IN THE SUPREME COURT OF MISSISSIPPI

No. 89-R-99001-SCT

IN RE: MISSISSIPPI RULES OF CIVIL PROCEDURE IN ALL CHANCERY, CIRCUIT AND COUNTY COURTS OF THE STATE

ORDER

This matter has come before the Court, en banc, on petition of the Mississippi Supreme Court Rules

Advisory Committee for amendment of certain rules, comments and historical notes to the Mississippi

Rules of Civil Procedure. Having considered the proposal, the Court finds that such amendments will

promote the fair and efficient administration of justice and that the petition should be

granted and the

amendments should be adopted.

IT IS NOW THEREFORE ORDERED that the comment to Rule 4 shall be and is hereby amended

as set forth in Appendix A to this order.

IT IS FURTHER ORDERED that the comment to Rule 9 shall be and is hereby amended as set

forth in Appendix B to this order.

IT IS FURTHER ORDERED that Rule 10(d) of the Mississippi Rules of Civil Procedure and the

accompanying comment shall be and are hereby amended as set forth in Appendix C to this order, with

the addition of the historical note indicated therein.

IT IS FURTHER ORDERED that Rule16 of the Mississippi Rules of Civil Procedure and the

accompanying comment and historical note shall be and are hereby amended as set out in Appendix D to

this order.

IT IS FURTHER ORDERED that Rule 26(c) of the Mississippi Rules of Civil Procedure and the

accompanying comment and historical note shall be and are hereby amended as set out in Appendix E to

this order.

IT IS FURTHER ORDERED that the Rule 33 and the accompanying comment and historical note

set forth in Appendix F hereto shall be and are hereby amended as set forth in Appendix F to this order.

IT IS FURTHER ORDERED that Rule 53(c) of the Mississippi Rules of Civil Procedure and the

accompanying comment and historical note shall be and are hereby amended as set forth in Appendix G

to this order.

IT IS FURTHER ORDERED that Rule 81 of the Mississippi Rules of Civil Procedure and the

accompanying comment and historical note shall be and are hereby amended as set forth in Appendix H

to this order.

IT IS FURTHER ORDERED that all such amendments shall be effective on entry of this order.

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, Second Series (Mississippi*

Edition) and in the next edition of *Mississippi Rules of Court*.

BANKS, P.J. WOULD DENY AMENDMENT OF RULES 4, 9 AND 10(d).

McRAE, J. WOULD DENY AMENDMENT OF RULES 16, 26(c) AND 53(c).

APPENDIX A

RULE 4. SUMMONS

* * * *

Advisory Committee Historical Note

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Comment

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Rule 4(b) provides that where there are multiple plaintiffs or defendants, the summons may name just the first party on each side, together with the name and address of the party to be served. However, the complaint, which must accompany the summons, will provide the names of all parties to the action.

Exhibits to the complaint form a part of the complaint and in most cases ~~must~~ <u>should</u> be attached to the complaint [See Rule 10(d)]. However, in cases where unusually lengthy exhibits are attached to the complaint, plaintiff may elect not to attach copies of the lengthy exhibits to the copies of the complaint served, but instead may attach a statement to the effect that such exhibits are not

attached because of their size and that the exhibits are available ~~in the court file~~ for inspection and copying.

Rule 4(c)(1) provides for service by a process server and Rule 4(c)(2) provides for service by a sheriff. There is no limit to the territorial jurisdiction of a process server who may serve the summons anywhere in the world. A sheriff, however, may serve the summons only within his county. However, the mere service of the summons and complaint does not, of itself, resolve all questions as to jurisdiction over the person of the defendant, and any such questions may be raised at appropriate times.

*** * * ***

[Comment adopted effective March 1, 1986; amended effective February 1, 1990; July 1, 1998 April 13,2000 .]

APPENDIX B

RULE 9. PLEADING SPECIAL MATTERS

* * * *

Comment

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Rule 9(d) does not modify the requirement of proof of local and private legislation before such can be admitted into evidence; Miss. Code Ann. § 13-1-147 (1972) provides that such legislation need not be specially pleaded.

Rule 9(e) is identical to Federal Rule 9(e) and conforms, generally, to prior Mississippi practice. *See* Miss. Code Ann. § 11-7-111 (1972). Of course, MRCP 10(d)~~requires~~ states that a copy of the judgment should be attached to the pleading. If a defendant wishes to question the validity of the judgment being sued upon, he must do so specifically in his answer; he cannot raise the issue by a general denial or by a motion to dismiss. Once jurisdiction is put in issue, however, the party relying on the earlier judgment or decision has the burden of establishing its validity. 5 Wright & Miller, *supra,* §§ 1306-1307.

Under common law practice, allegations of time and place were considered immaterial to a statement of the cause of action. A party was required to plead time accurately only when it formed a material part of the substance of the case, as, for example, the date of a written instrument being sued upon. Allegations of place were also immaterial and only in local, as opposed to transitory, causes of action was it necessary to plead this assertion accurately. MRCP 9(f) treats time and place as material on a motion testing the sufficiency of the pleadings; accuracy in pleading time and place will facilitate the identification and isolation of the transaction or event in issue and provide mechanism for the early adjudication or testing of certain claims and defenses most notably, statutes of limitations. 5 Wright & Miller, *supra*, §§ 1308-1309; *See also* V. Griffith, *supra,* § 83(a).

* * * *

[Comment amended effective April 13, 2000.]

APPENDIX C

RULE 10. FORM OF PLEADINGS

* * * *

(d) Copy Must Be Attached. When any claim or defense is founded on an account or other written instrument, a copy thereof ~~must~~ 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. So. 2d (West Miss. Cas. 2000)

Comment

* * * *

Defective incorporation by reference may be raised by a motion to strike, a motion for a more definite statement, or a motion to dismiss for failure to state a claim upon which relief can be granted. The court can also remedy the defect on its own motion. *See Oppenheimer v. F. J. Young & Co.*, 3 F.R.D. 220 (D.C.N.Y.1943); 5 Wright & Miller, *supra*, § 1327.

The original Rule 10(d) provided that "[w]hen any claim or defense is founded on an account or other written instrument, a copy thereof *must* be attached to or filed with the pleading unless sufficient justification for its omission is stated in the pleading." That subdivision, which does not appear in Federal Rule 10~~; it~~ was ~~added~~ included in the original MRCP 10 to continue the prior ~~traditional~~ Mississippi practice. ~~of annexing to pleadings copies of written documents upon which the claim or defense is founded. *See* Miss. Code Ann. § 11-7-47 (1972).~~ However, the Mississippi Supreme Court criticized the mandate of subdivision 10(d) as being "at odds with the structure and philosophy of the Rules." *Gilchrist Machine Co. v. Ross*, 493 So. 2d 1288, 1292 n.1 (Miss. 1986). It required the attachment of foundational documents, even if the pleading stated a sufficient claim or defense under general pleading standards, and indeed even if the document was voluminous and readily available to all sides. The Court by interpretation removed much of the subdivision's mandatory effect. See *Edwards v. Beasley*, 577 So. 2d 384 (Miss. 1991) (trial judge committed reversible error by failing to permit the defendant to amend the answer at trial to attach two agreements on which a defense was based); *Gilchrist*, *supra* (failure to attach to the complaint invoices on which the claim was based did not render the invoices inadmissible at trial); *Bryant, Inc. v. Walters*, 493 So. 2d 933, 938 (Miss. 1986) (failure to comply with 10(d) did not void a default jdugment). Consequently, subdivision 10(d) was amended to its present form, which states that foundational documents *should* be attached, unless a reason for the failure to do so is stated. Thus, it remains good practice normally to attach such documents as part of a clear statement of a claim or defense. If, However, a foundational document is not attached to an otherwise sufficient pleading, the document may be obtained thruough discovery.

[Comment amended effective April 13, 2000.]

APPENDIX D

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 ~~to the cause~~, direct ~~and require~~ 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. So. 2d. (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).

Comment

Rule 16 governs the pretrial conference. It provides that such a conference *may* be held on the court's own motion or on the motion of any party and *shall* be held on the motion of all parties. It authorizes the amending or supplementing of proposed jury instructions, or of proposed findings of fact and conclusions of law in non-jury cases, after they have been preliminarily agreed upon in the pretrial conference. Also, it provides that the court *may* enter a pretrial order, and if such order is entered it "shall control the subsequent course of action unless modified."

[Comment amended April 18, 1995; April 13, 2000.]

RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY

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(c) Discovery Conference. ~~After the joinder of issue,~~ At any time after the commencement of the action, the court ~~shall~~ 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.

* * * *

[Amended effective March 1, 1989; March 13, 1991; April 13, 2000.]

Advisory Committee Historical Note

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

Comment

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Sweeping and abusive discovery is encouraged by permitting discovery confined only by the "subject matter" of a case -- the language of Miss. Code Ann. § 13-1-226(b) (1972) -- rather than limiting it to the issues presented. Discovery should be limited to the specific practices or acts that are in issue. Determining when discovery spills beyond "issues" and into "subject matter" will not always be easy, but M.R.C.P. 26(b)(1) is intended to favor limitations, rather than expansions, on permissible discovery. Accordingly, "admissible evidence" referred to in the last sentence of 26(b)(1) must be limited by the new relevancy which emerges from the term "issues, " rather than from the more sweeping term "subject matter."

Rule 26(c) establishes a discovery conference convened on the court's own motion or at the request of any party. This conference is a corollary to the limitation on the scope of discovery dictated by Rule 26(b)(1). ~~While~~ Whether the conference is ~~to be~~ convened on the court's own motion or upon a litigant's certified request, the court ~~thereafter~~ has control over the time of its convening and the scope of its reach.

~~While there may be reasonable disagreement among lawyers and judges as to whether the preparation of a case for trial, including necessary pretrial discovery, should be left to the adversary lawyers or whether the court should take early control,~~ Rule 26(c) ~~at~~

~~least~~ provides the procedure for ~~the alternative of~~ early judicial control but continues to impose principal responsibility upon the litigating bar for the preparation of a case. In the great majority of cases, opposing counsel should be able, without judicial intervention, to formulate an appropriate plan and schedule of discovery in relation to issues readily defined by agreement. ~~Good practice dictates that counsel reduce their agreement to writing to facilitate resolution should a dispute later arise. Additionally, the court may require that it be informed of such an agreement.~~ In those instances, however, where it would facilitate the discovery process,~~the parties cannot agree either upon the definition of issues or upon a plan and schedule of discovery,~~ the court ~~should be available~~ may hold a discovery conference on its own motion or upon the request of either party ~~to resolve differences~~.

The discovery conference will produce an order defining: (a) a "plan" in which the types and subjects of discovery are set forth, e. g., oral depositions of A, B and C; production of contracts and any letters, correspondence or memoranda explaining or modifying them, etc.; (b) a "schedule" for discovery which specifies the time and place for discovery events, e. g., the dates and places for the taking of depositions of A, B and C, or the time within which documents are to be produced, and (c) such "limitations" as might otherwise be employed in protective orders, e. g., the documents of C shall be disclosed only to B's lawyers.

The ~~proposed~~ rule also provides for "allocation of expenses." This provision would permit courts, as justice dictates, to reassign the usual financial burdens of discovery. For example, a court might condition discovery demanded by party A upon the payment by A of all or part of party B's expenses, including attorneys' fees.

~~To further ensure that the discovery conference should be the exception rather than the rule, Rule 26(c) requires the party calling for the conference to certify that he has conferred with his adversary and has made a reasonable attempt to settle upon a definition of the issues and to arrive at an agreed upon discovery plan. If a conference is convened, the court may later impose sanctions if it determines that the conference was necessitated by the lack of good faith of one or more parties. While such sanctioning authority is probably inherent in the judicial power, this provision is intended as an explicit warning to the uncooperative; lack of agreement should be~~

~~excused only rarely.~~

An early accord or order on discovery may require later modification. Rule 26(c) allows such amendments freely. Again, cooperation among counsel should be the rule rather than the exception. ~~Rules 26(b)(1) and (c) are patterned after the recommendations of the American Bar Association for Federal Rule 26. *See* Special Committee for the Study of Discovery Abuse, Section of Litigation, A.B.A., Report, at 2-7 (1977); also, Pyle, Ott, Rumfelt, *Mississippi Rules of Discovery*, 46 Miss.L.J. 681, 686-99 (1975).~~

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

APPENDIX F

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 reasons for objection shall be stated in lieu of an answer.~~ 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 isexcused 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.

~~(b)~~ **(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.

~~(c)~~ (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 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.]

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. So. 2d (West Miss.Cas. 2000).

Comment

~~Generally, M.R.C.P. 33 is identical to Miss. Code Ann. § 13-1-233 (1972). However~~, M.R.C.P. 33(a) places a numerical limitation on the number of interrogatories that may be posed as a matter of right.

The thirty interrogatories permitted as 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.

MRCP 33(b)(1) emphasizes the duty of the responding party to provide full responses to the extent not objectionable. MRCP 33(b)(4) requires that the grounds for any objection be stated with specificity. Answers may not be provided subject to an objection. Instead, the responding party should quote or otherwise identify the part of the interrogatory that is objectionable, state the grounds for the objection, and respond in full to the remainder. 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 objection to providing the information with respect to the remaining facilities should be stated specifically.

The ~~new,~~ final sentence of M.R.C.P. 33~~(c)~~ (d) is designed to eliminate the mechanical response of an invitation to "look at all my documents." The rule makes it clear that the responding party has the duty to specify precisely, by category and location, which documents apply to which question. Further, such answers being given under oath are intended to eliminate subsequent evasive use of additional documents at trial on issues confronted by the interrogatory request. *See* Special Committee for the Study of Discovery Abuse, Section of Litigation, A.B.A., Report, at 18-21 (1977); Pyle, Ott, Rumfelt, *Mississippi Rules of Discovery*, 46 Miss.L.J. 681, 735 42 (1975).

[Comment ammended effective April 13, 2000.]

APPENDIX G

RULE 53. MASTERS, REFEREES, AND COMMISSIONERS

*** * * ***

(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 ~~A reference to a master shall be the exception and not the rule. A~~ reference shall be made only upon a showing that some exceptional condition requires it.

* * * *

[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. So. 2d. (West Miss.Case.2000).

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

Comment

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The first change in prior practice effectuated by Rule 53 is the pronouncement that the term "master" include masters, referees, commissioners, and other judicial assistants heretofore recognized by Mississippi. Rule 53(a). The second change in the rule is the requirement that all masters -- except as specified -- be attorneys at law. Rule 53(b).

~~As Rule 53(e) clearly states, masters are not supernumerary judges and should not be utilized as such; however, when a master is necessary one should be appointed.~~ Rule 53(c) allows the court, in its discretion, to order the appointment of a master on the written consent of the parties. This Provision was added to permit courts to expedite certain cases when the court's caseload might otherwise delay the resolution of the matter. When a party objects, however, the court may refer a matter only when exceptional circumstances justify it.

Rule 53~~(c)~~ (d) provides that the order of reference may specify or limit the master's 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; the order may also fix the time and place for beginning and closing the hearing and for filing the master's report.

Subject to the specifications and limitations stated in the order, the master has ant may 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, and he may rule upon the admissibility of evidence. He has the power to administer oaths to witnesses and to direct the issuance of subpoenas. However, the master may not himself serve subpoenas. Cf. MRCP 45(c).

To ensure that reference matters are not unduly delayed, Rule 53(e) contains several provisions intended to expedite proceedings before the master. The clerk is required to give the master a copy of the order of reference "forthwith"; the master must "forthwith" set a time and place for the hearing, in any event within ten days after the reference is made. The master is required to proceed with "all reasonable diligence," and any party may apply to the court for an order that the master speed the proceedings.

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[Comment amended effective April 13, 2000.]

APPENDIX H

RULE 81. APPLICABILITY OF RULES

*** * * ***

(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.

* * * *

(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 ~~entered~~ 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.

* * * *

[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. So. 2d (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).

Comment

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Rule 81(d)(4) expressly provides that no answer is required but allows a defendant/respondent to file an answer or other pleading if he so desires. The rule does recognize that on occasion an answer may be necessary to properly present issues or to narrow them; therefore, the Court may require an answer to be filed. The rule also provides that a party who fails to provide an answer when required shall not be permitted to present evidence on his behalf.

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. ~~The rule is flexible by permitting each court to decide the manner in which a trial date is determined and as to how such matters shall be continued if it is not tried on the day originally set.~~ 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 originally required that the continuance order be *entered* on the date originally set for the hearing. This requirement proved burdensome in those instances in which the court was sitting in a county different from the one in which the clerk's office was located. Under the present rule, the court may sign the continuance order on the date

of the original hearing, thus giving all present parties notice of the continuance, then transmit the order to the clerk for entry.) 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.

* * * *

[Amended effective January 10, 1986; June 24, 1992; April 13, 2000..]