an insurer has denied or indicated that it may deny that a contract covers a party's claim against an insured, that party may seek a declaratory judgment construing the contract to cover the claim.

(3) Any person interested as or through an executor, administrator, trustee guardian or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust in the administration of a trust, or of the estate of a decedent, an infant, insolvent, or person under a legal disability, may have a declaration of rights or legal relations in respect thereto:

(A) to ascertain any class of creditors, devisees, legatees, heirs, next of kin or others; or,

(B) to direct the executors, administrators, or trustees, to do or abstain from doing any particular act in their fiduciary capacity; or,

(C) to determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings.

(4) The enumeration in subdivisions (1), (2) and (3) of this rule does not limit or restrict the exercise of the general powers stated in paragraph (a) in any proceeding where declaratory relief is sought in which a judgment will terminate the controversy or remove an uncertainty.

[Amended effective July 27, 2000.]

Advisory Committee Notes

A plaintiff may ask for a declaratory judgment either as sole relief or in addition or auxiliary to other relief, and a defendant may similarly counterclaim therefor. Thus the court is not limited only to remedial relief for acts already committed or losses already incurred; it may either substitute or add preventive and declaratory relief. It may be sought upon either legal or equitable claims and the right to jury trial is fully preserved as in civil actions generally.

Absent extraordinary circumstances, the failure to order separate trials in order to avoid putting the issue of insurance before the jury which tries liability and damages as between the insured and the injured party will be deemed an abuse of discretion.

RULE 58. ENTRY OF JUDGMENT

Every judgment shall be set forth on a separate document which bears the title of "Judgment." However, a judgment which fully adjudicates the claim as to all parties and which has been entered as provided in M.R.C.P. 79(a) shall, in the absence of prejudice to a party, have the force and finality of a judgment even if it is not properly titled. A judgment shall be effective only when entered as provided in M.R.C.P. 79(a).

[Amended effective July 1, 2001; amended effective May 27, 2004 to address finality of improperly titled judgment.]

Advisory Committee Historical Note

Effective July 1, 1994, a new Rule 58 was adopted. 632-635 So.2d XXXII-XXXIII (West Miss.Cases 1994).

[Adopted August 21, 1996.]

Advisory Committee Notes

The "entry" of the judgment is the ministerial notation of the judgment by the clerk of the court pursuant to Rules 58 and 79(a); however, it is crucial to the effectiveness of the judgment and for measuring time periods for appeal and the filing of various motions.

The date of entry of judgment is significant because certain post-trial motions must be filed within 10 days after entry of judgment. They include: (i) a motion for j.n.o.v. pursuant to M.R.C.P. 50(b); (ii) a motion to amend findings or make additional findings of fact pursuant to M.R.C.P. 52(b); (iii) a motion for new trial pursuant to M.R.C.P. 59; and (iv) a motion to alter or amend the judgment pursuant to M.R.C.P. 59(e). The trial court may not extend the 10-day period in which to file these post-trial motions. M.R.C.P. 6 (b). The time in which certain Rule 60(b) motions must be made also begins after entry of judgment.

In addition, M.R.A.P. 4(a) provides that a notice of appeal from a final judgment in chancery court or circuit court (one that resolves all claims among all parties) shall be filed within 30 days after entry of judgment. If a party files: (i) a motion for j.n.o.v. pursuant to M.R.C.P. 50(b); (ii) a motion to amend findings or make additional findings of fact pursuant to M.R.C.P. 52(b); (iii) a motion for new trial pursuant to M.R.C.P. 59; (iv) a motion to alter or amend the judgment pursuant to M.R.C.P. 59(e); or (v) a motion for relief pursuant to M.R.C.P. 60 within 10 days after entry of judgment, the time for appeal runs from the entry

of the order disposing of the last such outstanding motion rather than the entry of judgment. *See* M.R.A.P. 4(d).

[Advisory Committee Note adopted effective July 1, 2014, amended effective January 16, 2020.]

RULE 59. NEW TRIALS; AMENDMENT OF JUDGMENTS

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of Mississippi; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of Mississippi.

On a motion for a new trial in an action without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. A motion for a new trial shall be filed not later than ten days after the entry of judgment.

(c) Time for Serving Affidavits. When a motion for new trial is based upon affidavits they shall be filed with the motion. The opposing party has ten days after service to file opposing affidavits, which period may be extended for up to twenty days either by the court for good cause shown or by the parties' written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. Not later than ten days after entry of judgment the court may on its own initiative order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a timely motion for a new trial for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be filed not later than ten days after entry of the judgment.

[Amended effective July 1, 1997.]

Advisory Committee Historical Note

Effective July 1, 1997, Rule 59(b), (c) and (e) were amended to clarify that motions for a new trial and accompanying affidavits, and motions to alter or amend a judgment, must be filed not later that ten days after entry of judgment. 689 So. 2d XLIX (West Miss. Cases).

Advisory Committee Notes

In jury trials, the trial court may grant a new trial based upon a prejudicial error by the court in the admission or exclusion of evidence, an error in the jury instructions, prejudicial comments by the judge or attorneys, a finding that the verdict is against the great weight of the evidence, a finding that the jury's verdict is the result of passion, prejudice or bias, or any grounds upon which new trials were granted in actions at law prior to the adoption of these rules. A trial court's ruling on a motion for new trial is reviewed for abuse of discretion.

Although "[i]t is clearly better practice to include all potential assignments of error in a motion for new trial,…when the assignment of error is based on an issue which has been decided by the trial court and duly recorded in the court reporter's transcript, such as the omission or exclusion of evidence, [the appellate court] may consider it regardless of whether it was raised in the motion for new trial." *See Kiddy v. Lipscomb,* 628 So. 2d 1355, 1359 (Miss. 1993).

The rule does not authorize a motion for reconsideration after entry of judgment. If a motion is mislabeled as a motion for reconsideration and was filed within ten days after the entry of judgment, the trial court should treat such motion as a post-trial motion to alter or amend the judgment pursuant to M.R.C.P. 59(e). *Boyles v. Schlumberger Tech. Corp.,* 792 So. 2d 262, 265 (Miss. 2001). A party moving to alter or amend the judgment "must show: (i) an intervening change in controlling law, (ii) availability of new evidence not previously available, or (iii) need to correct a clear error of law to prevent manifest injustice." *See Brooks v. Robertson,* 882 So. 2d 229, 233 (Miss. 2004). A motion to alter or amend the judgment is within the trial court's discretion. When a motion is mislabeled as a motion for reconsideration, does not state that it was brought pursuant to Rule 59, and was filed more than ten days after the entry of the final judgment in the case, the trial court should treat such motion as one for relief from a judgment pursuant to Rule 60(b). *See Carlisle v. Allen,* 40 So. 3d 1252, 1260 (Miss. 2010).

A motion for new trial or a motion to alter or amend the judgment made pursuant to M.R.C.P. 59 must be filed within 10 days after entry of the judgment. The trial court has no authority or discretion to extend the 10-day time period. M.R.C.P. 6(b). A timely Rule 59 motion for a new trial or to alter or amend the judgment tolls the time in which to file a notice of appeal; the thirty-day time period in which to file a notice of appeal runs from the entry of the order disposing of the post-trial motion. M.R.A.P. 4(c). If not filed within ten days after entry of the judgment, a Rule 59 motion for a new trial, to alter or amend the judgment, or for reconsideration does not toll the time period in which to file a notice of appeal. M.R.A.P. 4(d); *but see Wilburn v. Wilburn*, 991 So. 2d 1185, 1190-191 (Miss. 2008) (Court refused to address the timeliness of appellant's notice of appeal even though appellant

filed a motion to reconsider more than ten days after entry of judgment and did not file a notice of appeal within thirty days after the entry of judgment, noting that the appellee did not object to the untimely motion to reconsider.)

In a case tried without a jury, a party may move the court to amend its findings of fact or make additional findings of fact pursuant to M.R.C.P. 52(b). The motion must be filed within ten days after entry of judgment. Upon a timely motion, the court may amend its findings or make additional findings and amend its judgment accordingly.

A motion for relief from a final judgment pursuant to M.R.C.P. 60(b) is different from a motion to alter or amend the judgment pursuant to M.R.C.P. 59(e) in that a change in the law after entry of final judgment is not an "extraordinary or compelling circumstance" warranting relief pursuant to M.R.C.P. 60(b). *See Regan v. S. Cent. Reg'l Med. Ctr.*, 47 So. 3d 651, 655 (Miss. 2010). Relief pursuant to Rule 60(b)(6) is reserved for cases involving "exceptional and compelling circumstances" in light of the desire to achieve finality in litigation. *See id.*

[Advisory Committee Note adopted effective July 1, 2014, amended effective January 16, 2020.]

RULE 60. RELIEF FROM JUDGMENT OR ORDER

(a) Clerical Mistakes. Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders up until the time the record is transmitted by the clerk of the trial court to the appellate court and the action remains pending therein. Thereafter, such mistakes may be so corrected only with leave of the appellate court.

(b) Mistakes; Inadvertence; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) fraud, misrepresentation, or other misconduct of an adverse party;

(2) accident or mistake;

(3) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;

(6) any other reason justifying relief from the judgment.

The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than six months after the judgment, order, or proceeding was entered or taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. Leave to make the motion need not be obtained from the appellate court unless the record has been transmitted to the appellate court and the action remains pending therein. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action and not otherwise.

(c) Reconsideration of transfer order. An order transferring a case to another court will become effective ten (10) days following the date of entry of the order. Any motion for reconsideration of the transfer order must be filed prior to the expiration of the 10-day period, for which no extensions may be granted. If a motion for reconsideration is filed, all proceedings will be stayed until such time as the motion is ruled upon; however, if the transferor court fails to rule on the motion for reconsideration within thirty (30) days of the date of filing, the motion shall be deemed denied.

[Amended effective July 1, 2008, to provide for reconsideration of transfer orders entered on or after that date.]

Advisory Committee Notes

The trial court may grant relief from a judgment or order to correct clerical errors pursuant to Rule 60(a), or for other reasons enumerated in Rule 60(b). The trial court may correct clerical errors at any time, but if the case is on appeal and the trial court clerk has transmitted the record to the appellate court, the trial court must obtain leave from the appellate court before correcting any clerical mistakes. Motions for relief from a judgment or order based upon one of the reasons enumerated in Rule 60(b) must be made within a reasonable time, and in some cases, not more than six months after the judgment or order was entered.

Rule 60(a) only authorizes the trial court to correct clerical errors; it does not authorize any changes to the judgment that are substantive and change the effect or intent of the original judgment. *See Whitney Nat'l Bank v. Smith*, 613 So. 2d 312, 316 (Miss. 1993).

When ruling upon a Rule 60(b) motion, the trial court should balance the litigant's interest in a resolution on the merits of the motion with the desire to achieve finality in litigation. *See Stringfellow v. Stringfellow*, 451 So. 2d 219, 221 (Miss. 1984). Rule 60(b) motions that attempt to merely relitigate the case should be denied. *Id*.

A party moving for relief pursuant to Rule 60(b)(1) based upon fraud, misrepresentation or other misconduct of an adverse party must do so within six months after entry of the judgment and must prove the fraud, misrepresentation or other misconduct by clear and convincing evidence. *See Stringfellow*, 451 So. 2d at 221. Relief from a final judgment based upon fraud upon the court may be sought pursuant to Rule 60(b)(6). *See In re Estate of Pearson,* 25 So. 3d 392, 395 (Miss. Ct. App. 2009). "[R]elief based on 'fraud upon the court' is reserved for only the most egregious misconduct, and requires a showing of 'an unconscionable plan or scheme which is designed to improperly influence the court

in its decision.'" *Id.* (citing *Wilson v. Johns-Manville Sales Corp.,* 873 F.2d 869, 872 (5th Cir. 1989)).

A party moving for relief pursuant to Rule 60(b)(2) based upon accident or mistake must do so within six months after entry of the judgment. A Rule 60(b)(2) motion will only be granted upon a showing of exceptional circumstances. Generally, "neither ignorance nor carelessness on the part of an attorney will provide grounds for relief." *See Stringfellow*, 451 So. 2d at 221.

A party may move to set aside a default judgment pursuant to Rule 60(b)(2). When ruling on such a motion, the trial court may consider: (1) whether the default was caused by excusable neglect or a bona fide technical error; (2) whether the claimant will suffer prejudice if the default judgment is set aside; and (3) whether the defaulting party has a colorable defense to the merits. *See State Highway Comm'n of Miss. v. Hyman*, 592 So. 2d 952, 955 (Miss. 1991).

A party moving for relief pursuant to Rule 60(b)(3) based upon newly discovered evidence must do so within six months after entry of the judgment. To justify relief, the evidence: (i) must have been in existence at the time of trial; (ii) could not have been discovered by due diligence prior to the expiration of the ten-day period in which a Rule 59 motion for new trial could have been filed; (iii) must be material and not cumulative; and (iv) must be of such character as to probably produce a different result in the event of a new trial or be of such character as to require a different ruling on summary judgment. *See January v. Barnes*, 621 So. 2d 915, 920 (Miss. 1992).

A party may move to set aside a void judgment pursuant to Rule 60(b)(4) more than six months after entry of the judgment if the delay in moving for relief was reasonable. *See Ladner v. Logan*, 857 So. 2d 764, 770 (Miss. 2003). A judgment is void if the trial court lacked jurisdiction over the subject matter or the parties or acted in a manner inconsistent with due process of law. *See Bryant, Inc. v. Walters*, 493 So. 2d 933, 938 (Miss. 1986).

A party may move to set aside the judgment pursuant to Rule 60(b)(5) if the judgment has been satisfied, released or discharged or a prior judgment upon which it is based has been reversed or otherwise vacated. Rule 60(b)(5), however, "does not authorize relief from a judgment on the ground that the law applied by the court in making its adjudication has been subsequently overruled or declared erroneous in another and unrelated proceeding." *See Regan v. S. Cent. Reg'l Med. Ctr.*, 47 So. 3d 651, 655 (Miss. 2010).

A party may move to set aside the judgment pursuant to Rule 60(b)(6) if there are "extraordinary and compelling" circumstances justifying relief. When ruling on a Rule

60(b)(6) motion, the trial court may consider the following factors: "(1) [t]hat final judgments should not lightly be disturbed; (2) that the Rule 60(b) motion is not to be used as a substitute for appeal; (3) that the rule should be liberally construed in order to achieve substantial justice; (4) whether the motion was made within a reasonable time; (5) [omitted factor relevant only to default judgments]; (6) whether if the judgment was rendered after a trial on the merits-the movant had a fair opportunity to present his claim or defense; (7) whether there are intervening equities that would make it inequitable to grant relief; and (8) any other factors relevant to the justice of the judgment under attack." *See Carpenter v. Berry*, 58 So. 3d 1158, 1162 (Miss. 2011).

The trial court has discretion to grant or deny a Rule 60(b) motion, unless the judgment is void, in which case the court is required to set aside the judgment. *See Sartain v. White*, 588 So. 2d 204, 211 (Miss. 1991).

Motions for relief under this rule are filed in the original action, rather than as an independent action.

Rule 60 motions for relief from a judgment filed no later than ten days after entry of judgment toll the time period in which an appeal may be taken. M.R.A.P. 4(d). Rule 60 motions filed more than ten days after entry of judgment do not toll the time period in which an appeal may be taken. A Rule 60(b) motion for relief from a judgment does not automatically stay execution upon the judgment. The trial court has discretion to stay execution upon the judgment while a Rule 60(b) motion is pending. M.R.C.P. 62(b).

Ordinarily, the filing of a notice of appeal transfers jurisdiction from the trial court to the appellate court. Rule 60, however, confers limited concurrent jurisdiction to the trial court to grant relief under Rule 60(a) and (b) even if a notice of appeal has been filed. If the record on appeal has been transmitted to the appellate court, then leave must be obtained from the appellate court to make corrections to a judgment or order pursuant to Rule 60(a) or to move for relief under Rule 60(b). *McNeese v, McNeese*, 129 So. 3d 125, 128 (Miss. 2013); *Griffin v. Armana*, 679 So. 2d 1049, 1050 (Miss. 1996); *Ward v. Foster*, 517 So. 2d 513 (Miss. 1987).

[Advisory Committee Note adopted effective July 1, 2014; amended effective January 16, 2020.]

RULE 61. HARMLESSS ERROR

No error in either the admission or the exclusion of evidence and no error in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

RULE 62. STAY OF PROCEEDINGS TO ENFORCE A JUDGMENT

(a) Automatic Stay; Exceptions. Except as stated herein or as otherwise provided by statute or by order of the court for good cause shown, no execution shall be issued upon a judgment nor shall proceedings be taken for its enforcement until the expiration of thirty days after its entry. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal. The provisions of subdivision (c) of this rule govern the suspending, modifying, restoring, or granting of an injunction during the pendency of an appeal.

(b) Stay on Motion. Upon a motion, the court may, in its discretion and on such conditions for the security of the adverse party as are proper, stay the execution of or any proceedings to enforce a judgment pending the disposition of: (i) a motion for new trial pursuant to Rule 59; (ii) a motion to alter or amend a judgment made pursuant to Rule 59(e); (iii) a motion for relief from a judgment or order made pursuant to Rule 60(b); (iv) a motion for judgment notwithstanding the verdict made pursuant to Rule 50(b); or (v) a motion for amendment to the findings or for additional finding made pursuant to Rule 52(b).

(c) Injunction Pending Appeal. When an interlocutory or final judgment has been rendered granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of an appeal from such judgment upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. The power of the court to make such an order is not terminated by the taking of the appeal.

(d) Stay Upon Appeal. When an appeal is taken, the appellant, when and as authorized by statute or otherwise, may obtain a stay subject to the exceptions contained in subdivision (a) of this rule.

(e) [Omitted].

(f) Stay in Favor of the State of Mississippi or Agency Thereof. When an appeal is taken by the State of Mississippi or an officer or agency thereof or by direction of any department of the government of same and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required of the appellant.

(g) Power of Appellate Court Not Limited. The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the

pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.

(h) Stay of Judgment Upon Multiple Claims or as to Multiple Parties. When a court has ordered a final judgment under the conditions stated in Rule 54(b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

[Amended effective July 1, 1997.]

Advisory Committee Historical Note

Effective July 1, 1997, Rule 62(a) was amended to clarify that the stay of enforcement of a judgment expires ten days after the later of the entry of the judgment or the disposition of a motion for a new trial, and Rule 62(b) was amended to state that a court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion to set aside a verdict made pursuant to Rule 50(b). 689-692 So. 2d XLIX (West Miss. Cas. 1997).

Advisory Committee Notes

Subdivision (e) of the Federal Rules applies to stays in favor of the United States; it is omitted from the Mississippi Rules of Civil Procedure.

RULE 63. JUDGE'S INABILITY TO PROCEED

(a) During Trial. If for any reason the judge before whom an action has been commenced is unable to proceed with the trial, another judge regularly sitting in or assigned under law to the court in which the action is pending may proceed with and finish the trial upon certifying in the record that he has familiarized himself with the record of the trial; but if such other judge is satisfied that he cannot adequately familiarize himself with the record, he may in his discretion grant a new trial.

(b) After Verdict or Findings. If for any reason the judge before whom an action has been tried is unable to perform the duties to be performed by the court after a verdict is returned, or after the hearing of a nonjury action, then any other judge regularly sitting in or assigned under law to the court in which the action was tried may perform those duties; but if such other judge is satisfied that he cannot perform those duties, he may in his discretion grant a new trial.

[Amended effective July 1, 2020.]

Advisory Committee Historical Note

Effective July 1, 2020, the caption for Rule 62 was amended to refer to a judge's inability to proceed rather than a judge's disability.

CHAPTER VIII. PROVISIONAL AND FINAL REMEDIES AND SPECIAL PROCEEDINGS

RULE 64. SEIZURE OF PERSON OR PROPERTY

At the commencement of and during the course of an action, all remedies providing for the seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by law. These remedies include attachment, replevin, claim and delivery, sequestration and other corresponding or equivalent remedies, however designated and regardless of whether the remedy is ancillary to an action or must be obtained by an independent action.

[Amended effective September 1, 1987.]

Advisory Committee Historical Note

Effective September 1, 1987, Rule 64 was amended by deleting "garnishment" as a prejudgment remedy included in the provisions of the Rule. 508-511 So. 2d XXIX (West Miss. Cas. 1987).

RULE 65. INJUNCTIONS

(a) Preliminary Injunction.

(1) Notice. No preliminary injunction shall be issued without notice to the adverse party.

(2) Consolidation of Hearing With Trial on Merits. Before or after the commencement of the hearing on application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon a trial. This subdivision (a)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

(b) Temporary Restraining Order; Notice; Hearing; Duration. A temporary restraining order may be granted, without notice to the adverse party or his attorney if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed ten days, as the court fixes (except in domestic relations cases, when the ten-day limitation shall not apply), unless within the time so fixed the order for good cause shown is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be stated in the order.

In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and take precedence over all matters except older matters of the same character. When the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order.

On two days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(c) Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs, damages, and reasonable attorney's fees as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained; provided, however, no such security shall be required of the State of Mississippi or of an officer or agency thereof, and provided further, in the discretion of the court, security may not be required in domestic relations actions. The provisions of Rule 65.1 apply to a surety upon a bond or undertaking under this rule.

(d) Form and Scope of Injunction or Restraining Order.

(1) Every order granting a restraining order shall describe in reasonable detail and not by reference to the complaint or other document the act or acts sought to be restrained; it is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

(2) Every order granting an injunction shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail and not by reference to the complaint or other document the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

(e) Jurisdiction Unaffected. Injunctive powers heretofore vested in the circuit and chancery courts remain unchanged by this rule.

Advisory Committee Notes

Rule 65 authorizes parties to seek temporary restraining orders (TROs) and preliminary injunctions in civil cases in which permanent injunctive relief or other relief is being sought. A party may move for, and in appropriate circumstances, obtain a TRO and/or a preliminary injunction before the merits of the case are resolved.

Generally, the purpose of a TRO is to provide temporary short term relief until further action can be taken in the case. To obtain a TRO without notice to the adverse party, the party seeking relief must show, by affidavit or verified complaint, that it will suffer immediate and irreparable injury before the adverse party can be heard in opposition. In addition, the attorney for the party seeking the TRO must certify to the court in writing the efforts made to give the adverse party notice and the reasons why the notice to the adverse party should not be required. If a TRO is granted without notice, it must contain the information required by Rule 65(b) and it must expire by its terms, not more than 10 days after its entry, except in domestic relations cases. Before its expiration, a TRO may be extended by the court for a like period if the restrained party consents or the court extends the TRO for good cause shown.

The purpose of a preliminary injunction is to provide injunctive relief until the merits of the case are resolved. Preliminary injunctions cannot be granted without notice. A party moving for preliminary injunctive relief pursuant to Rule 65(a) must demonstrate that "(i) there exists a substantial likelihood that the [movant] will prevail on the merits; (ii) the injunction is necessary to prevent irreparable harm; (iii) the threatened injury to the [movant] outweighs the harm an injunction might do to the [opposing party]; and (iv) granting a preliminary injunction is consistent with the public interest." *See Littleton v. McAdams,* 60 So. 3d 169, 171 (Miss. 2011). Motions for preliminary injunctions are within the trial court's discretion. *See City of Durant v. Humphreys County Mem'l Hosp.,* 587 So. 2d 244, 250 (Miss. 1991).

Rule 65 (c) requires that proper security be given by the movant obtaining a TRO or preliminary injunction so that proper payment for costs, damages and reasonable attorneys' fees may be made to the restrained party in the event it is determined that such party was wrongfully enjoined or restrained. Such security is not required from the State of Mississippi and may be waived in domestic relations cases. Mississippi Code Annotated §11-13-37 provides an independent statutory basis for awarding damages and attorneys' fees upon dissolution of an injunction.

County courts have some authority to issue injunctive relief. Mississippi Code Annotated §9-9-21 provides that county courts "shall have jurisdiction concurrent with the circuit and chancery courts in all matters of law and equity wherein the amount of value of the things in controversy shall not exceeds…the sum of …$200,000.00." Mississippi Code Annotated §99-9-23 provides that county courts "shall have the power to order the issuances of writs of certiorari, supersedeas, attachments, and other remedial writs in all cases pending in, or within the jurisdiction of, [the county court]." Section 9-9-23, however, further provides that county courts "shall not have original power to issue writs of injunction, or other remedial writs of equity or in law except in those cases hereinabove specified as being

within [the court's] jurisdiction." The statutes have been interpreted as authorizing county courts to issue injunctions in cases falling within the concurrent jurisdiction of the chancery and county court. *See, e.g., Lee v. Coahoma Opportunities, Inc.,* 485 So. 2d 293, 294 (Miss. 1986) (citing Miss. Code Ann. §9-9-21(1)) ("A claim for specific performance of a contract of employment plus attendant injunctive relief is well within the jurisdiction of the county court on its equity side"); *Swan v. Hill,* 855 So. 2d 459, 462-63 (Miss. Ct. App. 2003) (holding that the county court had jurisdiction to issue injunctive relief in a case involving property rights).

65.1 SECURITY: PROCEEDINGS AGAINST SURETIES

Whenever these rules require or permit the giving of security by a party, and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting the liability on the bond or undertaking may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the suretiess if their addresses are known.

RULE 66. RECEIVERS

An action wherein a receiver has been appointed shall not be dismissed except by order of the court. In all other respects the action in which the appointment of a receiver is sought or which is brought by or against a receiver is governed by these rules.

RULE 67. DEPOSIT IN COURT

In any action in which any part of the relief sought is judgment for a sum of money or the disposition of any other thing capable of delivery, a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part of such sum or thing.

Where money is paid into court to abide the result of any legal proceeding, the judge may order it deposited at interest in a federally insured bank or savings and loan association authorized to receive public funds, to the credit of the court in the action or proceeding in which the money was paid. The money so deposited plus any interest shall be paid only upon the check of the clerk of the court, annexed with its certified order for the payment, and in favor of the person to whom the order directs the payment to be made.

RULE 68. OFFER OF JUDGMENT

At any time more than fifteen days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within ten days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the court shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the cost incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict, order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time, not less than ten days, prior to the commencement of hearing to determine the amount or extent of liability.

RULE 69. EXECUTION

(a) Enforcement of Judgment. Process to enforce a judgment for the payment of money shall be by such procedures as are provided by statute. The procedure on execution, in proceedings supplementary to and in aid of judgment, and in proceedings on and in aid of execution, shall be as provided by statute.

(b) Examination by Judgment Creditor. To aid in the satisfaction of a judgment of more than one hundred dollars, the judgment creditor may examine the judgment debtor or any other person, including the books, papers, or documents of same, upon any matter not privileged relating to the debtor's property.

The judgment creditor may examine the judgment debtor or other person in open court as provided by statute or may utilize the discovery procedures stated in Rules 26 through 37 hereof.

RULE 70. JUDGMENT FOR SPECIFIC ACTS; VESTING TITLE

(a) Specific Acts. If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party.

(b) Divestment of Title. If real or personal property is within the State of Mississippi, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others; such judgment has the effect of a conveyance executed in due form of law.

(c) Delivery of Possession. When any order or judgment is for the delivery of possession, a certified copy of the judgment or order shall be sufficient authority for the sheriff of the county in which the property is located to seize same and deliver it to the party entitled to its possession.

(d) Contempt. The court may also in proper cases adjudge the party in contempt.

Advisory Committee Notes

Rule 70 applies only after judgment is entered; Rules 6 and 65 provide for remedies prior to judgment. Rule 70 applies only if a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents to perform only other specific acts and the party has failed to comply within the time specified.

RULE 71. PROCESS IN BEHALF OF AND AGAINST PERSONS NOT PARTIES

When an order is made in favor of a person who is not a party to the action, other than a creditor of a party to a divorce proceeding, he may enforce obedience to the order by the same process as if he were a party; and when obedience to an order may be lawfully enforced against a person who is not a party, he is liable to the same process for enforcing obedience to the order as if he were a party.

Advisory Committee Notes

A court order may be enforced by a non-party if the non-party shares an identity of interest with the prevailing party. For example, an assignee of a prevailing party in a case concerning title to property is entitled to enforce a judgment in the same manner as the party assignor. Similarly, a judgment may be against a person who is the successor in interest to a party, but the court must first obtain personal jurisdiction on the successor in interest. *See, e.g., Mansour v. Charmax Ind., Inc.,* 680 So. 2d 852, 855 (Miss. 1996) (holding that service of process is requirement to personal jurisdiction before Rule 71 can be applied); *Libutti v. U.S.,* 178 F.3d 114, 124-25 (2d Cir. 1999) (holding that the court must have personal jurisdiction over the non-party against whom the judgment is enforced).

RULE 71A. EMINENT DOMAIN [OMITTED]

CHAPTER IX. APPEALS

RULES 72 TO 76. [OMITTED]

CHAPTER X. COURTS AND CLERKS

RULE 77. COURTS AND CLERKS

(a) Court Always Open. The courts shall be deemed always open for the purposes of filing any pleading or other proper paper, of issuing and returning process, and of making and directing all interlocutory motions, orders, and rules.

(b) Trials and Hearings; Orders in Chambers. All trials upon the merits shall be conducted in open court, except as otherwise provided by statute. All other acts or proceedings may be done or conducted by a judge in chambers, without the attendance of the clerk or other court officials and at any place within the state either within or without the district; but no hearing shall be conducted outside the district without the consent of all parties affected thereby.

(c) Clerk's Office and Orders by Clerk. The clerk's office with the clerk or a deputy clerk in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays. All motions and applications to the clerk for issuing process, for issuing process to enforce and execute judgments, for entering defaults, and for other proceedings which do not require allowance or order of the court are grantable of course by the clerk; but his action may be suspended or altered or rescinded by the court upon cause shown.

(d) Notice of Orders or Judgments. Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a note in the docket of the service. Any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal, nor relieve, nor authorize the court to relieve, a party for failure to appeal within the time allowed, except as permitted by the Mississippi Rules of Appellate Procedure.

[Amended effective July 1, 1997.]

Advisory Committee Historical Note

Effective July 1, 1997, Rule 77(d) was amended to allow for service of notices of the entry of orders and judgments by parties. 689-692 So. 2d LXII (West Miss. Cas. 1997.)

Effective February 1, 1990, Rule 77 was amended by adding subsection (d), requiring the clerk of the court to give notice of the entry of orders and judgments to the interested parties. 553-556 So. 2d XLII (West Miss. Cas. 1990).

Advisory Committee Notes

Rule 77(a) provides that the courts shall be deemed always open for the purpose of filing papers and issuing and returning process and making motions and orders. This does not mean that the office of the clerk must be physically open at all hours or that the filing of papers can be effected by leaving them in a closed or vacant office. Under Rule 5(e)(1) papers may be filed out of business hours by delivering them to the clerk or to the judge if he or she permits. *See* Miss. Const. § 24 (all courts shall be open).

Rule 77(b) requires that the "all trials upon the merits" be conducted in "open court"; all other acts or proceedings may be done or conducted by a judge "in chambers," without the necessity of the attendance of the clerk or other court official and at any place within the state. However, no hearing, other than one heard ex parte, shall be conducted outside the district without the consent of all parties affected thereby. *See Corporate Mgmt., Inc. v. Greene Rural Health Ctr. Bd. of Trustees,* 47 So. 3d 142, 146 (Miss. 2010).

Rule 77(d) requires that the clerk provide copies of all orders and judgments, immediately upon their entry, to all parties who are not in default for failure to appear.

M.R.A.P. 4(h) provides that a party who did not receive notice of entry of a judgment or order from the clerk or any party within 21 days of its entry may move the trial court to reopen the time for appeal.

Rule 77(d) gives a prevailing party who wants to ensure that the time for appeal is not reopened pursuant to M.R.A.P. 4(h), the opportunity to serve notice of entry of the judgment or order upon opposing parties in the manner provided in Rule 5. Although prevailing parties may take the initiative to assure that their adversaries receive effective notice, the clerk retains the duty to give notice of entry of judgments and orders.

RULE 78. MOTION PRACTICE

Each court shall establish procedures for the prompt dispatch of business, at which motions requiring notice and hearing may be heard and disposed of; but the judge at any time or place and on such notice, if any, as he considers reasonable may make orders for the advancement, conduct, and hearing of actions.

To expedite its business, the court may make provision by rule or order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition.

[Amended effective March 1, 1989; amended effective April 17, 2003 to allow the courts, by rule to provide for determination of motions seeking final judgment without oral argument.]

Advisory Committee Historical Note

Effective March 1, 1989, Rule 78 was amended by changing its title to "MOTION PRACTICE" and by abrogating provisions for local rules. 536-538 So. 2d XXXI (West Miss. Cas. 1989).

Advisory Committee Notes

Rule 78 does not alter any local rules governing motion practice; however, the rule must be considered in light of Rule 83.

RULE 79. BOOKS AND RECORDS KEPT BY THE CLERK AND ENTRIES THEREIN

(a) General Docket. The clerk shall keep a book known as the "general docket" of such form and style as is required by law and shall enter therein each civil action to which these rules are made applicable. The file number of each action shall be noted on each page of the docket whereon an entry of the action is made. All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be noted in this general docket on the page assigned to the action and shall be marked with its file number. These entries shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The entry of an order or judgment shall show the date the entry is made. In the event a formal order is entered, the clerk shall insert the order in the file of the case.

(b) Minute Book. The clerk shall keep a correct copy of every judgment or order. This record shall be known as the "Minute Book."

(c) Indexes; Calendars. Suitable indexes of the general docket shall be kept by the clerk under the direction of the court. There shall be prepared, under the direction of the court, calendars of all actions ready for trial.

(d) Other Books and Records. The clerk shall also keep such other books and records as may be required by statute or these rules. The documents required to be kept under this rule may be recorded by means of an exact-copy photocopy process.

(e) Removing the File in a Case. The file of a case shall not be removed from the office of the clerk except by permission of the court or the clerk.

Advisory Committee Historical Note [Rule 79]

Effective April 1, 2002, the Comment to Rule 79(a) was amended to underscore that docket entries must accurately reflect the actual date of entry. 813-815 So. 2d LXXXVIII (West Miss. Cases 2002).

Advisory Committee Notes

Rule 79(a) specifies that the docket entries reflect the date on which entries are made in the general docket. Since several important time periods and deadlines are calculated from the date of the entry of judgments and orders, these entries must accurately reflect the actual

date of the entries rather than another date, such as the date on which a judgment or order is signed by the judge. See, for example, Rule 58 mandating that a judgment is effective only when entered as provided in Rule 79(a), and Rule 59 which requires that motions to alter or amend judgments be filed within ten days after the entry of judgment.

RULE 80. STENOGRAPHIC REPORT OR TRANSCRIPT AS EVIDENCE [OMITTED)]

Advisory Committee Notes

Mississippi has statutory provisions for the appointment, oath, nature and term of office, bond, removal from office, and duties and responsibilities of court reporters. *See* Miss. Code Ann. §§9-13-1 *et seq.* (1972) and M.R.A.P. Appendix III.

RULE 81. APPLICABILITY OF RULES

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

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

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

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

(4) proceedings pertaining to election contests;

(5) proceedings pertaining to bond validations;

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

(7) eminent domain proceedings;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

may by order or rule authorize its clerk to set such actions or matters for original hearing and to continue the same for hearing on a later date.

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

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

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

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

Plea in abatement shall mean *motion*;

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

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

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

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

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

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

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

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

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

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

Advisory Committee Historical Note

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

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

Effective January 1, 1986, Rule 81(a) was amended by adding subsections (10) – (12); Rule 81(b) was amended by deleting examples and by deleting a provision that no answers are required in *ex parte* matters; Rule 81(d) was rewritten to provide for proceedings in a number of specified actions and to abrogate its treatment of domestic relations matters. 470-473 So. 2d XVI-XVIII (West Miss. Cas. 1986).

Advisory Committee Notes

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

Rule 81(a) lists 12 categories of civil actions which are not governed entirely by the M.R.C.P. In each of those actions there are statutory provisions detailing certain procedures to be utilized. *See generally* Miss. Code Ann. §§11-43-1, *et seq.,* (habeas corpus); 73-3-301, *et seq.*, (disciplining of attorneys); 43-21-1, *et seq.,* (youth court proceedings); 23-15-911 *et seq.* (election contests); 31-13-1, *et seq.*, (bond validation); 41-21-61, *et seq.,* (persons with mental illness or an intellectual disability); 41-30-1, *et seq.,* (adjudication, commitment and release of alcohol and drug addicts); 11-27-1, *et seq.,* (eminent domain); 91-1-1, *et seq.,* (trusts and estates); 93-1-1, *et seq.,* (domestic relations); 51-29-1, *et seq.,* and 51-31-1, *et seq.,* (creation and maintenance of drainage and water management districts); 21-1-1, *et seq.,* (creation of and change in boundaries of municipalities); and those proceedings identified in category (12) by their Code Title as follows: 9-5-103 (bonds of receivers, assignees, executors may be reduced or cancelled, if excessive or for sufficient cause); 11-1-23 (court or judge may require new security); 11-1-29 (proceedings on death of surety on bonds, etc.);

11-1-31 (death of parties on bonds having force of judgment—citation in anticipation of judgment); 11-1-35 (death of parties on bonds having force of judgment when citation issued and returnable); 11-1-43 through 11-1-49 (seizure of perishable commodities by legal process); 11-5-151 through 11-5-167 (receivers in chancery); and 11-17-33 (receivers appointed for nonresident or unknown owners of mineral interests).

However, in any instance in the twelve listed categories in which the controlling statutes are silent as to a procedure, the M.R.C.P. govern.

As to ex parte matters, Rule 81(b) is intended to preserve, inter alia, the summary manner in which many matters testamentary, of administration, in minors/wards' business, and in cases of idiocy, lunacy, and persons of unsound mind are handled. *See* Miss. Code Ann. §11-5-49 (1972).

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

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

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

Rule 81(d)(5) recognizes that since no answer is required of a defendant/respondent, then the summons issued shall inform him of the time and place where he is to appear and defend. If the matter is not heard on the date originally set for the hearing, the court may sign an order on that day continuing the matter to a later date. The rule also provides that the Court may adopt a rule or issue an order authorizing its Clerk to set actions or matters for original hearings and to continue the same for hearing on a later date. (Local rules should be filed with the Supreme Court as required by Rule 83).

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

CHAPTER XI. GENERAL PROVISIONS

RULE 82. JURISDICTION AND VENUE

(a) Jurisdiction Unaffected. These rules shall not be construed to extend or limit the jurisdiction of the courts of Mississippi.

(b) Venue of Actions. Except as provided by this rule, venue of all actions shall be as provided by statute.

(c) Venue Where Claim or Parties Joined. Where several claims or parties have been properly joined, the suit may be brought in any county in which any one of the claims could properly have been brought. Whenever an action has been commenced in a proper county, additional claims and parties may be joined, pursuant to Rules 13, 14, 22 and 24, as ancillary thereto, without regard to whether that county would be a proper venue for an independent action on such claims or against such parties.

(d) Improper Venue. When an action is filed laying venue in the wrong county, the action shall not be dismissed, but the court, on timely motion, shall transfer the action to the court in which it might properly have been filed and the case shall proceed as though originally filed therein. The expenses of the transfer shall be borne by the plaintiff. The plaintiff shall have the right to select the court to which the action shall be transferred in the event the action might properly have been filed in more than one court.

(e) Forum Non-conveniens. With respect to actions filed in an appropriate venue where venue is not otherwise designated or limited by statute, the court may, for the convenience of the parties and witnesses or in the interest of justice, transfer any action or any claim in any civil action to any court in which the action might have been properly filed and the case shall proceed as though originally filed therein.

[Amended effective February 20, 2004, to add Section 82(e) allowing transfer for forum non-conveniens for cases filed after the effective date.]

Advisory Committee Notes

Rule 82(c) provides that if venue is proper for one plaintiff's claim and such plaintiff has been properly joined with other plaintiffs, venue is proper for all plaintiffs' claims. Mississippi Code Annotated §11-11-3(2), however, provides that "[i]n any civil action where more than one (1) plaintiff is joined, each plaintiff shall independently establish proper venue; it is not sufficient that venue is proper for any other plaintiff joined in the civil

action." Rule 82(b) states that "[e]xcept as provided by this rule, venue in all actions shall be as provided by statute." Thus, there is a conflict between the rule and the statute in that the rule states that venue is proper in cases involving multiple plaintiffs who are properly joined if venue is proper for a single plaintiff's claim, whereas the statute provides that in cases involving multiple plaintiffs venue must be proper for each plaintiff's claim. There is no conflict in cases involving multiple defendants—"venue properly established against one defendant generally is proper against all defendants." *See Penn Nat'l Gaming, Inc. v. Ratliff,* 954 So. 2d 427, 432 (Miss. 2007). In cases involving a medical malpractice defendant and another defendant, however, venue established by Mississippi Code Annotated §11-11-3 is only appropriate in the county where the alleged malpractice occurred. *See Adams v. Baptist Memorial Hospital-DeSoto, Inc.,* 965 So. 2d 652, 657-58 (Miss. 2007).

Rule 82(e) authorizes a motion to transfer venue to another court having proper venue within the state based upon forum non-conveniens. In addition, Mississippi Code Annotated §11-11-3 authorizes transfer to another forum within Mississippi that is more convenient and further authorizes dismissal of the case in Mississippi if a more convenient forum is available in another state. A trial court ruling on a motion to dismiss made pursuant to the statute must determine whether, given "the interest of justice" and "the convenience of the parties and witnesses," "a claim or action would be more properly heard in a forum outside this state or in a different county of proper venue within this state." Mississippi Code Annotated §11-11-3(4)(a). The trial court may consider the factors set forth in Mississippi Code Annotated §11-11-3(4)(a).

RULE 83. LOCAL COURT RULES

(a) When Permissible. The conference of circuit, chancery and county court judges may hereafter make uniform rules and amendments thereto concerning practice in their respective courts not inconsistent with these rules. Likewise, any court by action of a majority of the judges thereof may hereafter make local rules and amendments thereto concerning practice in their respective courts not inconsistent with these rules. In the event there is no majority, the senior judge shall have an additional vote.

(b) Procedure for Approval. All such local rules and uniform rules adopted before being effective must be filed in the Supreme Court of Mississippi for approval. Such motions shall also include a copy of the motion and of the proposed rules in an electronically formatted medium (such as USB Flash Drive or CD-ROM). Upon receipt of such proposed rules and prior to any approval of the same, the Supreme Court may submit them to the Supreme Court Advisory Committee on Rules for advice as to whether any such rules are consistent or in conflict with these rules or any other rules adopted by the Supreme Court.

(c) Publication. All local and uniform rules hereinafter approved by the Supreme Court shall be submitted for publication in the Southern Reporter (Mississippi cases).
[Amended effective March 1, 1989; November 29, 1989; February 1, 1990; March 13, 1991; December 16, 1991; amended March 10, 1994, effective retroactively from and after January 1, 1993; amended October 13, 1995, effective from and after April 14, 1994; amended effective July 1, 2010.]

Advisory Committee Historical Note

Rule 83 was amended March 10, 1994, effective retroactively from and after January 1, 1993, by deleting the word "hereinafter" in Rule 83(b) following the words, "uniform rules"; by deleting Rule 83(c) in its entirety; and by renumbering 83(d) as 83(c). 632-635 So.2d XXIII-XXIV (West Miss.Cases 1994).

[Adopted August 21, 1996.]

Advisory Committee Notes

Practitioners may access local rules that have been approved by the Mississippi Supreme Court on the Court's website.

RULE 84. FORMS

The forms contained in the Appendix of Forms are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate.

RULE 85. TITLE

These rules shall be known as the Mississippi Rules of Civil Procedure and may be cited as M.R.C.P.; e. g., M.R.C.P. 85.

APPENDIX A. FORMS
[*See* Rule 84]

INTRODUCTORY STATEMENT

1. The following forms are intended for illustration only. They are limited in number. No attempt is made to furnish a manual of forms.

2. Except where otherwise indicated, each pleading, motion, and other paper should have a caption similar to that of the summons, with the designation of the particular paper substituted for the word "Summons." In the caption of the summons and in the caption of the complaint all parties must be named but in other pleadings and papers it is sufficient to state the name of the first party on each side, with an appropriate indication of other parties. *See* M.R.C.P. 4(b), 7(b)(2), and 10(a).

3. Each pleading, motion, and other paper is to be signed by at least one attorney of record in his individual name (M.R.C.P. 11). The attorney's name is to be followed by his address as indicated in Form 2. In forms following Form 2 the signature and address are not indicated.

4. If a party is not represented by an attorney, the signature and address of the party are required in place of those of the attorney (M.R.C.P. 11).

FORM 1A. SUMMONS

(Process Server)

IN THE _____ COURT OF _____ COUNTY, MISSISSIPPI

A.B., Plaintiff(s)

v. Civil Action, File No._____

CD., Defendant(s)

SUMMONS

THE STATE OF MISSISSIPPI
TO: (Insert the name and address of the person to be served)

NOTICE TO DEFENDANT(S)

THE COMPLAINT WHICH IS ATTACHED TO THIS SUMMONS IS IMPORTANT AND YOU MUST TAKE IMMEDIATE ACTION TO PROTECT YOUR RIGHTS.

You are required to mail or hand deliver a copy of a written response to the Complaint to _____, the attorney for the Plaintiff(s), whose post office address is _____ and whose street address is_____. Your response must be mailed or delivered within (30) days from the date of delivery of this summons and complaint or a judgment by default will be entered against you for the money or other things demanded in the complaint.

You must also file the original of your response with the Clerk of this Court within a reasonable time afterward.

Issued under my hand and the seal of said Court, this ___ day of _____ , 20__.

_____

Clerk of _____County, Mississippi

_____

_____

(Seal)

[This form shall appear on the reverse side of Form 1A. Summons (Process Server)]

PROOF OF SERVICE--SUMMONS

(Process Server)

[*Use separate proof of service for each person served*]

_____
Name of Person or Entity Served

I, the undersigned process server, served the summons and complaint upon the person or entity named above in the manner set forth below (process server must check proper space and provide all additional information that is requested and pertinent to the mode of service used):

__ FIRST CLASS MAIL AND ACKNOWLEDGEMENT SERVICE. By mailing (by first class mail, postage prepaid), on the date stated in the attached Notice, copies to the person served, together with copies of the form of notice and acknowledgement and return envelope, postage prepaid, addressed to the sender (Attach completed acknowledgement of receipt pursuant to M.R.C.P. Form 1B).

__ PERSONAL SERVICE. I personally delivered copies to _____ on the __ day of __ _____ , 20_, where I found said person(s) in _____ County of the State of _____.

__ RESIDENCE SERVICE. After exercising reasonable diligence I was unable to deliver copies to said person within _____ county, (state). I served the summons and complaint on the ___ day of _____, 20__, at the usual place of abode of said person by leaving a true copy of the summons and complaint with _____ who is the _____ (here insert wife, husband, son, daughter or other person as the case may be), a member of the family of the person served above the age of sixteen years and willing to receive the summons and complaint, and thereafter on the ___ day of _____, 20__, I mailed (by first class mail, postage prepaid) copies to the person served at his or her usual place of abode where the copies were left.

__ CERTIFIED MAIL SERVICE. By mailing to an address outside Mississippi (by first class mail, postage prepaid, requiring a return receipt) copies to the person served. (Attach signed return receipt or the return envelope marked "Refused.")

At the time of service I was at least 18 years of age and not a party to this action.

Fee for service: $_____

Process server must list below: [Please print or type]

Name_____
Address_____

_____
Telephone No._____

State of_____)
County of_____)

Personally appeared before me the undersigned authority in and for the state and county aforesaid, the within named _____who being first by me duly sworn states on oath that the matters and facts set forth in the foregoing "Proof of Service-Summons" are true and correct as therein stated.

_____
Process Server (Signature)

Sworn to and subscribed before me this the ___ day of _____ 20 __.

_____
Notary Public

(Seal) My Commission Expires:_____

[Adopted effective March 1, 1985; amended effective May 2, 1985; amended March 17, 1995; amended December 21, 2022.]

FORM 1AA. SUMMONS

(Sheriff)

IN THE _____ COURT OF _____ COUNTY, MISSISSIPPI

A.B., Plaintiff(s)

v. Civil Action, File No.____

C.D., Defendant(s)

SUMMONS

THE STATE OF MISSISSIPPI
TO: (Insert the name and address of the person to be served)

NOTICE TO DEFENDANT(S)

THE COMPLAINT WHICH IS ATTACHED TO THIS SUMMONS IS IMPORTANT AND YOU MUST TAKE IMMEDIATE ACTION TO PROTECT YOUR RIGHTS.

You are required to mail or hand-deliver a copy of a written response to the Complaint to _____, the attorney for the Plaintiff(s), whose post office address is _____, and whose street address is _____. Your response must be mailed or delivered within (30) days from the date of delivery of this summons and complaint or a judgment by default will be entered against you for the money or other things demanded in the complaint.

You must also file the original of your response with the Clerk of this Court within a reasonable time afterward.

Issued under my hand and the seal of said Court, this ___ day of _____ , 20 ___.

_____
Clerk of _____ County,
Mississippi

_____
_____

(Seal)

[This form shall appear on the reverse side of Form 1AA: Summons (Sheriff)]

RECEIVED THIS ___ DAY OF _____, 20 __.

BY_____
SHERIFF

SHERIFF'S RETURN

State of Mississippi)
County of_____)

( ) I personally delivered copies of the summons and complaint on the ___ day of _ _____, 20__, to:_____.

( ) After exercising reasonable diligence I was unable to deliver copies of the summons and complaint to _____ within _____ County, Mississippi. I served the summons and complaint on the ____day of ____, 20__, at the usual place of abode of said _ _____, by leaving a true copy of the summons and complaint with _____, who is the (here insert wife, husband, son, daughter or other person so as the case may be), a member of the family of the person served above the age of sixteen years and willing to receive the summons and complaint, and thereafter on the ___ day of _____, 20__, I mailed (by first class mail, postage prepaid) copies to the person served at his or her usual place of abode where the copies were left.

( ) I was unable to serve the summons and complaint.

This the ___ day of _____, 20 __.

_____
Sheriff of _____ County,
Mississippi

By: _____, Deputy Sheriff

[Note: All summons issued to the sheriff must be returned within thirty days from the day the summons was received by the sheriff pursuant to the requirements of Mississippi Rule of Civil Procedure 4(c)(2)].

[Adopted effective March 1, 1985; amended effective February 1, 1990; amended December 21, 2022.]

FORM 1B. NOTICE AND ACKNOWLEDGMENT FOR SERVICE BY MAIL

IN THE COURT OF _____ COUNTY, MISSISSIPPI

A.B., Plaintiff(s)
(include appropriate designation of other plaintiffs)
v. Civil Action, File No._____
C.D., Defendant(s)
(include appropriate designation of other defendants)

NOTICE

TO: (Insert the name and address of the person to be served)

The enclosed summons and complaint are served pursuant to Rule 4(c)(3) of the Mississippi Rules of Civil Procedure.

You must sign and date the acknowledgment at the bottom of this page. If you are served on behalf of a corporation, unincorporated association (including a partnership), or other entity, you must indicate under your signature your relationship to that entity. If you are served on behalf of another person and you are authorized to receive process, you must indicate under your signature your authority.

If you do not complete and return the form to the sender within 20 days of the date of mailing shown below, you (or the party on whose behalf you are being served) may be required to pay any expenses incurred in serving a summons and complaint.

If you do complete and return this form, you (or the party on whose behalf you are being served) must respond to the complaint within 30 days of the date of your signature. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

I declare that this Notice and Acknowledgement of Receipt of Summons and Complaint was mailed on _____ (Insert date)

_____
Signature

THIS ACKNOWLEDGMENT OF RECEIPT OF SUMMONS AND COMPLAINT MUST BE COMPLETED

I acknowledge that I have received a copy of the summons and of the complaint in the above-captioned matter in the State of _____.

_____
Signature

(Relationship to Entity/Authority
to Receive Service of Process)

_____
Date of Signature

State of_____)
County of_____)

Personally appeared before me, the undersigned authority in and for the State and County aforesaid, the above named _____, who solemnly and truly declared and affirmed before me that the matters and facts set forth in the foregoing Acknowledgement of Receipt of Summons and Complaint are true and correct as therein stated.

Affirmed and subscribed before me this ___day of _____, 20 __ .

_____
Notary Public
My Commission Expires_____

(Seal)

[Adopted effective March 1, 1985; amended effective May 2, 1985; amended March 17, 1995; amended December 21, 2022.]

FORM 1C. SUMMONS BY PUBLICATION

IN THE COURT OF _____ COUNTY, MISSISSIPPI

A.B., Plaintiff(s)
(It is sufficient here to state the name of the first plaintiff with an appropriate designation of other plaintiffs.)

v. Civil Action, File No.___

CD., Defendant(s)
(It is sufficient here to state the name of the first defendant with an appropriate designation of other defendants.)

SUMMONS

THE STATE OF MISSISSIPPI
TO: (Insert name of the person(s) to be served)

You have been made a Defendant in the suit filed in this Court by (Insert name of all Plaintiffs), Plaintiff(s), seeking (Insert a brief description of the relief being sought). Defendants other than you in this action are (insert names of all defendants other than the person or persons who are the subject of this summons).

You are required to mail or hand deliver a written response to the Complaint filed against you in this action to _____, Attorney for Plaintiff(s), whose post office address is _____ and whose street address is_____.

YOUR RESPONSE MUST BE MAILED OR DELIVERED NOT LATER THAN THIRTY DAYS AFTER THE ___ DAY OF _____, 20__, WHICH IS THE DATE OF THE FIRST PUBLICATION OF THIS SUMMONS. IF YOUR RESPONSE IS NOT SO MAILED OR DELIVERED, A JUDGMENT BY DEFAULT WILL BE ENTERED AGAINST YOU FOR THE MONEY OR OTHER RELIEF DEMANDED IN THE COMPLAINT.

You must also file the original of your Response with the Clerk of this Court within a reasonable time afterward.

Issued under my hand and the seal of said Court, this __ day of _____, 20 __.

Clerk of _____ County,
Mississippi

(Seal)

[Adopted effective March 1, 1985; amended effective May 2, 1985; amended December 21, 2022.]

FORM 1D. RULE 81 SUMMONS

(Sheriff or Process Server)

IN THE _____ COURT OF COUNTY, MISSISSIPPI

A. B., Plaintiff(s)

v. Civil Action, File No._____

C. D., Defendant(s)

SUMMONS

THE STATE OF MISSISSIPPI
TO: (Insert the name

NOTICE TO DEFENDANT(S)

THE COMPLAINT OR PETITION WHICH IS ATTACHED TO THIS SUMMONS IS IMPORTANT AND YOU MUST TAKE IMMEDIATE ACTION TO PROTECT YOUR RIGHTS.

You are summoned to appear and defend against said complaint or petition at ___O'clock ____.M. on the _____ day of _____ 20__, in the courtroom of the _____ ___ County Courthouse at _____, Mississippi, and in case of your failure to appear and defend a judgment will be entered against you for the money or other things demanded in the complaint or petition.

You are not required to file an answer or other pleading but you may do so if you desire.

Issued under my hand and the seal of said Court, this ___ day of _____ , 20__ .

_____
Clerk of _____ County,
Mississippi

(Seal)
(Note: All summons issued to the sheriff must be returned prior to the time the defendant is summoned to appear.)

[Adopted effective January 10, 1986; amended December 21, 2022.]

FORM 1DD. RULE 81 SUMMONS

(Summons by Publication)

IN THE COURT OF _____ COUNTY, MISSISSIPPI

A.B., Plaintiff(s)
(It is sufficient here to state the name of the first plaintiff with an appropriate designation of other plaintiffs.)

v. Civil Action, File No.____

C.D., Defendant(s)
(It is sufficient here to state the name of the first defendant with an appropriate designation of other defendants.)

SUMMONS

THE STATE OF MISSISSIPPI
TO: (Insert name of the person(s) to be served.)

You have been made a Defendant in the suit filed in this Court by _____, (Insert name of all Plaintiffs) Plaintiff(s) seeking _____ (Insert a brief description of the relief being sought). Defendants other than you in this action are _____ (Insert names of all defendants other than the person or persons who are the subject of this summons)

You are summoned to appear and defend against the complaint or petition filed against you in this action at ___ o'clock _. M. on the ___ day of _____, 20__, in the courtroom of the _____ County Courthouse at _____, Mississippi, and in case of your failure to appear and defend, a judgment will be entered against you for the money or other things demanded in the complaint or petition.

You are not required to file an answer or other pleading but you may do so if you desire.

Issued under my hand and the seal of said Court, this ____ day of _____, 20 __.

_____
Clerk of County,

Mississippi

(Seal)

FORM 1E. WAIVER OF PROCESS

IN THE _____ COURT OF COUNTY, MISSISSIPPI

A.B. Plaintiff

v. Civil Action, File No._____

C.D. Defendant

WAIVER OF PROCESS

The undersigned __(name__), whose post office address is _____ and whose street address is _____, does hereby waive the service of summons and __(designate any pleading on which service is being waived__) upon myself in this cause.

In executing this document I certify that I am not an unmarried minor and am not mentally incompetent.

(In addition the person executing the waiver may add any or all of the following to the document:)

[Furthermore, by the filing of this document, I enter my appearance in this cause]

just as if I had been served more than 30 days prior to this date]

[and agree that this action may be heard and disposed of without further notice to me]

[and join in this action and in the prayer for relief]

This the __ day of _____, 20__.

_____
Name

STATE OF_____)
COUNTY OF_____)

Personally appeared before me, the undersigned authority for the jurisdiction aforesaid, the within named _____ who acknowledged that he signed and delivered the above and foregoing instrument on the day and year therein mentioned.

Given under my hand this the __ day of _____, 20__.

_____
Notary Public

My Commission Expires:

_____

[In lieu of the above acknowledgment the following oath may be used:]

STATE OF_____)
COUNTY OF_____)

Personally appeared before me the undersigned authority in and for the jurisdiction aforesaid the within named _____ who, being first by me duly sworn, states on oath that the matters and facts set forth in the foregoing instrument are true and correct as therein stated.

_____
Name

Sworn to and subscribed before me this the __ day of ____, 20__.

_____
Notary Public

My Commission Expires:

_____

[Adopted effective February 1, 1990; amended effective July 1, 2009 to delete convicted felony exception; amended December 21, 2022.]

FORM 2. COMPLAINT ON A PROMISSORY NOTE

1. Defendant on or about _____, 20__, executed and delivered to Plaintiff a promissory note [in the following words and figures: (here set out the note verbatim)]; [a copy of which is hereto annexed as Exhibit A]; [whereby defendant promised to pay to plaintiff or order on _____, 20__, the sum of ____ dollars with interest thereon at the rate of ___ percent per annum] [and agreed to pay a reasonable attorney's fee for collection].

2. Defendant owes to plaintiff [the amount of said note] [$_____ that is due on said note] and interest.

Wherefore plaintiff demands judgment against defendant for the sum of ____ dollars, interest, attorney's fee, and costs.

_____
Attorney for Plaintiff

_____

_____
Address

FORM 3. COMPLAINT ON COVENANT OR AGREEMENT

1. On or about the __ day of _____, 20__, plaintiff and defendant entered into agreement by which defendant promised [here set out agreement in general terms].

2. Defendant breached the agreement by [here set out breaches in general terms].

Wherefore plaintiff demands judgment against defendant in the sum of _____ dollars, interest and costs.

FORM 4. COMPLAINT FOR SPECIFIC PERFORMANCE

1. This is an action for specific performance of a contract to convey real property in _____ County, Mississippi.

2. On _____, 20__, plaintiff and defendant entered into a written contract, a copy being attached and marked Exhibit A.

3. Plaintiff timely tendered the purchase price to defendant and requested a conveyance of the real property described in the contract but defendant refused to accept the tender or to make the conveyance.

4. Plaintiff offers to pay the purchase price.

Wherefore plaintiff demands judgment that defendant be required to perform specifically the contract and for damages.

FORM 5. COMPLAINT ON AN OPEN ACCOUNT

1. Defendant owes plaintiff _____ dollars due by open account.

Wherefore plaintiff demands judgment against defendant in the sum of _____ dollars, interest and costs.

FORM 6. COMPLAINT ON ACCOUNT STATED

1. Defendant owes plaintiff _____ dollars on an account stated between the plaintiff and defendant on the __ day of _____, 20__.

Wherefore plaintiff demands judgment against defendant in the sum of _____ dollars, interest and costs.

FORM 7. COMPLAINT FOR GOODS SOLD AND DELIVERED

1. Defendant owes plaintiff _____ dollars for goods sold and delivered by plaintiff to defendant between the ___ day of _____ and the ___ day of_____, 20__.

Wherefore plaintiff demands judgment against defendant in the sum of _____ dollars, interest and costs.

FORM 8. COMPLAINT FOR WORK AND LABOR DONE

1. Defendant owes plaintiff _____ dollars for work and labor done for the defendant by the plaintiff on the __ day of _____, at defendant's request.

Wherefore plaintiff demands judgment against defendant in the sum of _____ dollars, interest and costs.

FORM 9. COMPLAINT FOR MONEY LENT

1. Defendant owes plaintiff ___ dollars for money lent by plaintiff to defendant on or about the __ day of _____, 20__.

Wherefore plaintiff demands judgment against defendant in the sum of _____ dollars, interest and costs.

FORM 10. COMPLAINT FOR MONEY PAID BY MISTAKE

1. Defendant owes plaintiff _____ dollars for money paid by plaintiff to defendant by mistake on or about the __ day of _____. 20__, under the following circumstances:

[here briefly state the circumstances].

Wherefore plaintiff demands judgment against defendant in the sum of _____ dollars, interest and costs.

FORM 11. COMPLAINT FOR MONEY HAD AND RECEIVED

1. Defendant owes plaintiff _____ dollars for money had and received from one ___ ____ on or about the __ day of _____, 20__, to be paid by defendant to plaintiff.

Wherefore plaintiff demands judgment against defendant in the sum of _____ dollars, interest and costs.

FORM 12. COMPLAINT FOR MONEY PAID BY PLAINTIFF FOR DEFENDANT

1. Defendant owes plaintiff ____ dollars because of money paid by the plaintiff for the defendant on or about the __ day of _____, 20__, at defendant's request.

Wherefore plaintiff demands judgment against defendant in the sum of _____ dollars, interest and costs.

FORM 13. COMPLAINT ON A POLICY OF LIFE INSURANCE

1. On or about the ___ day of _____, 20__, defendant issued a policy whereby the defendant insured the life of _____ who died on the __ day of _____ , 20__, of which the defendant has had notice.

2. As a result, the amount of the policy is now due and the plaintiff is the beneficiary of the proceeds of the policy.

Wherefore plaintiff demands judgment against defendant in the sum of _____ dollars, interest and costs.

FORM 14. COMPLAINT ON A POLICY OF FIRE INSURANCE

1. On or about the ___ day of _____. 20__, defendant insured plaintiffs dwelling house (or other property, as the case may be) against loss or injury by fire and other perils in a policy of insurance, for the term of _____ years.

2. The house (or other property) was wholly destroyed (or was damaged) by fire on the __ day of _____, 20__, of which the defendant has had notice.

Wherefore plaintiff demands judgment against defendant in the sum of _____ dollars, interest and costs.

FORM 15. COMPLAINT FOR NEGLIGENCE OR WANTONNESS

1. On or about the ___ day of ___. 20__, upon a public highway [state the name of the street] in [City]; _____County, Mississippi, the defendant negligently [or wantonly] caused or allowed a motor vehicle to collide with a motor vehicle occupied by the plaintiff.

2. As a proximate consequence of the defendant's said negligence [or wantonness], the plaintiff was caused to suffer the following injuries and damages: [enumerate injuries and damages].

Wherefore plaintiff demands judgment against defendant in the sum of _____ dollars and costs.

FORM 16. COMPLAINT FOR ASSAULT AND BATTERY

1. On or about the ___ day of _____, 20__, the defendant committed an assault and battery on the plaintiff.

Wherefore plaintiff demands judgment against defendant in the sum of _____ dollars and costs.

FORM 17. COMPLAINT FOR FALSE IMPRISONMENT

1. On or about the ___ day of _____, 20__, the defendant unlawfully arrested and imprisoned the plaintiff (or caused the plaintiff to be arrested and imprisoned as the case may be) on a charge of larceny (or as the case may be) for __ days.

Wherefore plaintiff demands judgment against defendant in the sum of _____ dollars and costs.

FORM 18. COMPLAINT FOR MALICIOUS PROSECUTION

1. On or about the ___ day of _____, 20__, defendant, maliciously, and without probable cause therefor, caused the plaintiff to be arrested under a warrant issued by _____ , a justice court judge, on a charge of (as the case may be).

2. Before the commencement of this action, this charge was judicially investigated, the prosecution ended, and the plaintiff discharged.

Wherefore plaintiff demands judgment against defendant in the sum of _____ dollars and costs.

FORM 19. COMPLAINT FOR FRAUD

1. On or about the ___ day of _____, 20__, defendant and plaintiff were negotiating concerning the purchase by plaintiff from defendant of the following described property:

[describe property].

2. At that time defendant represented to plaintiff that [here set out representations with particularity].

3. The representations made by defendant were false [and defendant knew that they were false] [and defendant, without knowledge of the true facts, recklessly misrepresented them] [and were made with the intention that plaintiff should rely upon them].

4. Plaintiff believed the representations and in reliance upon them purchased the property.

Wherefore plaintiff demands judgment against defendant in the sum of _____ dollars and costs.

FORM 20. COMPLAINT ON A WARRANTY

1. On or about the ___ day of _____, 20__, defendant sold a (as the case may be) to the plaintiff on which the defendant gave warranty as shown by Exhibit A which is attached hereto [or insert the substance of the warranty].

2. In fact [here state the breach in general terms].

FORM 21. COMPLAINT FOR CONVERSION

1. On or about the ___ day of _____, 20__, defendant converted to his own use [here describe in general terms the property allegedly converted] of the _____ Company of the value of ___ dollars, the property of plaintiff.

Wherefore plaintiff demands judgment against defendant in the sum of ____ dollars, interest and costs.

FORM 22. MOTION TO DISMISS PURSUANT TO RULE 12(b)

The defendant moves that the Court proceed as follows:

1. To dismiss the complaint for lack of subject matter jurisdiction in that it is [an action seeking the reformation of a written instrument (or as the case may be)] and plaintiff has a full and adequate remedy [at law] [in equity].

2. To dismiss the complaint for lack of jurisdiction over the person in that [the defendant is a corporation organized under the laws of the State of _____ and was not and is not subject to service of process within the State of Mississippi (or as the case may be)].

3. To dismiss the action on the ground of improper venue in that defendant is a domestic corporation domiciled in _____ County, which is not the county in which [this action is brought] [the cause of action occurred or accrued].

4. To dismiss the complaint because of insufficiency of process in that the summons served on the defendant [was not signed by the clerk] [does not contain the names and addresses of the parties] [is directed to a person other than the defendant named in the complaint [did not have attached a copy of the complaint] (or as the case may be).

5. To dismiss the action because of insufficiency of service of process in that the summons served on defendant [was sent by ordinary mail rather than by certified mail] [was served by a process server who is not sheriff of the county in which it was served nor a person eighteen years or older] [was served on a member of defendant's family who is less than sixteen years of age] [was served on _____, who is neither an officer nor the registered agent of the defendant corporation] (or as the case may be).

6. To dismiss the complaint for failure to state a claim upon which relief can be granted.

7. To dismiss the complaint for failure to join _____, a [person] [corporation] necessary for just adjudication because [he] [it] is this defendant's [co-tenant, lessee, royalty holder, assignee (or as the case may be)] whose rights are involved in this action.

NOTICE OF MOTION

TO:

_____
Attorney for Plaintiff

_____
_____
Address

Please take notice that the undersigned will bring the above motion on for hearing before this court at the _____ County Courthouse in the City of _____, Mississippi, on the __ day of _____, 20__, at ____ o'clock a. m./p. m. that day or as soon thereafter as counsel can be heard.

_____
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of this Motion to Dismiss and Notice of same on J.K, Counsel of Record for the Plaintiff, A.B., by placing a copy of same in the United States mail, postage prepaid, addressed to his regular business mailing address.

This the ___ day of _____, 20__.

_____
Attorney for Defendant

Address

FORM 23. ANSWER PRESENTING DEFENSES UNDER RULE 12 (b)

First Defense

[Improper Venue]

The action is brought in the wrong county because the defendant is a domestic corporation domiciled in _____ County, which is not the county in which this action is brought or in which the cause of action occurred or accrued.

Second Defense

[Admission and Denial]

Defendant admits the allegations contained in paragraphs 1 and 4 of the complaint; alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2 of the complaint; and denies each and every other allegation contained in the complaint.

Third Defense

[Statute of Limitations]

The right of action set forth in the complaint did not accrue within _____ years next before the commencement of this action.

Counter-claim

Here set forth any claim as a counter-claim in the manner in which a claim is pleaded in a complaint.

Cross-Claim against Defendant M. N.

Here set forth the claim constituting a cross-claim against defendant M. N. in the manner in which a claim is pleaded in a complaint.

FORM 24. MOTION TO BRING IN THIRD-PARTY DEFENDANT

Defendant moves for leave, as third-party plaintiff, to cause to be served upon E. F. a summons and third-party complaint, copies of which are attached as Exhibit A.

FORM 25. THIRD-PARTY COMPLAINT

1. Plaintiff, A. B., has filed against defendant, C. D., a complaint, a copy of which is attached as Exhibit A.

2. If the defendant, C. D., is liable to the plaintiff on the occasion complained of in the complaint, it is liable because [here state the grounds upon which C. D., is entitled to recover from E. F., all or part of what A. B. may recover from C. D. The statement should be framed as in an original complaint.]

Wherefore, C. D. demands judgment against third-party defendant E. F. for all sums that may be adjudged against defendant C. D. in favor of plaintiff, A. B.

FORM 26. MOTION TO INTERVENE AS A DEFENDANT UNDER RULE 24

[Based upon the Complaint, Form 15]

IN THE CIRCUIT COURT OF ___ COUNTY, MISSISSIPPI

A.B., Plaintiff

v. Civil Action, File No._____

C.D., Defendant
E.F., Applicant for Intervention

MOTION TO INTERVENE AS A DEFENDANT

E. F. moves to intervene as a defendant in this action to assert the defenses set forth in his proposed answer, a copy of which is attached hereto, on the ground that he is the owner of the automobile alleged in the Complaint to have collided with the vehicle occupied by the plaintiff and as such as a defense to plaintiffs claim presenting both questions of law and of fact which are common to the main action.

_____
Attorney for E. F.
Applicant for Intervention

_____
_____
Address

NOTICE OF MOTION

[Contents the same as in Form 22]

IN THE CIRCUIT COURT OF _____ COUNTY, MISSISSIPPI

A.B., Plaintiff

v. Civil Action, File No._____

C.D., Defendant

E.F., Intervener

INTERVENER'S ANSWER

First Defense

Intervener denies the allegations stated in paragraphs 1 and 2 of the Complaint in so far as they assert negligence on the part of the defendant.

Second Defense

Intervener asserts that at the time of the collision stated in the Complaint the plaintiff was operating his vehicle under the influence of alcohol and in a wantonly negligent manner.

Third Defense

Intervener asserts that at the time of the collision stated in the Complaint defendant was operating intervener's vehicle without intervener's authority, permission, or license.

FORM 27. MOTION TO DROP DEFENDANT OR FOR SEVERANCE OF CLAIMS

Defendant, _____, moves the court for an order dropping him as a party defendant herein or in the alternative for an order severing the claim asserted against him by plaintiff herein from the claim asserted against defendant, _____, on the grounds that:

1. The alleged claim asserted against defendant, ____, does not arise from the same transaction, occurrence, or series of transactions or occurrences, as the claim asserted against defendant, _____; nor do the two alleged claims involve questions of law or fact common to both defendants.

2. The moving defendant will be put to undue expense and embarrassment if he is required to proceed with his defense without a severance of the issues.

3. The trial of action will be embarrassing and the jury confused by a joint trial of the claims asserted against the two defendants herein, all to the prejudice of the moving defendant.

FORM 28. MOTION BY DEFENDANT FOR SEVERANCE OF CLAIMS OF SEVERAL PLAINTIFFS

Defendant moves the court for an order severing the claims asserted by the respective plaintiffs herein against the defendant, on the grounds that:

1. The alleged claim or claims of each plaintiff differ in material and essential elements and respects from the alleged claim or claims of each of the other plaintiffs.

2. The alleged claims of the plaintiffs do not arise out of the same transaction, occurrence, or series of transactions or occurrences, and do not involve questions of law or fact common to all the plaintiffs.

3. The joining in one action and one complaint of the alleged claims of the plaintiffs is prejudicial to the defendant and injures his substantial rights and will embarrass and delay the trial.

FORM 29. MOTION BY PLAINTIFF TO ADD DEFENDANT

Plaintiff moves the court for an order making _____ a party defendant herein and directing the issuance and service of process on him, and for grounds therefor shows:

1. This is an action for [state briefly the nature of the claim for relief].

2. [State facts showing that the proposed additional defendant is an indispensable, necessary or proper party defendant].

3. The said _____ is a citizen and resident of _____, is subject to the jurisdiction of this court as to both service of process and venue and can be made a party defendant herein without depriving the court of jurisdiction.

FORM 30. MOTION BY DEFENDANT TO BRING IN ADDITIONAL DEFENDANT

Defendant moves the court for an order making _____ a party defendant herein; directing that process be issued and served upon defendant _____; and requiring plaintiff to serve and file an amended complaint, and for grounds therefor shows:

1. This is an action for [state briefly the nature of the claim for relief].

2. [State facts showing that a person needed for just adjudication has not been joined as a defendant].

3. The said _____ is a citizen and a resident of _____, is subject to the jurisdiction of this court as to both service of process and venue, and can be made a party defendant herein without depriving the court of jurisdiction.

FORM 31. MOTION BY DEFENDANT TO ADD ADDITIONAL PLAINTIFF

Defendant moves the court for an order directing that _____ be made a party plaintiff herein, or in the alternative, if _____ refuses to join as a plaintiff, he be made a defendant as provided by Rule 19(a), and for grounds therefor shows:

1. This is an action for [state briefly the nature of the claim for relief].

2. [State facts showing that a person needed for just adjudication has not been joined as a plaintiff].

3. The said _____ is a citizen and resident of _____; he is subject to the jurisdiction of this court as to service of process and venue; and he can be made a party plaintiff (or, as the case may be, a party defendant) herein without depriving the court of jurisdiction.

FORM 32. ANSWER TO COMPLAINT SET FORTH IN FORM 11 WITH COUNTER-CLAIM FOR INTERPLEADER

Defense

Defendant admits the allegations stated in paragraph 1 of the complaint and denies the allegations stated in paragraph 2 to the extent set forth in the counter-claim herein.

Counter-claim for Interpleader

1. Defendant received the sum of _____ dollars as a deposit from E. F.

2. Plaintiff has demanded the payment of such deposit to him by virtue of an assignment of same which he claims to have received from E. F.

3. E. F. has notified the defendant that he claims such deposit, that the purported assignment is not valid, and that he holds the defendant responsible for the deposit.

Wherefore defendant demands:

(1) That the court order E. F. to be made a party defendant to respond to the complaint and to this counter-claim.

(2) That the court order the plaintiff or E. F. to interplead their respective claims.

(3) That the court adjudge whether the plaintiff or E. F. is entitled to the sum of money.

(4) That the court discharge defendant from all liability in the action except to the person it shall adjudge entitled to the sum of money.

(5) That the court award to the defendant its costs and attorney's fees.

FORM 33. PLAINTIFF'S MOTION FOR SUBSTITUTION - DECEASED PARTY DEFENDANT

Plaintiff shows to the court that _____, the above-named defendant, died intestate (or testate) on or about the ____ day of _____, 20__; that letters of administration upon the estate of the said were issued on the ___day of _____, 20__, to _____ as administrator by the _____ Court of the State of Mississippi (or, that _____ was duly appointed executor of the last will of _____ by the _____ Court of the State of Mississippi and qualified as such executor on the ___day of _____, 20__): and this is an action for [state briefly nature of action] and the claim of plaintiff was not extinguished by the death of defendant.

Wherefore plaintiff moves the court for an order substituting _____, administrator (or, as the case may be, executor) of the estate of _____, deceased, as party defendant herein.

FORM 34. PRE-TRIAL ORDER

1. Counsel.

Appearing for the plaintiff: _____

Appearing for the defendant: _____

2. Nature of the case. [Count 1 of] the complaint alleges a cause of action based upon [negligence, breach of warranty, breach of oral contract, etc.].

3. Positions of the parties.

a. Plaintiff contends: [concise statement of factual and legal contentions].

b. Defendant contends: [concise statement of factual and legal contentions].

4. Stipulations and admissions.

5. Discovery. Discovery proceeding6 have been completed except as follows: [specify additional discovery proceedings required].

6. Additional Orders: [as required by the particular case].

Ordered that the above allowances and agreements are binding on all parties in the above-styled cause unless this order be hereafter modified by the Court for good cause and to prevent manifest injustice.

Done this ___day of _____, 20__.

_____
Judge

FORM 35. MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR IN THE ALTERNATIVE, FOR NEW TRIAL

Defendant [Plaintiff] moves the Court to set aside the verdict and judgment entered in the above-styled action on _____, 20__, and to enter judgment in favor of the Defendant [Plaintiff] in accordance with the motion for directed verdict, or, in the alternative, Defendant [Plaintiff] moves the court to set aside the verdict and grant Defendant [Plaintiff] a new trial on the following grounds, to-wit:

1.
2. [Herein state grounds]
3.

FORM 36. APPLICATION TO CLERK FOR ENTRY OF DEFAULT AND SUPPORTING AFFIDAVIT

The clerk is requested to enter default against the defendant in the above entitled action for failure to plead, answer or otherwise defend as set out in the affidavit hereto annexed.

_____
Attorney for Plaintiff

State of Mississippi)
County of_____)

_____, being duly sworn, deposed and says:

1. That he is attorney of record of the plaintiff, and has personal knowledge of the facts set forth in this affidavit.

2. That the defendant was duly served with a copy of the summons, together with a copy of plaintiffs complaint, on the ___day of _____, 20__.

3. That more than 30 days have elapsed since the date on which the said defendant was served with summons and a copy of the complaint.

4. That the defendant has failed to answer or otherwise defend as to plaintiffs complaint, or serve a copy of any answer or other defense which he might have upon the undersigned attorney of record for the plaintiff.

5. That this affidavit is executed by affiant herein in accordance with Rule 55(a) of the Mississippi Rules of Civil Procedure, for the purpose of enabling the plaintiff to obtain an entry of default against the defendant, for his failure to answer or otherwise defend as to the plaintiffs complaint.

_____
Attorney for Plaintiff

Sworn to and subscribed before me this the ___day of _____, 20__.

_____
Notary Public

FORM 37. DOCKET OF ENTRY OF DEFAULT

Default entered against defendant _____ this ___day of _____, 20__.

FORM 38. DEFAULT JUDGMENT ENTERED BY COURT

This action came on for hearing on the motion of the plaintiff for a default judgment pursuant to Rule 55(b)(2) of the Mississippi Rules of Civil Procedure, and the defendant having been duly served with the summons and complaint and not being an infant or an unrepresented incompetent person and having failed to plead or otherwise defend, and his default having been duly entered and the defendant having taken no proceedings since such default was entered,

It is Ordered and Adjudged that [here set forth relief granted to plaintiff].

This ___day of _____, 20__.

_____
Judge

APPENDIX B. STATUTES AFFECTED

[DELETED IN ITS ENTIRETY.]
[Effective June 24, 1992.]

APPENDIX C. TIME TABLE FOR PROCEEDINGS UNDER THE MISSISSIPPI RULES OF CIVIL PROCEDURE

[DELETED IN ITS ENTIRETY.]
[Effective June 24, 1992.]