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## 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.

FOR THE COURT

Neville Patterson,
Chief Justice

## 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 to secure the just, speedy, and inexpensive determination of every action.

#### Comment

The purpose of Rule 1 is to state the scope and applicability of the Mississippi Rules of Civil Procedure and the basic philosophical principle for their judicial construction.

Rule 1 must be considered together with Rule 81 to determine the applicability of the Mississippi Rules of Civil Procedure to civil practice in Mississippi. Generally, all civil actions in the circuit, chancery, and county courts are subject to the application of the rules; exceptions are listed in Rule 81. The excepted civil actions are governed by procedures stated in the statutes pertaining to those actions.

It is intended that these rules 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 rules apply irrespective of the nature of the parties to the action, including the state of Mississippi or any political subdivision thereof. It is established law in Mississippi that where a statute permits the state or a subdivision thereof to be brought into court as a litigant, it is subject to the same procedural rules as is any other party. *Humphreys County v. Cashin*, 128 Miss. 236, 90 So. 888 (1922), *Bolivar County v. Bank of Cleveland*, 170 Miss. 555, 561, 155 So. 176, 177 (1934) (Ethridge, J., dissenting).

The salient provision of Rule 1 is the statement that "These rules shall be construed 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 should be to promote the ends of justice; these rules reflect the view that this goal can be best 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.

Properly utilized, the rules will tend to discourage battles over mere form and to sweep away needless procedural controversies that either delay a trial on the merits or deny a party his day in court because of technical deficiencies. The mandate in the final sentence of Rule 1 is only one of a number of similar admonitions scattered throughout the rules directing that the rules be interpreted liberally in order that the procedural framework in which litigation is conducted promotes the ends of justice and facilitates decisions on the merits, rather than determinations on technicalities. *See*, e. g., Miss. Code Ann. § 11-5-13 (1972) (statute setting forth requirements of bill of complaint). Perhaps the most important of these statements is the provision of Rule 61 which directs that "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."

The keystone to the effective functioning of the Mississippi Rules of Civil Procedure is, obviously, the discretion of the trial court. The rules grant considerable power to the judge and only provide general guidelines as to the manner in which it should be exercised. Accordingly, judges must view the rules with a firm understanding of the philosophy of the rules and must exercise a wise and sound discretion to effectuate the objective of the simplified procedure. The rules will remain a workable system only so long as trial judges exercise their discretion intelligently on a case-by-case basis; application of arbitrary rules of law to particular situations will have a debilitating effect on the overall system.

## RULE 2. ONE FORM OF ACTION

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

### Comment

The purpose of Rule 2 is to eliminate the term "cause of action" from the lexicon of Mississippi civil practice. By substituting for "cause of action" the phrases "claim" or "claim for relief," these rules will give the courts of Mississippi the freedom and authority to deal pragmatically with any aggregate of operative facts which give rise to a right enforceable in the courts, consistent with the jurisdiction of the courts.

The prescription in Rule 2 that there shall be one form of action may be the most fundamental rule of all. A number of important consequences follow from Rule 2: Forms of action are abolished; most distinctions between chancery procedure and law procedure are eliminated; the significance of the term "cause of action," which formerly was a matter of serious dispute, has been eliminated. These rules will provide a procedural framework for all litigation in the trial courts of Mississippi. Except in certain limited instances enumerated in Rule 81, the civil action prescribed by these rules is the proper medium for exercising any civil power the chancery, circuit, or county courts in Mississippi may possess.

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 his claim in an orderly manner to a court empowered to give him 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 an action founded on legal principles and what was a bill in equity before these rules is still a civil action founded on principles of equity.

## 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.** If a pauper's affidavit is filed in the action the costs deposit and security for costs may be waived. 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.]

## 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).

## Comment

The purpose of Rule 3(a) is to establish 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. *Accord Bacon v. Gardner*, 23 Miss. 60 (1851); *see* Miss. Code Ann. § 11-7-33 (1972). Service of process upon the defendant is not essential to commencement of the action.

Ascertaining the precise date of commencement is important in determining whether an action has been brought prematurely, *see Euclid-Mississippi v. Western Cas. & Sur. Co.*, 249 Miss. 547, 163 So.2d 676 (1964); whether it is barred by a statute of limitations, *see Maddux v. Jones*, 51 Miss. 631 (1875); 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 consideration; *see Euclid-Mississippi v. Western Cas. & Sur. Co.*, supra. *See* also, *Bacon v. Gardner, supra* (statute of limitations not tolled when plaintiff filed complaint but requested that process not be issued); *accord, Erving's Hatcheries, Inc. v. Garrott*, 250 Miss. 701, 168 So.2d 52 (1964).

The provisions in Rule 3 pertaining to costs are intended to make uniform the assessing, accounting for, and refunding of costs. It is intended that there be no local variations from the costs deposit provision of Rule 3 (a); Rule 3 (b) provides ample latitude for requiring additional costs, and accords with prior Mississippi practice. *See* Miss. Code Ann. § 11-53-5 (1972).

Rule 3 (c) accords with Miss. Code Ann. § 11-53-17 (1972) in allowing indigents to sue without depositing security for costs; however, the indigent affiant may be examined as

to his financial condition and the court may, if the allegation of indigence is false, dismiss the action. *Accord*, Miss. Code Ann. § 11-53-19 (1972).

Rule 3 (d) requires that clerks promptly account for costs in all actions. It is intended that this provision will make uniform the procedure for refunding costs. Costs are an expense of individual parties -- not their attorneys. Accordingly, unused costs deposits are to be promptly returned to the parties on a case-by-case basis. *Accord*, Miss. Code Ann. § 11-53-9 (1972).

## 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).

## Comment

The original version of Rule 4, effective as of January 1, 1982, was amended by the Mississippi Supreme Court on March 5, 1982. The amending order deleted the entire text of Rule 4 and substituted the prior statutory procedure for service of the summons. On December 28, 1984, the Supreme Court adopted a new Rule 4, effective March 1, 1985. Forms applicable to the new Rule 4 were adopted on May 2, 1985. This comment pertains

to new Rule 4 and its forms.

After an action is commenced, the clerk is required to issue a separate summons for each defendant except in the case of summons by publication. The plaintiff or his attorney has the right, by written election, to determine whether each summons shall be delivered to the plaintiff or his attorney for service by process server or delivered by the clerk to the sheriff of the county in which the defendant resides or may be found. Where service is by publication, the clerk shall hand the summons to the plaintiff or to his attorney, or, if so requested by either of them, the clerk shall hand it to the publisher of the proper newspaper for publication.

Forms 1A, 1AA, 1B and 1C are provided as suggested forms for the various summons. All summonses used pursuant to Rule 4 must be in substantial conformity with these forms.

Various "Processes" provided for by statute, other than the summons and subpoena (the subpoena is governed by Rule 45), will continue to be governed by statute.

Rule 4(a)(2) requires that a copy of the complaint be served with the summons. Rule 4(b) requires that the summons form notify defendant that his failure to appear will result in a judgment by default against defendant for the relief demanded in the complaint. Although the "judgment by default will be rendered" language may be an overstatement, the language is included in Rule 4 for two reasons. First, the language is part of Federal Rule 4(b), and an effort has been made to maintain procedural conformity between the Mississippi and federal systems where possible. Second, the strong language is deemed more likely to encourage defendants to appear to protect their interests.

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 should 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 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.

A party using a process server may pay such person any amount that is agreed upon. However, only that amount statutorily allowed to the sheriff under Miss. Code Ann. § 25-7-19 (Supp. 1984) may be taxed as recoverable costs in the action.

Plaintiff is given the option under Rule 4(c)(3) of obtaining service by first-class mail. Defendant's failure to complete and return one copy of the "Notice and Acknowledgment for Service by Mail" may trigger the cost-shifting provisions of Rule 4(c)(3)(B). The provisions for service by first-class mail are modeled upon Federal Rule 4(c)(2)(C)(ii). The completion and return of Form 1B (Notice and Acknowledgment for Service by Mail) does not operate as a waiver of objections to jurisdiction. All jurisdictional objections are preserved whether Form 1B is completed and returned from inside or outside the State.

Rule 4(c)(4) provides for service of summons by publication and generally tracks the previous statutory requirements for summons by publication under Miss. Code Ann. § 13-3-19 et seq. (1972). However, a few major changes should be noted. Under Rule 4(c)(4)(B), "[t]he defendant shall have thirty (30) days from the date of first publication in which to appear and defend." The thirty days from first publication is a shorter time in which one must respond than was previously provided by statute.

Publication under this rule is deemed complete with the third publication in those instances where the time of an event is related to completion of publication. However, it should be noted that this is not deemed to alter the time for response by defendant.

It should be noted that there will be instances under Rule 4(c)(4)(E) where service by publication is appropriate for persons under disability, but service of the summons and complaint upon the "other person" required to be served under Rule 4(d)(2) will not be appropriate by publication because the "other person" may be found within the State of Mississippi.

Rule (4)(c)(4)(C) continues the previous statutory requirement that the clerk send a copy of the summons (and now also of the complaint) by first-class mail to the address of the defendant. The mailing provides further opportunity to give defendant notice of the action. If the defendant's post office address is unknown to plaintiff after diligent inquiry, then the mailing of the summons and complaint is not required.

Rule 4(c)(5) provides for "Service by Certified Mail on Person Outside State" by sending a copy of the summons and complaint to the person to be served by certified mail, return receipt requested. The certified mail procedure is not available to serve a person within the state. It is an alternative form of service because a person outside of the state may also be served under Rule 4(c)(1), 4(c)(3) or 4(c)(4).

The Rule 4(c)(5) procedure supplants the circuitous procedures previously available to obtain in personam jurisdiction against nonresidents. E.g. Miss. Code Ann. § 13-3-63 (1972). However, the criteria for subjecting nonresidents to the jurisdiction of Mississippi courts are those established by the legislature.

Rule 4(d) provides the methods by which the summons and complaint may be served by a sheriff or process server. The basics of service follow generally the previous statutory practice under Miss. Code Ann. § 13-3-33 *et seq.* (1972). However, there are differences which must be noted. Rule 4(d)(1)(A) tracks previous statutory practice by providing that reasonable diligence be made to deliver a copy of the complaint and summons to the person personally or to his authorized agent. Where the summons and complaint cannot be delivered to the defendant personally, the copies may be delivered at defendant's usual place of abode by leaving the same with defendant's spouse or some other person of the defendant's family above the age of sixteen years who is willing to receive service. The corresponding Federal Rule 4(d)(1) has no such requirement. A new procedural safeguard has been added to this mode of "residence service." A copy of the summons and complaint must thereafter be mailed (first-class mail, postage prepaid) to the person to be served at the place where a copy of the summons and complaint were left. Such "residence service" of a summons is not deemed complete until the 10th day after such mailing.

Rule 4(d)(2)(A) provides for service upon an unmarried infant and makes several changes from previous practice. The unmarried infant must only be served a copy of the summons and complaint if twelve years of age or older (previously there was no age limitation). The rule now specifies that the guardian served may be the guardian of either the person or of the estate of the unmarried minor, and such service is now permitted upon "the individual having care of such infant or with whom he lives" in addition to the infant's mother, father or legal guardian. This rule is not intended to depart from the basic concepts of traditional Mississippi practice which must still be followed. See: Section 232, Griffith, Mississippi Chancery Practice. The record, exclusive of server's return, should reflect facts sufficient to establish service upon the proper person.

Rule 4(e) provides for waiver of service of the summons and complaint and tracks the provisions of Miss. Code Ann. § 13-3-71(1) (Supp. 1984). The waiver must be dated and signed by the defendant after the day on which the action is commenced. A waiver may be

executed without a summons having been issued since for purposes of Rule 4(e) "commencing the action" means merely filing the complaint. Although the Statutory provisions of Miss. Code Ann. § 13-3-71(2) (Supp. 1984) dealing with when causes are triable after waiver by a fiduciary are not mentioned in Rule 4(e), such provisions are not in conflict with Rule 4(e) and continue in effect.

Rule 4(f) provides that the person serving the process shall promptly file a return of service with the court. Prior to revision in 1997, the rule sanctioned making the return at any time before the person served was required to respond. The failure to promptly file a return may precipitate a default or defeat a defendant's right to remove the case. The purpose of the requirement for prompt filing is to avoid these problems that may arise when a defendant is unable to verify the date of service by examining the return of service in the court records.

Rule 4(h) provides that service upon a defendant must be made within 120 days after the filing of the complaint or the cause will be dismissed without prejudice as to that defendant unless good cause can be shown as to why service could not be made.

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

## 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 on 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).

## Comment

The purpose of Rule 5 is to provide both an expedient method of exchanging written 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 not

a party 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. *See* Miss. Code Ann. § 11-5-37 (1972) (answer may be made a cross-bill). However, where a plaintiff has settled his case, the service on him of a notice and motion to intervene is ineffectual to bring him back into court. This is consistent with Mississippi practice, although past procedure did not recognize intervention. *See Hyman v. Cameron*, 46 Miss. 725 (1872).

A motion which may be heard *ex parte* is not required to be served, but should be filed; see also M.R.C.P. 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.

Discovery papers, referred to in Rule 5(a), embrace interrogatories, Rule 33, requests for admission, Rule 36, and requests for production, Rule 34. Responses served under the provisions of any of these rules must also be served on all parties.

The Administrative Office of Courts (AOC) is authorized to establish procedures for a comprehensive electronic case management and electronic filing system known as the Mississippi Electronic Court System (MEC). Please refer to the Administrative Procedures for Mississippi Electronic Court System on the Supreme Court's website at www. mssc.state.ms.us. While the use of the MEC is optional for the chancery, circuit, and county courts, the procedures 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.

A secondary purpose of Rule 5(c) is to permit the court to alleviate some of the difficulties in actions where there are unusually large numbers of defendants. Rule 5(c) is the only instance in which the provisions of Rule 7(a) (pleadings allowed) are permitted to be relaxed. This relaxation extends only to replies to counter-claims and answers to cross-claims; other pleadings and all motions must still be served in the usual manner.

Rule 5(d) recognizes both the expense of making additional transcripts of recordings and duplicating exhibits or attachments to discovery papers, and the fact that the routine filing of such items can engulf the space in a clerk's office. Accordingly, papers produced in the course of discovery need not be filed with the court unless they are relevant to some proceeding or the court so directs, nor must all discovery papers be filed if only some of them are required for the disposition of some motion or proceeding. M.R.C.P. 5(d) differs from Federal Rule 5(d) in the preceding respect, but accords with the recommendations of the

American Bar Association for correcting abuses in the discovery procedures. *See* Special Committee for the Study of Discovery Abuse, Section of Litigation, A.B.A., Report, at 1, 2 (1977).

Of further significance in Rule 5(d) is that, although service must be made within the times prescribed, filing is permitted to be made within a reasonable time thereafter. *See Blank v. Bitker*, 135 F.2d 962 (7th Cir. 1943). 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 it 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 his 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.

For general discussions of the federal rule analogous to M.R.C.P. 5, *see* 1 Wright & Miller, Federal Practice and Procedure, Civil §§71-82 (1969), and 2 Moore's Federal Practice ¶¶ 5.01-5.11 (1975).

## 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).

**Comment**

The purpose of Rule 6 is to provide reasonably flexible, general guidelines for the measurement of time periods under these rules. Rule 6(a) implements a new method for computing time by excluding Saturday or legal holidays from being the last day of a time period, and excluding intermediate Saturdays, Sundays, and legal holidays from the computation when the total time period is less than seven days.

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.

Under Rule 6(b), the court is given wide discretion to enlarge the various time periods both before and after the actual termination of the allotted time, certain enumerated cases being expected. *Accord*, e. g., *Rogers v. Rogers*, 290 So.2d 631 (Miss.), *cert.* denied 419 U.S. 837 [95 S. Ct. 65, 42 L.Ed.2d 64] (1974); *Grand Lodge Colored K.P. v. Yelvington*, 111 Miss. 352, 71 So. 576 (1916).

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." Excusable neglect is discussed and illustrated in 4 Wright & Miller, Federal Practice and Procedure, Civil § 1165 (1969).

Rule 6(c) does not abolish court terms. This rule 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., M.R.C.P. 6(d) (motions and notices of hearings thereon to be served not less than five days before time fixed for hearing), and M.R.C.P. 12(a) (defendant to answer within thirty days after service of summons and complaint).

Rule 6(d) is self-explanatory in requiring a minimum of five days notice for hearing motions.

Rule 6(e) is patterned after Miss. Code Ann. § 13-3-83 (1972) and adds nothing new to Mississippi practice.

[Amended effective August 11, 2005.]

## 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).

### Comment

The purpose of Rule 7 is to facilitate the court's ability to reach a just decision on the merits of a case by providing for a simple and elastic pleading and motion procedure which emphasizes substance rather than form. Rule 7(a) contemplates that in the normal situation of a claim and a defense the pleadings shall consist of only a complaint and an answer; under

certain circumstances a reply may be ordered to an answer or a third-party answer. Affirmative defenses in the answer are deemed denied or avoided, and a reply is required if the answer contains a counter-claim denominated as such. Otherwise, a reply is unauthorized and may be stricken or disregarded. In no case may the pleading go beyond the reply. It should be noted that the general provision requiring or allowing a reply is subject to the qualification of Rule 5(c).

An answer is required where a cross-claim is set forth in a co-party's answer. *Cf.* Miss. Code Ann. § 11-5-37 (1972). If a party to an action proceeds under Rule 14 to bring in a third party, he must file a third-party complaint. If a third party is served, an answer is required of him. No reply is mandatory to an answer made to a cross-claim, unless it contains a counter-claim denominated as such. Although a third-party answer may contain a counter-claim denominated as such, Rule 7(a) does not provide for a mandatory reply thereto.

Rule 7(b)(1) provides that a motion must state with particularity the grounds therefore and the relief or order sought. *See generally*, V. Griffith, Mississippi Chancery Practice, §§ 399, 400 (2d ed. 1950). Reasonable specification is all that the requirement of particularity imposes. Good practice dictates that an ex parte order should be based on a written motion. The record will then show the basis for the ex parte order.

Rule 7(c) requires all filings and depositions to be made on short paper, and all depositions to comply with transcript requirements. The purpose of Rule 7(c) is to facilitate a system-wide transfer from legal size paper to letter size paper effective July 1, 1993. *See* Miss.Sup.Ct. Rules 11, 32, and Guideline for Court Reporters. Voluntary compliance with this Rule is to begin January 1, 1993; mandatory compliance will become effective July 1, 1993.

Rule 7(d) abolishes the use of demurrers and pleas and exceptions for insufficiency of pleadings. This is in accordance with Miss. Code Ann. §§ 11-5-25, 11-5-45 and 11-7-59 (1972), but is contrary to Miss. Code Ann. §§ 11-5-23 and 11-7-79 (1972). Under these rules, if a question concerning the legal sufficiency of a complaint is to be raised before answering on the merits, it should be done by a motion to dismiss for failure to state a claim upon which relief can be granted, Rule 12(b)(6), or for judgment on the pleadings, Rule 12(c).

While demurrers are abolished, no penalty should attach, in light of Rule 1, to the denomination of a valid defense or objection as a demurrer. The defense or objection should be treated as though it had been accurately denominated as a motion for certain relief. Further, while it is desirable that pleadings be properly labeled in accordance with Rules 7(a)

and 8(c), there should be no penalty for mislabeling. *See Shell Petroleum Corp. v. Stueve*, 25 F. Supp. 879 (D. Minn. 1938); *Howard v. United States*, 28 F. Supp. 985 (W.D. Wash. 1939); *Equitable Life Assurance Society v. Kit*, 26 F. Supp. 880 (E.D. Pa. 1939); 5 Wright & Miller, Federal Practice and Procedure, Civil § 1196 (1969).

As to when a reply should be ordered by the court, see 2A Moore's Federal Practice ¶ 7.03 (2d ed. 1968), and 5 Wright & Miller, Federal Practice and Procedure, Civil § 1185 (1969).

[Amended effective November 19, 1992.]

## 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.

**Comment**

The purpose of Rule 8 is to give notice, not to state facts and narrow the issues as was the purpose of pleadings in prior Mississippi practice. Consequently, the distinctions between "ultimate facts" and "evidence" or conclusions of law are no longer important since the rules do not prohibit the pleading of facts or legal conclusions as long as fair notice is given to the parties. 5 Wright & Miller, Federal Practice and Procedure, Civil §§ 1202, 1218 (1969); 2A Moore's Federal Practice ¶¶ 8.12, 8.13 (2d ed. 1968); *contra, Pigott v. Boeing Co.*, 240 So.2d 63 (Miss.1970); and *King v. Mississippi P. & L. Co.*, 244 Miss. 486, 142 So.2d 222 (1962) (it is not sufficient to allege negligence as a mere conclusion of the pleader, but facts must be pleaded showing actionable negligence); *see also Bennett v. Hardwell*, 214 Miss. 390, 59 So.2d 82 (1952); *McLemore v. McLemore*, 173 Miss. 765, 163 So. 500 (1935) (ultimate essential facts upon which action is based must be averred, but not the items of evidence by which ultimate facts are to be proved); and *Barnes v. Barnes*, 317 So.2d 387 (Miss.1975) (where issue of possession of property was not presented by the pleadings in divorce action and no proof as to possession appeared in record, that portion of decree awarding possession of land to complainant was not substantiated by proof and was not valid).

Although Rule 8 abolishes many technical requirements of pleadings, it does not eliminate the necessity of stating circumstances, occurrences, and events which support the proffered claim. Averments of residency are no longer required unless needed by the claim, as in divorce proceedings. *See* Miss. Code Ann. § 93-5-5 (1972). The rule allows the claims to be stated in general terms so that the rights of the client are not lost by poor drafting skills of counsel.

The list of affirmative defenses in Rule 8(c) is not intended to be exhaustive. Useful in determining what must be pleaded under 8(c) are considerations of policy, fairness, and probability. *See* 5 Wright & Miller, *supra*, 1271. The pleader normally will not be penalized for stating matter that technically is not an affirmative defense.

As with the statement of claims, notice of the defense raised by the defendant, Rule 8(d), is all that is required.

Rule 8(f) repudiates the prior Mississippi doctrine of construing the pleadings most strongly against the pleader. *See, e. g., Taylor v. Twiner*, 193 Miss. 410, 9 So.2d 644 (1942); V. Griffith, Mississippi Chancery Practice, §§ 82, 175, 288, 307, 432 (2d ed. 1950).

Rule 8(g) accords with traditional Mississippi practice. *See* Miss. Code Ann. § 11-7-151 (1972) (all papers read in evidence on the trial of any cause may be carried from the bar by the jury).

Rule 8(h) is intended to ensure that adequate notice is provided when one sues or defends for the beneficial interest of another. *See generally* V. Griffith, *supra*, §§ 127-150.

## 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.

## Comment

The purpose of Rule 9 is to permit the pleading of special matters with maximum emphasis on the substance of the pleading rather than on form.

Rule 9(a) is the same as was required by prior Mississippi procedure. *See* V. Griffith, Mississippi Chancery Practice, 164 (2d ed. 1950). A party desiring to raise an issue as to the legal existence, capacity, or authority of a party will be required to do so by specific negative averment. This is consistent with past procedure which held that affirmative defenses cannot be relied upon unless specially pleaded. *See* Miss. Code Ann. § 11-7-59(4) (1972); *White v. Thomason*, 310 So.2d 914 (Miss. 1975). 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) (failure to state a claim upon which relief may be granted), Rule 12(c) (a motion for judgment on the pleadings), or Rule 12(f) (a motion to strike).

Rule 9(b) is well-established in common law and past Mississippi practice. *McMahon v. McMahon*, 247 Miss. 822, 157 So.2d 494 (1963) (fraud will not be inferred or presumed and cannot be charged in general terms; the specific facts which constitute fraud must be definitely averred); Griffith, *supra*, §§ 176, 589. "Circumstances" 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 he obtained as a result. *See* 5 Wright & Miller, Federal Practice and Procedure, Civil § 1297 (1969). The so-called "textbook" elements of fraud may be pleaded generally, i. e., (1) false representation of a material fact, *Sovereign Camp, W.O.W. v. Boykin*, 182 Miss. 605, 181 So. 741 (1938); (2) knowledge of or belief in its falsity by the person making it, *H. D. Sojourner Co. v. Joseph*, 186 Miss. 755, 191 So. 418 (1939); (3) belief in its truth by the person to whom it is made, *Pilot Life Ins. Co. v. Wade*, 153 Miss. 874, 121 So. 844 (1929); (4) intent that it should be acted upon, *McNeer & Dodd v. Norfleet*, 113 Miss. 611, 74 So. 577 (1917); (5) detrimental reliance upon it by the person claiming to have been deceived, *Clopton v. Cozart*, 21 Miss. 363 (1850).

Conditions of mind, such as intent and malice, are required to be averred only generally. *Cf. Benson v. Hall*, 339 So.2d 570 (Miss.1976), and *Edmunds v. Delta Democrat Pub. Co.*, 230 Miss. 583, 93 So.2d 171 (1957) (charge in a libel suit that defendant published libelous material "falsely and maliciously or with reckless disregard of the truth" without alleging any facts, were mere conclusions of the pleader and were not admitted on demurrer).

Rule 9(c) conforms to traditional Mississippi practice. *See* Miss. Code Ann. § 11-7-109 (1972); *McClave-Brooks Co. v. Belzoni Oil Works*, 113 Miss. 500, 74 So. 332 (1917).

Rule 9(d) provides that in pleading an official document or official act, it is sufficient to aver that the document was issued or the act done in compliance with law; it is not necessary to allege facts showing due compliance. A defense based on the theory that an official document or act is defective must be raised by a specific denial. *See Ludlow Corp. v. Arkwright-Boston Mfrs. Mut. Ins. Co.*, 317 So.2d 47 (Miss. 1975) (portions of official document pertaining to Hurricane Camille, prepared by U.S. Army Corps of Engineers, were admitted into evidence to prove empirical facts; portions containing hearsay, conclusions, and irrelevant information were excluded).

Pleading ordinances, under Rule 9(d), is not significantly different from prior Mississippi practice. When a claim or defense is founded upon an ordinance, the pleader must specifically refer to the ordinance, as by its title or by the date of its approval; it is not necessary that a certified copy of the ordinance be attached thereto, as was formerly required. *See White v. Thomason*, *supra*.

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) 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).

Rule 9(g) conforms to past Mississippi practice requiring a detailed pleading of special damages and only a general pleading of general damages.

Briefly stated, "general" damage may be considered to be that which is so usual an accompaniment of the kind of breach or wrongdoing alleged in a complaint that the mere allegation of the wrong gives sufficient notice. Conversely, "special" damage is loss or injury of relatively unusual kind, which without specific notice the adversary would not understand to be claimed. *See Vicksburg & M.R.R. Co. v. Ragsdale*, 46 Miss. 458 (1872) (damages as may be presumed necessarily to result from a breach of contract need not be stated; special damages must be specifically stated).

General damage includes all those normal and standardized elements of recovery which the courts have adopted as safe bases of compensation and as to which they find it desirable to forego, not only the requirement of detailed pleading, but other requirements such as the "contemplation of the parties" requirement in contracts, or the requirement of certainty of proof. In contract and property cases, general elements of damage are usually based upon evaluation. Examples are the seller's claim for the refusal of the buyer to take the land or goods, measured by the difference between the contract price and the market value, or damages for the wrongful detention of land or goods, measured by the value of the use of the rental, valued during the delay. Similarly, when interest is allowable as damages, it is general damage.

The kinds of damage which are special and required to be set out in the complaint are infinite; only a few instances will be noted here. In cases of injury or to destruction of property, or its detention, any specific claims for damages other than the standardized compensation (based upon the value of the property and interest, or in case of detention, the rental or usable value) would be special. So, in actions for breach of contract all consequential loses, such as expenses or the loss of profits expected upon transactions with third persons, must be specially pleaded. In personal injury suits, the following are usually treated as matters to be specially pleaded: loss of time and earnings; impairment of future earning capacity; aggravation by the injury of a pre-existing disease; and insanity resulting from the injury. C. McCormick, Damages § 8 (1935).

Rule 9(h) is an adaptation of Miss. Code Ann. § 11-7-39 (1972), while Rule 9(i) is an adaptation of Miss. Code Ann. § 11-5-11 (1972); neither provision is new to Mississippi practice.

[Comment amended effective April 13, 2000.]

## 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.)

### Comment

Rule 10(a) is substantially the same as current Mississippi practice. *See* Miss. Code Ann. § 11-7-57 (1972).

The requirement in Rule 10(b) that averments be made in numbered paragraphs is

similar to Mississippi Chancery Court Rule 10. MRCP Rule 10(b) requires claims to be presented in separate counts only when two conditions are met: the claims must be founded upon separate transactions or occurrences, and a separation must facilitate the clear presentation of the matters set forth. Thus, the pleader cannot be required to use separate counts where his claims arise from a single transaction or occurrence. Even where the claims arise from separate transactions or occurrences, the test as to whether separate counts must be used is functional rather than conceptual; separate counts are required if they facilitate the clear presentation of the matters set forth. Failure to comply with the requirements of Rule 10(b) is not ground for dismissal of the complaint or striking of the answer, but the defect may be ordered cured by motion. *See* 5 Wright & Miller, Federal Practice and Procedure, Civil § 1322 (1969).

Rule 10(c) permits incorporation of portions of pleadings by reference to later portions of the same pleading or in subsequent pleadings or motions. This is particularly helpful where a factual averment has bearing in subsequent allegations of a pleading. Further, when pleadings are amended, prior phases of an earlier pleading not affected by the proposed amendment can be incorporated by reference. This practice functions most successfully when the requirement of numbered paragraphs, Rule 10(b), has been observed.

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 was included in the original MRCP 10 to continue the prior Mississippi practice. 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 judgment). 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 through discovery.

[Comment amended effective April 13, 2000.]

## 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).

### Comment

The purposes of Rule 11 are to require that all pleadings, motions, and papers in an action be signed by at least one attorney of record and to eliminate the requirement of verified pleadings. Only the original paper must be signed, although copies served on the adverse attorneys should indicate by whom the original was signed. Counsel's office address should appear on all pleadings and other papers. This procedure accords with Miss. Code Ann. §§ 11-5-9 and 11-7-91 (1972).

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 pleadings should he do so. Also, a signed pleading may be introduced into evidence in another action by an adverse party as proof of the facts alleged therein.

Verification will be the exception and not the rule to pleading in Mississippi; this is a break from past practice. *See* Miss. Code Ann. §§ 11-5-21; 11-5-29; 11-5-31; and 11-5-33 (1972). No pleading need be verified or accompanied by affidavit unless there is a specific provision to that effect in rule or statute. *See* Rules 27 (a) and 65.

Sham pleadings and willful violations are disciplined consistently with past Mississippi procedure. *See Sherrill v. Stewart*, 197 Miss. 880, 21 So.2d 11 (1945).

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. An objective standard is employed in determining whether Rule 11 sanctions should be imposed. *See, Tricon Metals & Services, Inc. v. Topp*, 537 So.2d 1331 (Miss.1989).

[Amended effective March 13, 1991.]

## 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.

**Comment**

The purpose of Rule 12 is to expedite and simplify the pretrial phase of litigation while promoting the just disposition of cases. The periods of time referred to in Rule 12(a) relate to service of process, motions, pleadings or notices, and not to the filing of the instruments. Because of the nature of divorce cases, Rules 12(a)(1) and (2) do not apply to such proceedings. *See* also M.R.C.P. 81(b). Rule 12(a) represents a marked change from the former procedures which linked the return date or response date to a term of court. *See* Miss. Code Ann. §§ 11-5-17; 11-7-121; and 13-3-13 (1972).

Rules 12(b)(6) and 12(c) serve the same function, practically, as the general demurrer. *See Investors Syndicate of America, Inc. v. City of Indian Rocks Beach, Florida*, 434 F.2d 871, 874 (5th Cir. 1970). They are the proper motions for testing the legal sufficiency of the complaint; to grant the motions there must appear to a certainty that the plaintiff is entitled

to no relief under any set of facts that could be proved in support of the claim.

If the complaint is dismissed with leave to amend and no amendment is received, the dismissal is a final judgment and is appealable unless the dismissal relates to only one of several claims. *See Ginsburg v. Stern*, 242 F.2d 379 (3rd Cir. 1957).

A motion pursuant to Rule 12(c) may be granted if it is not made so that its disposition would delay the trial; the moving party must be clearly entitled to judgment. *See Greenberg v. General Mills Fun Group, Inc.*, 478 F.2d 254, 256 (5th Cir. 1973).

Under 12(d), the decision to defer should be made when the determination will involve the merits of the action, thus making deference generally applicable to motions on Rules 12(b)(6) and (c).

Rule 12(e) abolishes the bill of particulars. Miss. Code Ann. § 11-7-97 (1972). 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 the only remedy for 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(f) is generally consistent with past Mississippi procedure. *See* Miss. Code Ann. § 11-7-59(3) (1972); *Parish v. Lumbermen's Mut. Cas. Co.*, 242 Miss. 288, 134 So.2d 488 (1961).

Rule 12(g) allows the urging of all defenses or objections in one motion with no waiver. There are three important qualifications which permit at least two rounds of motions: (1) the requirement of consolidation applies only to defenses and objections then available to the moving party; (2) the requirement applies only to defenses and objections which this rule permits to be raised by motion; (3) the prohibition against successive motions is subject to the exceptions stated in Rule 12(h).

Rule 12(h)(1) states that certain specified defenses which may be available to a party when he makes a pre-answer motion, but which he omitted from the motion, are waived. A party who by motion invites the court to pass upon a threshold defense should bring forward all the specified defenses he then has and thus allow the court to do a reasonably complete job. The waiver reinforces the policy of Rule 12(g) forbidding successive motions. 5 Wright

& Miller, Federal Practice and Procedure, Civil § 1391 (1969).

Rule 12(h)(2) preserves three defenses against waiver during the pleading, motion, discovery, and trial stages of an action; however, such defenses are waived if not presented before the close of trial. 5 Wright & Miller, *supra*, § 1392.

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 M.R.C.P. 60(b)(4) or may be presented for the first time on appeal. *Welch v. Bryant*, 157 Miss. 559, 128 So. 734 (1930); *Brown v. Bank*, 31 Miss. 454 (1856). This provision 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 the 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. *Cazeneuve v. Curell*, 70 Miss. 521, 13 So. 32 (1893).

[Amended effective February 1, 1990.]

## 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.

## Comment

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:

> It is, and should be, a paramount concern of the judiciary to prevent multiple suits where one suit will suffice. There is a tendency, perhaps, to forget that one who undergoes the rigors of an action, with all of its traumatic impact, loss of time, delay, substantial expense and disruption of his affairs, with consequent appeals and possible retrials and still other appeals, should be spared having to do this more often than is strictly necessary. Even the successful party after bearing the expense of one trial and of one appeal is, in many instances, hardly a winner. *Magee v. Griffin*, 345 So.2d 1027, 1032 (Miss.1977).

Under Rule 13(a), some claims may now be asserted as counter-claims which heretofore could have been interposed only by way of recoupment or set-off at law, *See* Miss. Code Ann. § 11-7-63 (1972), *Myers v. Estell*, 47 Miss. 4 (1872), or by cross-bill in equity, *See* Miss. Code Ann. § 11-5-37 (1972); *Stewart v. Stebbins*, 30 Miss. 66 (1855). Rule 13(a), however, makes it immaterial whether the counter-claim is legal or equitable, *See* Miss. Code Ann. § 11-5-37 (1972), or in contract or in tort, Miss. Code Ann. § 11-7-36 (1972), or even whether it has any connection whatever with the plaintiff's claim, *See Dewees v. Dewees*, 55 Miss. 315 (1877), *Oxford v. Spears*, 228 Miss. 433, 87 So.2d 914 (1956). A counter-claim is compulsory if there is any logical relation between the original claim and the counter-claim. Under 13(b), all other claims may be brought by a party in one action.

Under Rule 13(c), a counter-claim may ask for more or different relief than that sought by the opposing party. Cf. Miss. Code Ann. §§ 11-7-63 - 69 (1972), *Johnson v. Richardson*, 234 Miss. 849, 108 So.2d 194 (1959). Also, under Rule 13 additional parties may be brought in to defend against the counter-claim where there presence is necessary for the granting of complete relief.

Rule 13(g), providing for cross-claims, is essentially equivalent to past Mississippi chancery procedure, *see* Miss. Code Ann. § 11-5-37 (1972), and permits acceleration of liability by the cross-claim.

Rule 13(h) tracks the provisions of Miss. Code Ann. § 9-9-21 (Supp. 1987) regarding the jurisdiction of counter-claims in county court. The county court retains jurisdiction of a suit when a counter-claim is brought which exceeds the jurisdictional amount for original suits in county court unless a motion to transfer is made by all parties as described in Rule 13(h).

If a counter-claim or cross-claim has been properly asserted, then under M.R.C.P. 13(i) any person whose joinder in the original action would have been possible (pursuant to M.R.C.P. 20, permissible joinder) may be added as a party to the counter-claim or cross-claim. M.R.C.P. 13(i) is identical to Federal Rule 13(h).

Because of the liberal provisions in Rule 13 for counter-claims and cross-claims, the trial court may be faced with many disparate issues or claims in a single action. Should the court determine that one or more of the counter-claims or cross-claims should be handled separately to avoid prejudice or to promote convenience and economy, Rule 13(j) authorizes the judge to invoke Rule 43(b) and order separate trials of the claims. M.R.C.P. 13(j) is identical to Federal Rule 13(i).

Rule 13(k) governs actions appealed for trials de novo from lower courts in which there are no compulsory counter-claim provisions. Under this rule the defendant in the trial de novo must assert compulsory counter-claims within thirty days after the appeal has been perfected. In pursuing his counter-claim or cross-claim the defendant is not limited to the jurisdictional ceiling of the court below.

[Amended effective March 1, 1989.]

## 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).

### Comment

Third-party practice, or impleader, allows a defendant to bring into the action a person,

not previously a party, who is or may be liable to the defendant for all or part of the plaintiff's claim against the defendant. The defendant thus becomes a third-party plaintiff with respect to his claim against the new party, who becomes the third-party defendant. The purpose of the practice is to avoid the problem of circuitous or duplicative actions, which occur when a defendant, held liable in the first action, is required to bring a second action against another party he alleges is derivatively or secondarily liable to him for all or part of the judgment. By consolidating the main claim and the derivative or secondary claim in a single action, the court may avoid inconsistent results, duplication of effort, and unnecessary delay.

The rule requires a party seeking to implead a third party to obtain authorization from the court in all cases. (It thus differs from the federal version of Rule 14, which permits impleader without leave if the third-party complaint is filed within 10 days after service of the defendant's answer to the original claim.)

The rule also provides that "any party may move to strike the third-party claim" after it has been asserted. On motions either to authorize or to strike a third-party claim, the court must, of course, disallow any claim that does not meet the express requirements of the rule.

The rule also provides, however, that impleader should be permitted only for "good cause." This term makes clear what is implicit in the federal rule, that the court has discretion to disallow a claim even if it meets the technical requirements of the rule. As the cases interpreting the federal rule state, the court should exercise its discretion in light of the policies underlying the rule. *Weyerhauser Co. v. Wells*, 593 So. 2d 1010 (Miss. 1992) quotes the foregoing portion of this paragraph with approval and states further:

> It is apparent that the rule does not grant a defendant the right to have a third party claim heard by the court in the same action. The Mississippi trial courts have greater discretion on Rule 14 than the federal courts have. . . .

Thus, a valid third-party claim that will avoid circuitous or duplicative actions should ordinarily be permitted, unless it would unduly delay the original action. If the court determines that the third-party claim would unduly complicate the original action, it should not disallow impleader; instead, it should permit the claim and order a separate trial as authorized by the rule and by Rule 42(b).

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. Third-party practice is not a general device for bringing in additional parties to the action. It is not available, for example, to bring in a party solely on the ground that he is or may be liable to the original plaintiff. *McPherson v. Hoffman*, 275 F.2d 466 (6th Cir.1960); *Campbell Construction Engineers, Inc. v.*

*Water Works & Sewer Board*, 290 So.2d 194, 202, 52 Ala.App. 129 (1974). Thus, an allegation that the third party is a joint tortfeasor or is the one really liable to the original plaintiff is insufficient to state a third-party claim.

Impleader is likewise 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. *See*, e.g., *Nagunst v. Western Union Tel. Co.*, 76 F.R.D. 631, 635 (D.Kan.1977). Once a third-party claim is properly asserted, however, the third-party plaintiff may assert whatever additional claims he has against the third-party defendant under Rule 18 (a). *See*, e.g., *Schwab v. Erie Lackawanna R.R.*, 438 F.2d 62, 71 (3rd Cir.1971).

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 rule does not, however, create any such rights. It merely provides a procedure for expedited consideration of these rights where they are available under the substantive law. Thus, since Mississippi does not recognize a right of contribution for joint tortfeasors, Rule 14 will not, in general, permit impleader of a joint tortfeasor. Mississippi does, however, permit contribution among judgment joint tortfeasors, and also recognizes a right of indemnity in favor of a passive tortfeasor against an active one. *See Bush v. City of Laurel*, 215 So.2d 256, 259, 60 (Miss. 1968). Impleader would be available to accelerate the determination of claims by one tortfeasor against another based upon either of these theories of derivative liability, where their substantive requirements are satisfied. Similarly, a defendant may implead his liability insurer if the insurer is disclaiming liability on the policy. An insurer against loss, sued by its policyholder, may implead the person who allegedly caused the loss, where a right of subrogation would arise from the insurer's payment of the plaintiff's claim.

Because the rule expressly allows third-party claims against one who "may be liable," it is not an objection to impleader that the third party's liability is contingent on the original plaintiff's recovery against the third-party plaintiff. *Jeub v. B/G Foods, Inc.*, 2 F.R.D. 238 (D.Minn.1942).

The rule makes clear that a third-party claim may not be asserted against a person who is already a party. This limitation presents no difficulty if the defending party wishes to assert a claim for derivative liability against a co-party, because Rule 13(g) expressly allows cross-claims asserting that the co-party "may be" liable to the claimant. If, however, the party against whom the defendant wishes to assert his claim for derivative liability is a co-plaintiff of the party asserting the main claim, then the defendant does face a difficulty: the terms of Rule 13(a) and (b) state that a counter-claim must be mature. In a proper case, however, the court may order the severance of the co-plaintiff to allow the claim to be asserted, then consolidate the actions under Rule 42. *See* 6 Wright & Miller, Federal Practice and Procedure, Civil § 1446 (1990).

Although the rule does not state it expressly, a motion for leave to implead must be on notice to all the parties to the action, but not to the proposed third-party defendant. Moreover, under Rule 5 a copy of the third-party complaint, as well as the responsive pleadings of the third-party defendant, must be served on all the parties.

The third-party defendant may assert his defenses to the third-party claim by motion or answer as provided in Rule 12 and may assert defenses to the original plaintiff's claim against the third-party defendant. This last provision is necessary, since the defendant's assertion of a third-party claim may reduce his incentives to defend the original action vigorously.

The third-party defendant is subject to the compulsory counterclaim requirements of Rule 13(a) with respect to claims against the third-party plaintiff. He may also assert a claim he has against the original plaintiff that arises out of the same transaction or occurrence on the main claim, and the original plaintiff has a similar right vis-a-vis the third-party defendant.

The last sentence of the rule allows the third-party defendant to assert a fourth-party claim, again subject to the provisions and limitations already discussed.

Rule 14(b) allows a plaintiff against whom a counterclaim has been asserted to implead a third-party defendant. The rule's requirement that the claim asserted against plaintiff be a counterclaim suggests that it must be asserted by an opposing party. In spite of this, the plaintiff should be permitted to implead when the third-party defendant, who is not strictly an opposing party, has asserted a claim against him. *See* 6 Wright & Miller, Federal Practice and Procedure, Civil § 1464 (1990).

*History*: A version of Rule 14 was included in the original Rules of Civil Procedure adopted by the Supreme Court in 1981.

[Amended April 18, 1995; amended effective January 27, 2005.]

## 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.** 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. 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:

(1) 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

(2) 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. 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.]

## 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).

## Comment

"It is an invariable principle of practice that the admissible proof in any case must come within the allegations of the pleadings and that it avails nothing to prove what is not charged. But courts are organized for the purpose of hearing and determining causes on their actual merits; and, although it is true that good faith and a reasonable diligence are expected of parties in equity and of their solicitors, and that every party when he comes into court will in the first instance unfold his whole case or defense in accordance with the rules that govern the pleadings and proceedings therein, nevertheless it would be a hopelessly visionary and impractical expectation that every party in every case could always successfully communicate at once to his solicitor all the material facts with complete accuracy, or that any solicitor, although having all the facts, may reach such a height of professional perfectibility as to stand above the possibility of error or omission in pleading them -- as a consequence of which there would sometimes be a failure of full justice on the actual merits unless amendment and correction in the pleadings, and in other procedural steps, were seasonably and judiciously allowed." V. Griffith, Mississippi Chancery Practice, § 388 (2d ed. 1950).

The preceding statements state well the theory underlying Rule 15 and demonstrate that amended pleadings have been liberally permitted throughout Mississippi legal history. *See* Miss.

Code Ann. §§ 11-5-45, 11-5-57, 11-5-59, 11-5-61, 11-5-63, 11-7-55, 11-7-59(3), 11-7-115, and 11-17-117 (1972); *See* also, *Grocery Co. v. Bennett*, 101 Miss. 573, 58 So. 482 (1912) (courts are organized for the purpose of trying cases on their merits and only in exceptional cases should trial courts refuse to permit amendments to pleadings or proceedings); *Field v. Middlesex Bkg. Co., 77 Miss.* 180, 26 So. 365 (1899) (the presentation of a case on its merits should not be defeated by reason alone of any formal rules of pleading and practice, if within the legitimate powers of a court of conscience to avoid it).

M.R.C.P. 15(a) now varies from Federal Rule 15(a) in one important instance. The federal rule permits a party to amend his pleading only once as a matter of course before a responsive pleading is served; the Mississippi rule places no limit on the number of amendments.

Prior to the 2003 amendment of Rule 15(a), a party could, as a matter of right, amend within thirty days after losing on Rule 12(b)(6) and 12(c) motions on which matters outside the pleadings were not presented. In *Poindexter v. Southern United Fire Ins. Co.*, 838 So. 2d 964 (2003), the Supreme Court recognized that the rule mandated an opportunity to amend upon dismissal under Rule 12(b) even though circumstances might be such as would make an amendment futile. Recognizing that the federal rule gives no such absolute right to amend, it was suggested there that "the better course is to temper M.R.C.P. 15(a)'s mandate with the paramount concerns of logic, futility of amendment, and judicial economy." *Poindexter*, 838 So. 2d at 972, Waller, J., concurring. Now, M.R.C.P. 15(a) expressly provides that in the event a Rule 12(b)(6) or 12(c) motion is granted, leave to amend may be granted by the trial court where justice so requires.

Under M.R.C.P. 15(b), when evidence is introduced or an issue is raised with the express or implied consent of the other party, the pleadings shall be treated in all respects as if they had been amended to conform to such evidence. If the opposing party objects but fails to persuade the court that such party will be prejudiced in maintaining the party's claim or defense, the court must then grant leave to amend the pleadings to allow the evidence on the issue. If the objecting party can show prejudice, the court may grant a continuance to meet the evidence, but should again allow amendment of the pleadings. 6 Wright & Miller, *supra*, Civil § 1495.

Under Rule 15(c) the first test for whether an amendment relates back, is merely whether the amended claim or defense arose from the same "conduct, transaction, or occurrence" as the original. The remaining tests are whether the new party to be added by the amendment (if any) is served before expiration of the period provided by Rule 4(h) for service of a summons and complaint. An intended defendant who is notified of an action within the period allowed by Rule 4(h) for service of a summons and complaint may not defeat the action on account of a defect in the pleading with respect to the defendant's name, provided that the requirements of clauses (1) and (2) have been met. If the notice requirement is met within the Rule 4(h) period, a complaint may be amended at any time to correct a formal defect such as a misnomer or misidentification.

In allowing a name-correcting amendment within the time allowed by Rule 4(h), this rule allows not only the 120 days specified in that rule, but also any additional time resulting from any extension ordered by the court pursuant to that rule, as may be granted, for example, if the defendant is a fugitive from service of the summons.

Amendments pursuant to Rule 9(h) (fictitious parties) are not considered as changing parties and do relate back.

Rule 15(d) permits supplemental pleadings when such are reasonably necessary to show transactions, occurrences, or events which have transpired since the date of the pleading sought to be supplemented. This conforms, generally, to prior Mississippi practice. *See Wright v. Frank*, 61 Miss. 32 (1883).

While Rule 15(d) does not expressly incorporate the relation back doctrine of Rule 15(c), it appears sensible that supplemental pleadings should be subject to the basic relation back tests of 15(c). 6 Wright & Miller, *supra*, Civil § 1508.

[Amended effective September 1, 1987; amended August 21, 1996; amended July 1, 1998; amended effective April 17, 2003.]

## 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).

## 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 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).

### Comment

Motions for recusal should be timely filed and should not be used for purposes of delay. Specific procedures for presentation and consideration of motions seeking the recusal of judges are set forth in URCCC 1.15 and Unif. Chanc. R. 1.11. See also, M.R.A.P. 48B concerning review of the trial judges' denial of motions to recuse under M.R.A.P. 21.

[Adopted, April 4, 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.

## Comment

Rule 17 prescribes the general requirements that must be satisfied regarding the plaintiff's interest in the subject matter of the proceeding and each litigant's capacity either to sue or be sued. Rule 17(a) sets forth the basic principle for determining who may bring an action by requiring that it be prosecuted "in the name of the real party in interest," provides specific capacity rules to be followed in actions involving infants or persons under legal disabilities, and provides for the appointment and remuneration of attorneys as guardians ad litem.

The second sentence of Rule 17(a) contains a specific enumeration of a number of persons who are real parties in interest; the purpose of this listing is to provide guidance in cases in which it might not be clear who the real party in interest is and to emphasize the fact that he might not be the person beneficially interested in the potential recovery. Of course, the rule presumes that applicable substantive laws of Mississippi give the persons named in the rule the right to sue. Attempts have been made to interpret Rule 17 of the Federal Rules of Civil Procedure (after which M.R.C.P. 17 was drafted) as creating an exception to the joinder requirements of Rule 19 by the portion of Rule 17(a) stating that anyone listed "may sue in his own name without joining with him the party for whose benefit the action is brought"; the courts have rejected this interpretation and have held that Rule 17(a) assumes that the joinder of those beneficially interested in the action is not otherwise required. As a result, Rule 19 always must be consulted to determine if all the necessary parties have been joined. 6 Wright & Miller, Federal Practice and Procedure, Civil § 1543 (1971).

The provision that 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 the objection has been raised, for ratification, joinder, or substitution, is added simply in the interests of justice. Originally the rule was permissive in purpose: it was designed to allow an assignee to sue in his own name. That having been accomplished, the modern function of the rule in its negative aspect is simply to protect the defendant against a subsequent action by the party actually entitled to recover, and to ensure generally that the judgment will have its proper effect as res judicata. *See*, Miss. Code Ann. § 11-7-3 (1972); *Smith v. Copiah County*, 219 Miss. 633, 69 So.2d 404 (1954).

Rule 17(b) governs real parties in interest in subrogation cases. One of the most common instances of subrogation is when the insurer indemnifies its insured, at which time the former succeeds to whatever rights the latter has against the person who allegedly caused the damage. Difficulties arise when the subrogated insurer seeks to bring suit in the name of the insured in

order to avoid the antipathy juries are thought to have toward insurance companies, especially as against an injured person. As a practical matter, of course, the insurance company will control the prosecution of the lawsuit no matter in whose name it is brought.

The general rule under the federal equivalent of M.R.C.P. 17(b) is that if an insurer has paid the entire claim it is the real party in interest and must sue in its own name. This is sound since it is logical that an insured who has no interest in the outcome of the litigation may not bring suit. *See U.S. v. Aetna Cas. & Sur. Co.*, 338 U.S. 366 [70 S. Ct. 207, 94 L.Ed. 171] (1949); *American Fid. & Cas. Co. v. All Am. Bus Lines, Inc.*, 179 F.2d 7 (10th Cir. 1949); 6 Wright & Miller, *supra*, Civil § 1546.

The insurer who pays a part of the loss is only partially subrogated to the rights of the insured. This may occur when the loss exceeds the coverage or when the insurance policy contains a deductible amount that must be borne by the insured. The respective rights of the parties in this situation parallel those when there has been a partial assignment: either the insured or the insurer may sue in his own name. *See U.S. v. Aetna Cas. & Sur. Co., supra*. Thus, if the insured brings suit, the insurer who is partially subrogated may intervene in the action to protect his pro rata share of the potential recovery. *See McDonald v. E. J. Lavino Co.*, 430 F.2d 1065 (5th Cir. 1970); *Smith Petroleum Serv. Inc. v. Monsanto Chem. Co.*, 420 F.2d 1103 (5th Cir. 1970). If either sues and the other does not voluntarily join or intervene, the defendant may protect himself from multiple lawsuits, by having the absent party joined. *See U.S. v.. Aetna Cas. & Sur. Co., supra, Cross v. Harrington*, 294 F. Supp. 1340 (N.D.Miss. 1969); 6 Wright and Miller, *supra*, Civil § 1546.

The first sentence of M.R.C.P. 17(c) provides that whenever an infant or person, under a legal disability has a representative, such as a guardian, conservator, or other fiduciary, the representative may sue or defend on behalf of his ward. If the infant or person under a legal disability does not have a representative, he may be represented by a guardian ad litem.

If the rights of an unborn or unconceived person are before the court, that person may also be represented by a guardian ad litem. Infants and persons under a legal disability may sue by their next friends. Rule 17(c) gives the court the discretion to appoint guardians ad litem when deemed necessary. For an example of when the appointment of a guardian ad litem was held unnecessary to protect an infant, *See Hutton v. Hutton*, 233 Miss. 458, 102 So.2d 424 (1958). The rule also sets forth the general, professional qualifications for a guardian ad litem.

Rule 17(d) provides that when the appointment of a guardian becomes necessary, the court shall appoint an attorney to serve in that capacity, whose compensation shall be determined by the court and taxed as a cost of the action. Rules, 17(c) and (d) are adapted from Miss. Code Ann. § 9-5-89 (1972). *See* also V. Griffith, Mississippi Chancery Practice, § 34 (2d ed. 1950).

Rule 17(e) permits public officials to be referred to by their official titles when sued or suing in their official capacities; however, the trial court is empowered to require that the official's proper name be added. This subsection appears as Federal Rule 25(d)(2); however, since it pertains more to capacities and interests of parties than to substitution of parties, it was moved to Rule 17.

## 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.

### Comment

The purpose of Rule 18 is to eliminate piecemeal litigation by permitting liberal joinder of claims.

Rule 18(a) eliminates any restrictions on claims that may be joined in actions in the courts of Mississippi. Rule 18(a) permits a party to join as many original claims, counter-claims, cross-claims, or third-party claims as he has against an opposing party. Similarly, legal and equitable claims or any combination of them may 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 the litigation.

Rule 18(a) is intended to have its primary application during the pleading stage. Thus, the rule should be read in conjunction with the provisions governing pleading: in essence, any claim joined under Rule 18(a) must be set forth in accordance with Rule 8, which requires a short and plain statement showing that the pleader is entitled to relief; if the claim involves a subject described in Rule 9 (pleading special matters), then it may have to be delineated with more specificity than is required by Rule 8; Rule 19(b) necessitates that claims based on different transactions be separately stated when it would facilitate the clear presentation of the matters set forth in the pleadings; and Rule 11 requires that every pleading be signed by the litigant's attorney certifying that to the best of his knowledge, information, and belief there are good grounds to support the claims advanced in the pleading.

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 the claims he has against his 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.

In circuit court actions in which legal and equitable claims are asserted, the traditional procedure has been to move to transfer the action to chancery court. However, if the action is not transferred, the judgment will not be reversed on appeal solely because all or part of the subject matter was technically beyond the court's jurisdiction. Rule 18(a) will effectuate no change in this procedure. *See* V. Griffith, Mississippi Chancery Practice, 508-517(a) (2d ed. 1950); Miss. Const. § 147 (no reversal on appeal if action tried in wrong court, absent any other error); § 157 (transfer of actions from circuit court to chancery court); § 162 (transfer of actions from chancery court to circuit court). *See*, *McLean v. Green*, 352 So.2d 1312 (Miss.1977).

It must be remembered, however, that Miss. Const. § 147 does not bestow equitable remedies upon the law courts nor does it bestow common-law remedies upon the chancery courts.

Rule 18(b) permits a party to join two claims even though if they were asserted independently it would be necessary to prosecute one of them successfully before proceeding to the adjudication of the other. The provision is unqualified and allows the joinder of any type of contingent claim. The basic purpose of the rule is to reinforce the notion that a party should be able to obtain in a single action all the relief to which he is entitled.

For discussion of Federal Rule 18, after which M.R.C.P. 18 is patterned, *See* 6 Wright & Miller, Federal Practice and Procedure, Civil §§ 1581-1594 (1971); 3A Moore's Federal Practice ¶¶ 18.01-.10 (1968).

## 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.

### Comment

The purpose of Rule 19 is to permit a court to balance the rights of all persons whose interests are involved in an action.

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 a court must consider when deciding a question of joinder 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 he shares 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(a). 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(a) calls for determinations that are heavily influenced by the facts and circumstances of individual cases.

The structure of Rule 19 reflects the analytical sequence that a court should follow in deciding a party joinder problem. Once an issue of compulsory joinder is raised, the court initially must determine whether the absent person's interest in the litigation is sufficient to satisfy one or more of the tests set out in the first sentence of Rule 19(a). When it does, the second sentence of the subdivision states that if he has not been joined, "the court shall order that he be made a party." If the absent person should be regarded as a plaintiff but refuses to join, the court may join him as a defendant or, in a proper case, as an involuntary plaintiff.

Difficulties arise only if the absentee cannot be effectively joined because he is not subject to service of process, if his joinder will deprive the court of subject matter jurisdiction, or if he makes a valid objection to the court's venue after joinder. When joinder of someone described in Rule 19(a) is not feasible, the court must examine the four considerations described in Rule 19(b) to determine whether the action may go forward in his absence or must be dismissed, "the absent person being thus regarded as indispensable." By proceeding in this orderly fashion, the court would be able to avoid grappling with the difficult question of indispensability whenever it initially decides that the absentee's interest is not sufficient to warrant compelling his joinder. The first joinder standard, which is described in Rule 19(a)(1), is designed to protect those who are already parties by requiring the presence of all persons who have an interest in the litigation so that any relief that may be awarded will effectively and completely adjudicate the dispute. The second test set out in Rule 19 (a) relates the situations in which the action cannot be effectively adjudicated because the absentee claims an interest in the subject matter of the action, and disposing of the case in his absence may prejudice either those already before the court or the

absentee himself. *See* 7 Wright & Miller, Federal Practice and Procedure, Civil § 1604 (1972).

Generally, Rule 19 comports with traditional Mississippi practice; however, the rule effectuates at least one significant modification. Under M.R.C.P. 19, a person needed for just adjudication must be joined and may be joined as a defendant if, although properly a plaintiff, he refuses to join the suit voluntarily. Under prior practice the suit must be dismissed if a necessary party cannot be joined. *Comment, Procedural Reform in Mississippi: A Current Analysis*, 47 Miss.L.J. 33, 5859 (1976), citing *Terry v. Unknown Heirs of Gibson*, 108 Miss. 749, 67 So. 209 (1915); *Gates v. Union Naval Stores Co.*, 92 Miss. 227, 45 So. 979 (1908); *Borroughs v. Jones*, 78 Miss. 235, 28 So. 944 (1900); *Lemmon v. Dunn*, 61 Miss. 210 (1883); *See* also V. Griffith, Mississippi Chancery Practice §§ 137-150 (2d ed. 1950); 7 Wright & Miller, *supra*, §§ 1601-1625; 3A Moore's Federal Practice ¶¶ 19.01-.20 (1974).

## 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.]

### Comment

The purpose of Rule 20 is to promote trial convenience and expedite the final determination of disputes, thereby preventing multiple law suits. The rule is permissive in character; joinder in situations falling within the rule's standard is not required unless it is within the scope of compulsory joinder prescribed by Rule 19.

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. 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 Fielder v. Magnolia Beverage Co.* 757 So. 2d 925 (Miss. 1999) citing *Stoner v. Colvin*, 236 Miss. 736, 748, 110 So.2d 920, 924 (1959) (courts of general jurisdiction have inherent power to consolidate action 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. Coj. v. Travis*, 808 So. 2d 928, 934 (Miss. 2002).

Rule 20(b) gives the court authority to order separate trials or make any other order to prevent another party from being embarrassed, delayed, prejudiced, or put to unnecessary expense by the joinder of a party against whom the party asserts no claim and who asserts no claim against the party. Aside from emphasizing the availability of separate trials, Rule 20(b) has little significance inasmuch as the power granted the court therein also is provided by the much broader grant of discretion set forth in Rule 42(b). *See* 3A Moore's Federal Practice ¶¶ 20.01-.08 (1968); 7 Wright & Miller, Federal Practice and Procedure, Civil §§1651-1660 (1972).

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.

[Comment amended February 20, 2004.]

## 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.

### Comment

The purpose of Rule 21 is to avoid multiple litigation and to promote liberal joinder of parties.

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, *See Wherry v. Latimer*, 103 Miss. 524, 529, 60 So. 563, 564 (1912) (no error when no objection was made); (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, *See Jackson v. Dunbar*, 68 Miss. 288, 290, 10 So. 38, 40 (1890) (one of several plaintiffs having no right of action was improperly joined but no objection having been made there was no error where there was no recovery in favor of the one misjoined); Miss. Code Ann. § 11-5-65 (1972) (allows for chancery decree upon the merits disregarding objection for misjoinder at hearing); Miss. Code Ann. §§ 11-7-21, 11-7-23 (1972) (written objection to misjoinder to be made prior to trial, plaintiff to have leave to amend).

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, Miss. Code Ann. §§ 11-7-21, 11-7-23 (1972); *Williams v. General Insurors, Inc.*, 193 Miss. 276, 290, 7 So.2d 876, 878 (1942) (generally, equity court will not proceed where necessary party has been omitted), and makes it clear that the defect can be corrected. *Accord, Soloman v. Miss. Coast Hotels, Inc.*, 263 So.2d 526, 527 (Miss. 1972) (complainant is given leave to amend to add necessary party); *Wiener v. Pierce*, 253 Miss. 728, 732-33, 178 So.2d 869, 871 (1965) (on failure to amend, bill is dismissed, without prejudice); *Gates v. Union Naval Stores Co.*, 92 Miss. 227, 230, 45 So. 979, 980 (1908) (supreme court raised issue of nonjoinder and declined to proceed until the necessary parties were joined). *See* also, V. Griffith, Mississippi Chancery Practice, §§ 147-149 (2d ed. 1950); 3A Moore's Federal Practice ¶¶ 21.01-.05 (1974); 7 Wright & Miller, Federal Practice and Procedure, Civil §§ 1681-1689 (1972). M.R.C.P. 21 is identical to FRCP 21.

## 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.

### Comment

The purpose of Rule 22, interpleader, is to permit a stakeholder who is uncertain if and to whom he is liable for money or property held by him to join those who are or who might assert claims against him and to thereby obtain a judicial determination for the proper disbursement of the money or property. Interpleader is not new to Mississippi practice. *See*, e. g. *Yarborough v. Thompson*, 11 Miss. 291 (1844); *Anderson v. Wilkinson*, 18 Miss. 601 (1848); *Browning v. Watkins*, 18 Miss. 482 (1848). It is intended that Rule 22 be applied liberally.

The protection afforded by interpleader takes several forms. Most significantly, it prevents the 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 a 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 claims. 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. *See*, e. g., *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523 (87 S. Ct. 1199, 18 L.Ed.2d 270) (1967).

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

Historically, equitable interpleader was characterized by four requirements: (1) the same thing, debt, or duty must be claimed by both or all the parties against whom the relief is demanded; (2) all their adverse titles or claims must be dependent on or be derived from a common source; (3) the person asking the relief -- the plaintiff -- must not have or claim any interest in the subject matter; (4) he must have incurred no independent liability to either of the claimants; that is, he must stand perfectly indifferent between them, in the position of a stakeholder. *See* V. Griffith, Mississippi Chancery Practice, §§ 420-426 (2d ed. 1950). It is intended that Rule 22 be applied liberally with the view toward increasing the availability of interpleader in eliminating historical technical restraints on the device that are not founded on adequate policy consideration. As a result, the four historic limitations on interpleader should be of no great significance.

The primary test for determining the propriety of interpleading the adverse claimants and discharging the stakeholder is whether the stakeholder legitimately fears multiple vexation 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 fund 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 claims or judicial proceedings. This first stage may be concluded upon motion by either the stakeholder or one of the claimants for summary judgment or judgment on the pleadings, just as in any other action. In any event, since the determination of the propriety of interpleader turns upon an examination of compliance with the prerequisites of the rule, issues raised at the first stage are clearly for the court to determine.

Generally, the claimants will have asserted their claims to the interpleader fund in their answer to the stakeholder's complaint. If an order of interpleader is entered, each claimant must then traverse the claims of the other claimants, thus joining issue. Alternatively, if the issues are already clearly defined in the claimants' initial pleadings, further pleadings may be unnecessary.

After issue has been joined between the claimants, or among the claimants and the interested stakeholder, the court will proceed as in any other civil case. Summary judgment may be granted in favor of one of the claimants against any other, even before the former serves an answer to the latter's pleading, a procedure generally appropriate under Rule 56(b). In most cases, however, the issues at the second stage will be determined by a trial, and the manner of trial will necessarily depend upon the state of the pleadings at that time; the court is to decide, "by such method as *See*ms most suited to the particular case, " which claimants are to prevail and to what extent.

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 counter-claims 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. *See* 3A Moore's Federal Practice ¶¶22.01-.16; (2d. ed. 1992); 7 Wright, Miller & Kane, *Federal Practice and Procedure* Civil §§1701 *et seq*. (1986); Miss Code Ann. §§ 11-35-41, -43 (statutory interpleader by garnishee; 75-7-603 (statutory interpleader by bailee) (1972).

[Amended April 18, 1995.]

## RULE 23. [CLASS ACTIONS] [OMITTED]

## RULE 23.1 [DERIVATIVE ACTIONS BY SHAREHOLDERS] [OMITTED]

## RULE 23.2 [ACTIONS RELATING TO UNINCORPORATED ASSOCIATIONS] [OMITTED]

### Comment

Class action practice is not being introduced into Mississippi trial courts at this time.

Few procedural devices have been the subject of more widespread criticism and more sustained attack -- and equally spirited defense -- than practice under Federal Rule 23 and its state counterparts. The dissatisfaction focuses primarily on Rule 23(b)(3), which permits suits on the part of persons whose only connection is that one or more common issues characterize their position in relation to an adverse party.

In 1976 the American Bar Association, the Conference of Chief Justices, and the Judicial Conference of the United States jointly sponsored the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice. Class action practice was one of the topics considered by the National Conference (often referred to as the "Pound Conference," in deference to Roscoe Pound and his landmark address in 1906 entitled "The Causes of Popular Dissatisfaction with the Administration of Justice") and referred to the ABA for follow-up study and action.

Aside from general proposals to provide jurisdictional "floors" and "ceilings" to regulate the size of class actions, greater judicial control over awards of attorneys' fees, and replacing the "opt-out" provisions with "opt-in" requirements, no meaningful reforms have as yet been developed to render class action practice a more manageable tool. *See American Bar Association, Report of Pound Conference Follow-up Task Force*, 74 F.R.D. 159, 194-97 (1976); Erickson, *New Directions in the Administration of Justice: Responses to the Pound Conference*, 64 A.B.A.J. 48, 52, 56 (1978); Schuck and Cohen, *The Consumer Class Action: An Endangered Species*, 12 San Diego L.Rev. 39 (1974); *Comment, Class Actions and the Need for Legislative Reappraisal*, 50 Notre Dame Law. 285 (1974); *Comment, The Federal Courts Take a New Look at Class Actions*, 27 Baylor L. Rev. 751 (1975); Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. Legal Studies 47, 56-61 (1975).

## 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.

**Comment**

Rule 24, Intervention, concludes these rules' treatment of parties to civil actions: Rule 19 details who must be joined; Rule 20 details who may be joined; Rule 24 governs the rights of a stranger to the action who desires to be joined.

It has long been the law in Mississippi that a total stranger cannot interfere with the objects and purposes of a civil suit as between the original parties. Nevertheless, when it has happened that an owner or part owner has a claim or interest in property which is the subject of a pending action and which may be materially affected by the outcome of the litigation, he has been allowed to intervene to protect his interests; this is referred to as equitable intervention. *See* V. Griffith, Mississippi Chancery Practice, §§ 410, 411 (2d ed. 1950), quoted in *Edwards v. Harper*, 321 So.2d 301 (Miss.1975).

Additionally, intervention has been allowed when specifically permitted by statute; statutory intervention appears to have been the only form of intervention available in courts of law. *See*, e. g., Miss. Code Ann. § 11-33-101 (other creditors may intervene in attachment action instituted against a debtor); §§ 31-5-1 and -9 (in action on bond of contractor for Public Works Contracts materialmen and laborers may intervene); § 53-3-19 (in forfeiture and sale of oil and gas products seized as contraband, persons adversely affected thereby may intervene); § 71-3-71 (workmen's compensation employer or insurer entitled to intervene in action by employee against third party); and § 75-31-335 (1972) (any person damaged may intervene in injunction action pertaining to violation of Mississippi Milk Products Sale Law); *City of Biloxi v. Gully*, 187 Miss. 664, 193 So. 786 (1940).

M.R.C.P. 24 undertakes to continue to distinguish between two kinds of intervention: 24(a) pertains to Intervention of Right and provides that an applicant "shall be permitted to intervene" if he satisfies the tests of that portion of the rule; 24(b), however, is labeled Permissive Intervention and prescribes conditions under which an applicant "may be permitted to intervene" in an action.

If a statute of Mississippi grants a right to intervene, intervention is absolute or permissive depending on whether the statute creates an unconditional or conditional right. Other than this, intervention is said to be of right under 24(a)(2) when the applicant claims an interest relating to the property or transaction that is the subject of the action and he is so situated that the disposition of the action as a practical matter may impair or impede his ability to protect that interest, unless his interest is adequately represented by existing parties. An applicant who does not meet the test

of 24(a) may be permitted to intervene under 24(b)(2) if his claim or defense and the main action have a question of law or fact in common. 7A Wright & Miller, Federal Practice and Procedure, Civil § 1902 (1972).

So viewed, it is apparent that Rule 24 is, in practical effect, substantially the equivalent of traditional Mississippi practice in the area of intervention: 24(a)(1) and (b)(1) conform generally to traditional statutory intervention, and 24(a)(2) and (b)(2) follow equitable intervention practices. However, the rule gives law courts intervention powers formerly accorded only to courts of equity.

Whether a particular application to intervene falls under 24(a) or 24(b) makes at least one important difference: An application for permissive intervention is addressed to the discretion of the court, whereas an application for intervention of right poses only a question of law. 7A Wright & Miller, *supra*.

Intervention pursuant to 24(a) and (b) both require that the application be "timely." The requirement of timeliness is not of fixed meaning and provides an opportunity (even under 24(a)) for the court to take some account of the practical situation and the effect on those already parties and on the economical disposition of judicial business by allowing intervention. Rule 24(a) represents a judgment that in the situation there described justice demands that the interest of the absentee should predominate over the interests of the original parties and of trial convenience, but if the absentee has failed to move promptly to protect his interest he may find himself denied relief. 7A Wright & Miller, *supra*. Rule 24(d) allows the State of Mississippi to intervene in any civil action wherein a major element of controversy pertains to the constitutionality of a state statute. The purpose of this provision is to protect the public's interest in the result of an action that may have far-reaching statewide implications. Notice to the Attorney General is mandatory even if the court thinks the constitutional question frivolous, but failure to give the notice does not deprive the court of jurisdiction to decide the case. Rule 24(d) was patterned after the following similar rules from other jurisdictions: Alabama Rules of Civil Procedure, R. 24(b); Maine Rules of Civil Procedure, R. 24(d); Minnesota Rules of Civil Procedure, R. 24.04; Tennessee Rules of Civil Procedure, R. 24.04; Federal Rules of Civil Procedure, R. 24(c).

Rule 24(d) allows the State of Mississippi to intervene in any civil action wherein a major element of controversy pertains to the constitutionality of a state statute. The purpose of this provision is to protect the public's interest in the result of an action that may have far-reaching statewide implications. Notice to the Attorney General is mandatory even if the court thinks the constitutional question frivolous, but failure to give the notice does not deprive the court of jurisdiction to decide the case. Rule 24(d) was patterned after the following similar rules from other jurisdictions: Alabama Rules of Civil Procedure, R. 24(b); Maine Rules of Civil Procedure, R. 24(d); Minnesota Rules of Civil Procedure, R. 24.04; Tennessee Rules of Civil Procedure, R.

24.04; Federal Rules of Civil Procedure, R. 24(c). See *State v. Watkins*, 676 So. 2d 247 (Miss. 1996).

[Amended March 22,2001.]

## 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.

### Comment

Prior Mississippi practice provided two methods for the substitution of deceased parties or for public officers who died in office or were separated from their office: motion to revive, and bill of revivor. *See* Miss. Code Ann. §§ 11-7-25 through -31 (1972). Normally, under the statutes the suggestion of death of a party plaintiff would be filed by the defendant; if the

successors to the plaintiff did not appear, the suit could be dismissed. *Smith v. Pattison*, 45 Miss. 619 (1871). If the successors desired to enter the suit, it was only necessary for them to file a motion to revive, supported by affidavits reciting the facts of plaintiff's death and their appointment as plaintiff's legal representatives. Notice of the motion to revive was not required because the defendants were considered to be before the forum and were deemed to have taken notice of the statutory proceedings suggesting death and revival. *Mitchell v. Conner*, 42 Miss. 550 (1869); *Criscoe v. Adams*, 123 Miss. 37, 85 So. 119 (1920). Essentially, the same procedure was followed in the event of the defendant's death, but notice of the motion of revival was required to be served. *Smith v. Hargraves*, 114 Miss. 687, 75 So. 545 (1917). In the event the rights or liabilities of the survivors became litigious -- such as in a dispute as to who the true heirs were, or where interests under a will or trust were contested -- a bill of revivor could have been resorted to. Proceedings on a bill of revivor were conducted as an original action designed to resolve the litigated issues. *Sovereign Camp, W. O. W. v. Durr*, 186 Miss. 850, 192 So. 45 (1939). *See* V. Griffith, Mississippi Chancery Practice, §§ 416-419 (2d ed. 1950).

M.R.C.P. 25 provides, in four subsections, for the substitution of parties in the event of death, incompetency, transfer of interest, or public officers' succession in office. Rule 25 is inapplicable if substitution is sought for any reason other than one of these four circumstances, in which case resort must be to Rules 17 (real party in interest), 21 (adding or dropping parties), or 24 (intervention).

Rule 25 presupposes that substitution is for someone who was already a party to a pending action; substitution is not possible if one who was named as a party in fact died before the commencement of the action. *See Misukami v. Buras*, 419 F.2d 1319 (5th Cir. 1969). Similarly, if one named in a filed complaint dies, becomes incompetent, vacates office, or transfers his interest before he is served with process, substitution is available but process must be served on the new party to acquire in personam jurisdiction. *See Ransom v. Brennan*, 437 F.2d 513 (5th Cir. 1971).

As the rule states, the action will be dismissed without prejudice if a motion for substitution is not made within ninety days of the suggestion of death on the record. The suggestion of death must be in writing and must be served on parties in accordance with Rule 5 and upon persons not parties as provided in Rule 4 for the service of a summons. The general provisions of M.R.C.P. 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 the expiration of the ninety-day period on a showing that the failure to act earlier was the result of excusable neglect. M.R.C.P. 6(b)(2). *See* 7A Wright & Miller, Federal Practice and Procedure, Civil §§ 1951, 1955 (1972).

Objection to substitution may be made either by the representative of the decedent or by

any other party, since the presence or absence of a party may affect the rights of other parties. The court should not resolve the merits of the controversy in passing on the motion for substitution. 7A Wright and Miller, *supra*, § 1956.

The procedure for substitution after a party becomes incompetent is the same as for substitution after death. M.R.C.P. 25(b).

M.R.C.P. 25(c) applies to transfers, assignments, and corporate mergers and dissolutions. *See* Miss. Code Ann. §§ 79-3-151 (effect of merger or consolidation); 79-3-183(e) (articles of dissolution); and 79-3-209 (1972) (survival of remedy after dissolution, suspension or failure).

The most significant feature of Rule 25(c) is that it does not require that any action be taken after an interest has been transferred; the action may be continued by or against the original party and the judgment will be binding on his successor in interest even though he is not named. An order of joinder in such a situation is merely a discretionary determination by the trial court that the transferee's presence would facilitate the conduct of the litigation. Since Rule 25(c) is wholly permissive there is no time limit on moving to substitute under its provisions. The motion for substitution may be made by any party. The rule incorporates by reference the provisions of Rule 25(a) on service of the motion. Thus, the motion, with notice of the hearing, may be served on the existing parties in accordance with Rule 5 but must be served on persons who are not already parties as provided in Rule 4 for service of process. 7A Wright & Miller, *supra* § 1958. *See* Miss. Code Ann. § 11-7-3 (1972) (assignee of chose in action may sue).

M.R.C.P. 25(d) applies only when the public official is sued "in his official capacity." In those situations in which the public official's personal assets may be subject to execution after judgment, Rule 25(a) governs his substitution in the event of death. Subsection (d)(2) of Federal Rule 25, after which this Mississippi rule was patterned, appears as M.R.C.P. 17(e), since the latter provision pertains more to capacities and interests of parties than to substitution of parties.

# 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, electronic or magnetic data, 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 and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A) (i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

(ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subsection (b)(4)(C) of this rule, concerning fees and expenses, as the court may deem appropriate.

(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) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subsections (b)(4)(A)(ii) and (b)(4)(B) of this rule, and (ii) with respect to discovery obtained under subsection (b)(4)(A)(ii) of this rule, the court may require, and with respect to discovery obtained under subsection (b)(4)(B) of this rule, the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

*(5) Electronic Data.* To obtain discovery of data or information that exists in electronic or magnetic form, the requesting party must specifically request production of electronic or magnetic data and specify the form in which the requesting party wants it produced. The responding party must produce the electronic or magnetic data that is responsive to the request and is reasonably available to the responding party in its ordinary course of business. If the responding party cannot–through reasonable efforts–retrieve the data or information requested or produce it in the form requested, the responding party must state an objection complying with these rules. If the court orders the responding party to comply with the request, the court may also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.

**(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.** 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 one or more of the following:

(1) that the discovery not be had;

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

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

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

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

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

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

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

(9) the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, oppression or undue burden or expense, including provision for payment of expenses attendant upon such deposition or other discovery device by the party seeking same.

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. 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.** A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement that party's response with respect to any question directly addressed to (A) the identity and location of persons (i) having knowledge of discoverable matters, or (ii) who may be called as witnesses at the trial, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of the testimony.

(2) A party is under a duty seasonably to amend a prior response if that party obtains information upon the basis of which (A) the party knows that the response was incorrect when made, or (B) the party knows that the response, though correct when made, is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

[Amended effective March 1, 1989; March 13, 1991; April 13, 2000. Amended effective May 29, 2003 to add Rule 26(5) addressing discovery of electronic data.]

## 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, 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).

**Comment**

With two important exceptions MRCP 26 is identical to Miss. Code Ann. § 13-1-266 (1972); subdivision 26(b)(1) narrows the scope of permissible discovery, although it does permit the discovery of the identity and location of persons who may be called as witnesses at the trial; a new subdivision (c) is added and the original subdivisions are renumbered accordingly.

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(b) was amended effective May 29, 2003, adding subsection (5) to make specific provision for discovery of data and information existing in electronic and magnetic form. Recognizing that special problems may exist in the retrieval of such data, the rule limits the duty to that of production of electronic and magnetic data to that which is reasonably available to the responding party in its ordinary course of business. Further, if extraordinary steps are required to retrieve and produce the information, the court may require the requesting party to pay the expense of those steps, in addition to costs which may be assessed under Rule 26(d)(9). The production of data compilations which are subject to production under Rule 34 is also subject to the limitations of Rule 26(b)(5).

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). Whether the conference is convened on the court's own motion or upon a litigant's certified request, the court has control over the time of its convening and the scope of its reach.

Rule 26(c) provides the procedure for 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. In those instances, however, where it would facilitate the discovery process, the court may hold a discovery conference on its own motion or upon the request of either party.

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 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.

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.

[Comment amended effective March 1, 1989; April 13, 2000. Comment amended effective May 29, 2003.]

## 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.

## Comment

Miss. Code Ann. § 13-1-243 (1972) has been included as subdivision (d) of M.R.C.P. 27; otherwise, Rule 27 is identical to Miss. Code Ann. § 13-1-227 (1972). *See* Pyle, Ott, Rumfelt, *Mississippi Rules of Discovery*, 46 Miss.L.J. 681, 699-709 (1975).

## 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.

### Comment

Except for important modifications in M.R.C.P. 28(a), this rule is identical to Miss. Code Ann. § 13-1-228 (1972); the modifications in 28(a) are necessitated by new provisions in M.R.C.P. 30 which provide for the taking of testimony by telephone and for recording testimony by other than stenographic methods. M.R.C.P. 28(a) dispenses with the requirement that an officer authorized to administer oaths be present during an entire deposition, it is sufficient under the rule if the deposition is begun with the administration of the oath or affirmation.

Even in those cases where the deposition is taken by a stenographer, if the administrator of the oath or affirmation is different from the stenographer, there is no reason for the former to remain in attendance during the taking of the deposition. The rule retains the power of the court

to appoint specially a person capable of administering the oath which initiates the deposition. *See*, Special Committee for the Study of Discovery Abuse, Section of Litigation, A.B.A., Report, at 7, 8 (1977); also, Pyle, Ott, Rumfelt, *Mississippi Rules of Discovery*, 46 Miss.L.J. 681, 709-14 (1975).

## 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 provided in Rules 33, 34 and 36 for responses to discovery may be made only with the approval of the court.

### Comment

Rule 29 is identical to Miss. Code Ann. § 13-1-229 (1972). *See* Pyle, Ott, Rumfelt, *Mississippi Rules of Discovery*, 46 Miss.L.J. 681, 714-15 (1975).

## 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. 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.]

**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).
[Amended effective July 1, 1997.]

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**Comment**

M.R.C.P. 30(a), (d), and (g) are identical to Miss. Code Ann. § 13-1-230(a), (d), and (g), respectively. M.R.C.P. 30(b) is modified to provide for the taking of testimony by telephone without court order. It is intended that the word "telephone" embrace any other recognized form of telecommunications between distant points. The recipient of a notice calling for a deposition by telephone may apply to the court for an order requiring the noticing party to appear in the presence of the deponent for the taking of the deposition when physical confrontation is necessary for proper examination, to protect against coaching, or to permit the exchange and reading of documents.

M.R.C.P. 30(b)(4) reverses the statutory predilection against non-stenographic recording of testimony and permits the party noticing a deposition to provide for such without court order; Miss. Code Ann. § 13-1-230(b)(4) (1972) requires a court order for non-stenographic recordings.

Electronic recording is now reliably developed. A blanket requirement for live stenography may often entail unnecessary expense. Moreover, in many instances, the parties simply wish to know what a particular witness will say; there is no need for a transcript for trial. Accordingly, there is no basis for an automatic rule that requires transcription or compels the parties to apply to the court to lift that requirement.

Under this rule, a party or witness aggrieved by the taking of a non-stenographic deposition can simply arrange for transcription at his own expense. In addition, an application may be made by a party to the court in which the action is pending, or by a witness to that court or to the court in which the deposition is to be taken, to compel stenography if there is a basis to believe that accuracy requires it.

M.R.C.P. 30(b)(7) resolves any ambiguity which might otherwise arise in the case of a telephonic deposition and provides that a deposition is taken in the county where the deponent is physically present to answer questions propounded to him. The court in that county is therefore the appropriate court for purposes of orders pursuant to Rules 37(a)(1) and 37(b)(1), and an officer authorized to administer oaths in that county or by the laws of that place may administer the oath to the deponent as provided in Rule 28(a).

The changes in M.R.C.P. 30(c) are required to provide for the more informal methods of taking depositions permitted under M.R.C.P. 30(b). If a party does not desire to disclose the nature of his questions to his adversary, he may put them to the witness by telephone, thereby

obviating the need for the sealed envelope technique.

The changes in M.R.C.P. 30(e) are designed to improve the language in the rule and to provide for the authentication of a deposition taken by other than stenographic means as contemplated by M.R.C.P. 30 (b)(4).

The changes in M.R.C.P. 30(g) are required by the less formal manner prescribed by other rule changes for the taking of depositions. The rule also clarifies procedures for the marking, copying, and retention of exhibits. Unless disputed by a participant in the deposition, the court should presume the correctness of the certified transcript; a dispute over the correctness of the transcript is to be treated as a dispute of fact.

The preceding modifications of M.R.C.P. 30 were adapted from the Special Committee for the Study of Discovery Abuse, Section of Litigation, A.B.A., Report, at 9-17 (1977).

[Comment amended effective March 1, 1989; July 1, 1997.]

## 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.

### Comment

M.R.C.P. 31(a) is identical to Miss. Code Ann. § 13-1-231(a) (1972). However, the rule differs from the statute by deleting all references to filing, as provided by M.R.C.P. 5 and 30. *See* Pyle, Ott, Rumfelt, *Mississippi Rules of Discovery*, 46 Miss.L.J. 681, 725-26 (1975); and Special Committee for the Study of Discovery Abuse, Section of Litigation, A.B.A., Report, at 17 (1977).

## 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).

**Comment**

Rule 32 as originally adopted was based on Miss. Code Ann. § 13-1-232 (1972). *See* Pyle, Ott, Rumfelt, *Mississippi Rules of Discovery*, 46 Miss.L.J. 681, 726-35 (1975).

Subsection (a) has been amended to reflect the admissibility of depositions, apart from Rule 32, as permitted by the Mississippi Rules of Evidence.

Mississippi Rule of Evidence 801(d)(1)(A) permits the introduction for substantive purposes of a prior inconsistent statement made by a witness while testifying under oath in a judicial proceeding or deposition. *See* 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 801(D)(01)[01] (1985).

Mississippi Rule of Evidence 804(b)(1) permits the introduction of the deposition testimony of an unavailable witness. 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 is offered, including a predecessor in interest in civil actions, must have had both an opportunity and a similar motive for cross-examination. *See* 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 801(D)(01)[01] (1985).

Subsection (c) of the Rule has been deleted. The original purpose of subsection (c) was to avoid in certain situations application of the common law rule that prohibited a party from impeaching his own witness. *See* C. McCormick Handbook on the Law of Evidence § 38 (C. Cleary 3d ed. 1984). Subsection (c) precluded the application of the so-called voucher rule to a party by the mere act of taking the deposition of a witness. Subsection (c) *See*med to apply the voucher rule to a party who introduced a deposition of a witness for any purpose other than

contradicting or impeaching the deponent. To this extent, subsection (c) was inconsistent with Rule 43(b)(4) as originally enacted. *See* Dunbar, Discovery-Rules 26-34, 36 and 37, 52 Miss.L.J. 119, 136-37 (1982).

The adoption of Mississippi Rule of Evidence 607 has rendered subsection (c) superfluous and negated any contention that a party introducing a deposition might be precluded from impeaching the deponent. Mississippi Rule of Evidence 607 provides that any party, including the calling party, may impeach the credibility of any witness.
[Amended effective January 10, 1986.]

## 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 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. 753-754 So. 2d XVII (West Miss.Cas. 2000).

## Comment

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 final sentence of M.R.C.P. 33(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 amended effective April 13, 2000.]

## 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 (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.** 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 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. 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 reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order 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.

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.

**(c) Persons Not Parties.** This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

### Comment

M.R.C.P. 34(a) and (c) are identical to Miss. Code Ann. §§ 13-1-234 (a) and (c) (1972). Subdivision (b) of the rule differs from subdivision (b) of the statute in that the words "and complaint" are added after the word "summons" in the first sentences of the first and second paragraphs, and a new third paragraph is added to the rule. The former addition conforms to M.R.C.P. 4(a)(2) (copy of complaint to be served with summons); the latter tracks the recommendation of the Special Committee for the Study of Discovery, Abuse, Section of Litigation, A.B.A., Report, at 21-23 (1977).

The new paragraph, prescribing the manner of document production, is intended to deter deliberate attempts by a producing party to burden discovery with volume or disarray or deliberately mixing critical documents with others in an effort to obscure significance.

Generally, the most convenient and least burdensome method of producing documents would entail production in the order in which the documents are actually kept in the usual course of business, so that there is an internal logic reflecting business use. If this method is not elected, then the producing party may organize his paper production in accordance with the categories specified in the request.

*See* also Pyle, Ott, Rumfelt, *Mississippi Rules of Discovery*, 46 Miss.L.J. 681, 764-83 (1975).

## 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 __).

## Comment

Rule 35(a)(1) is modeled, in general, after FED. R. CIV. P. 35. The purpose of Rule 35(a)(1) is to allow a court to order a physical or mental examination of a person for good cause on motion. Previously, the omission in the Mississippi Rules of Civil Procedure of a counterpart to Federal Rule 35 was held to preclude a court from ordering an examination under any circumstances. *See Swan v. I. P. Inc.*, 613 So. 2d 846 (Miss. 1993).

The order may be made only upon good cause and is limited to cases in which the condition of the party or person to be examined is in controversy. For a discussion of the showing required, see Wright & Miller, *Federal Practice and Procedure*, Civil, § 2234.1 (1994). Although some states allow examinations under Rule 35 without an order of the court, Mississippi Rule 35, like the federal counterpart, requires such an order, and, generally, the choice of physicians is left to the party seeking the examination. Addressing federal practice, Wright & Miller havesaid: "The usual attitude is that the moving party has no absolute right to the choice of the physician, but that when no serious objection arises, it is probably best for the court to appoint the doctor of the moving party's choice." Wright & Miller, *Federal Practice and Procedure*, Civil, § 2234.2 (1994).

Rule 35(c) provides that in divorce, child custody, and other actions under Title 93 of the

Mississippi Code of 1972, examinations are entirely within the discretion of the Chancery Judge.

[Adoptive effective, January 16, 2003.]

## 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.

## Comment

Rule 36 is identical to Miss. Code Ann. § 13-1-236 (1972). *See* Pyle, Ott, Rumfelt, *Mississippi Rules of Discovery*, 46 Miss.L.J. 681, 748-62 (1975).

## 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 as follows:

**(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 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 of 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. 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:

(A) 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;

(B) 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;

(C) 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;

(D) 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.

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 (A), (B), and (C) of subsection (b)(2) of this rule. 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.

## Comment

M.R.C.P. 37 contains a new subdivision (e) which does not appear in Miss. Code Ann. § 13-1-237 (1972).

The statutory rule requires that each failure to respond to a discovery request be dealt with by a separate motion; the successful result of the first motion is usually an order to comply with the discovery request. Sanctions customarily are not imposed until after there has been a refusal to comply with a second order; moreover, under the statute there are no sanctions directed against a party who seeks unnecessary discovery. M.R.C.P. 37(e) gives greater flexibility to the trial court in the form of a general grant of power which would enable it to deal summarily with discovery abuses, whenever and however the abuse is brought to the attention of the court. For example, for the failure of a party to have made proper discovery, or for the misuse of the various discovery vehicles, the court may, at the conclusion of the case, impose monetary penalties according to the unnecessary expense to which the adverse party was put. It is significant that Rule 37(e) does not enumerate the sanctions available to the court; courts should have considerable latitude in fashioning sanctions suitable for particular applications. But *See*: *Karenina* by Vronsky v. Presley, 526 So.2d 518 (Miss.1988).

MRCP 37(e) was adapted from the Special Committee for the Study of Discovery Abuse, Section of Litigation, A.B.A., Report, at 23-25 (1972). *See* also Pyle, Ott, Rumfelt, *Mississippi Rules of Discovery*, 46 Miss. L. J. 681, 764-83 (1975).

[Amended effective February 1, 1990.]

## 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.

#### Comment

The purpose of Rule 38 is to guarantee to litigants their right to a trial by jury as declared by § 31 of the Mississippi Constitution, while simultaneously providing for more flexibility in the uses of juries.

Rule 38(a) neither broadens nor restricts the pre-Rule 38 right to a trial by jury; it takes a neutral position and affirms the right to a trial by jury in cases where it was guaranteed before the Rule. *See In re Extension of Boundaries of City of Meridian*, 237 Miss. 486, 115 So.2d 323 (1959) (Miss. Const. § 31 applies only to those cases where a jury trial was required at common law); *Talbot & Higgins Lumber Co. v. McLeod Lumber Co.*, 147 Miss. 186, 113 So. 433 (1927).

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

### Comment

Federal Rule 38 requires that a party desiring a trial by jury demand same in writing; if such a demand is not timely made, the right to trial by jury may be deemed waived and the action will be tried by the court. Federal Rule 39 prescribes the procedures for designating on the docket which actions are to be tried by a jury and which by the court.

Mississippi Rule 38 merely recites that a party's right to a jury trial is unabridged by these rules, but permits the right to be waived. There is no need for docketing actions according to whether they are to be tried by the court or by a jury; hence, Rule 39 is 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).

## Comment

Rule 40 establishes an orderly but flexible method of scheduling cases for trial, while assuring that the parties receive appropriate notice at important stages of the process. It accomplishes this function through the mechanisms of the trial calendar and the trial docket. The trial calendar, also required by Rule 79(c), is a list of pending actions that the court has found ready for trial. The order in which the cases appear on the trial calendar generally corresponds to the order in which they will be tried. Rule 40(a) requires that each court define the method of placing actions on the trial calendar. The precise method chosen is within the court's discretion, subject only to the requirement that it allow adequate time for discovery.

The trial docket reflects the trial dates for cases on the trial calendar, and is governed by Rule 40(b). The rule requires that the trial docket be prepared at the time the cases are set down for trial and that it state (i) the date, time, and place of trial; (ii) the names of the attorneys of record; (iii) and the names of attorneys and litigants who were present when the case was set for trial. Rule 40(b) requires that at least five (5) days notice be given to litigants of the date the case is to be set down for trial. This provision will allow attorneys and litigants the opportunity to be heard in the scheduling of their case for trial.

In addition, Rule 40(b) requires that the trial date be at least twenty (20) days after the time

the case is set for trial, unless the parties agree to a shorter period. The purpose of this requirement is, of course, to allow the parties adequate time to prepare for trial. Parties who are present at the setting receive notice of the date and time of trial at that time. Rule 40(b) requires the clerk to mail or personally to deliver notice of the date and time of trial within three (3) days to all parties not present or represented by their attorney at the setting. Thus, all parties will have received notice of the date, time and place of trial seventeen (17) days before that date, less the time necessary for the delivery of notice by mail. This time is adequate, first, since all cases covered by the rule will already have been found ready for trial under Rule 40(a). Moreover, all parties will have received notice of the setting of the docket and will therefore be aware that their trial may be imminent.

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

Rule 40(b) is subject to two (2) general exceptions. First, in actions in which the defendant is summoned to appear at a particular time and place, the rule is inapplicable, although in such cases, the court should give all parties notice appropriate to the nature of the case. Second, if a case has been placed on the trial docket under Rule 40(b) and for whatever reason is not tried at the scheduled time, the court may reschedule the trial for any date without further notice. To require five (5) days notice of the resetting and twenty (20) days notice of trial in all such cases would unduly hinder the prompt rescheduling of cases that are fully prepared for trial.

1985 Revision. Rule 40(b) was completely revised in 1985. The earlier version of the rule was ambiguous, but appeared to require that parties be given twenty (20) days notice of the proceeding at which the trial calendar is prepared, but established no mandatory time between that proceeding and the trial date. The committee determined that this rule required too much notice of the date the case was to be set, and failed to require adequate notice of the trial date.

Paragraphs (a) and (b) provide the manner in which a trial date is obtained in instances where parties are unable to agree on such date. Paragraph (c), added in 1987, makes clear that parties are not bound to follow the formalities of paragraphs (a) and (b), but may agree upon a trial date. Paragraph (c) also provides that any rule or statutory waiting period required prior to hearing or trial may be waived by parties, including those in a representative or fiduciary capacity.

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

## 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.

## Comment

The purpose of Rule 41 is to establish a uniform rule governing voluntary and involuntary dismissals of actions. Rule 41(a), which permits a plaintiff voluntarily to dismiss his action, is

intended to give him the right to take the case out of court if no other party will be prejudiced. The right is limited by the rule to the period before answer or motion for summary judgment; thereafter dismissal can be had only with consent of the court and on such conditions as are just.

Rule 41(a)(1) provides two methods by which a plaintiff may dismiss an action without obtaining the consent of the court: He may do so at any time by stipulation of all the parties; he may do so prior to service of an answer or of a motion for summary judgment by his own unilateral act of filing a notice of dismissal with the court.

The defenses listed in Rule 12(b) may, at the option of the defendant, be asserted in an answer or by motion to dismiss. If they are included in an answer, the service of the answer terminates plaintiff's right to dismiss by notice. Plaintiff's right of voluntary dismissal is not cut off if the defense is put forward by motion to dismiss. A motion to dismiss is neither an answer nor, unless accompanied by affidavits stating matters outside the pleadings that are not excluded by the court, a motion for summary judgment; a motion to dismiss does not terminate the right of dismissal by notice, nor does a motion for a stay or a motion for change of venue.

The other procedure for voluntary dismissal, in addition to dismissal by notice, a dismissal by stipulation of all the parties. Dismissal by stipulation may be had at any time. A stipulation will not be construed as being for dismissal in the absence of an unequivocal statement by the parties that it was so intended.

Dismissal by stipulation is without prejudice unless the stipulation provides that it is to be with prejudice. A voluntary dismissal by stipulation is effective immediately and does not require judicial approval.

The procedure under MRCP 41(a)(1) is contrary to past Mississippi nonsuit practice, which permitted the plaintiff to voluntarily dismiss his suit without prejudice at any time before the case was submitted to the jury. Miss. Code Ann. § 11-7-125; *See* also Miss. Code Ann. § 11-7-127 (1972) (plaintiff may take a nonsuit before the clerk in vacation); *Allison v. Camp Creek Drainage Dist.*, 211 Miss. 354, 364, 51 So.2d 743, 747 (1951) (plaintiff in chancery action may nonsuit without prejudice up to time cause is submitted to chancellor for final decision on the merits); but *see Adams v. Lucedale Commercial Co.*, 113 Miss. 608, 74 So. 435 (1917). It is also contrary to practice under Federal Rule 41(a), which permits only one voluntary nonsuit at any time before defendant's responsive pleading is made.

Although Miss. Code Ann. §§ 11-27-125 and -127 (1972) are couched in terms ostensibly granting an absolute right to the plaintiff to nonsuit before the cause is submitted, the statutes have not been so interpreted, particularly in chancery practice: "When in any respect the cause has proceeded to that point . . . that the defendant has . . . secured some substantial right which would be destroyed by the dismissal, it should not be permitted." *Mitchell v. Film Transit Co.*, 194 Miss. 550, 13 So.2d 154 (1943). *See* also V. Griffith, Mississippi Chancery Practice, § 534 (2d ed. 1950).

The trial court has no power to impose terms and conditions if a plaintiff properly dismisses by notice under Rule 41(a)(1). Nor may the plaintiff seek to make a conditional dismissal under that portion of the rule. If dismissal is by stipulation under Rule 41(a)(1), the parties work out for themselves the conditions on which they will enter into the stipulation. Accordingly, the authority of the court to require "such terms and conditions as the court deems proper" is limited to a motion for dismissal under Rule 41(a)(2).

The terms of conditions that may be imposed upon the granting of a motion for voluntary dismissal are for the protection of the defendant, although if one of several plaintiffs moves for dismissal conditions may be imposed for the protection of the remaining plaintiffs. The court may dismiss without conditions if they have not been shown to be necessary, but should at least require that the plaintiff pay the costs of the litigation. In imposing conditions the court is not limited to taxable costs, but may require the plaintiff to compensate for all of the expenses to which his adversary has been put; the court may require plaintiff to pay the defendant's attorney's fees as well as other costs and

disbursements.

Dismissal on motion under Rule 41(a)(2) is within the sound discretion of the court, and its order is reviewable only for abuse of discretion. The discretion given the court by Rule 41(a)(2) is a judicial, rather than an arbitrary, discretion. If necessary, a hearing should be held and the court should endeavor to ensure substantial justice to both parties.

The purpose of Rule 41(a)(2) is primarily to prevent voluntary dismissal which unfairly affects the other side, and to permit the imposition of curative conditions. Accordingly, the dismissal should be allowed generally unless the defendant will suffer some plain legal prejudice other than the mere prospect of a second law suit. It is not a bar to dismissal that plaintiff may obtain some tactical advantage thereby.

The second sentence of Rule 41(a)(2) provides that 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 shall not be dismissed against the defendant's objection unless the counter-claim can remain pending for independent adjudication by the court. The purpose of the rule is to preserve the court's jurisdiction over the parties and the counter-claim. Ordinarily the counter-claim can stand on its own and dismissal can be granted without affecting the counter-claim. If the counter-claim is compulsory, the court has jurisdiction to decide it even though the plaintiff claim is dismissed; if the counter-claim is permissive, it will ordinarily require independent grounds for jurisdiction and

these independent grounds permit it to remain pending. Thus, the rule applies only when there is a permissive counter-claim that can be maintained without an independent ground of jurisdiction, as when it is a setoff, or in other unusual circumstances in which the counter-claim would fall if the plaintiff's claim were dismissed.

Rule 41(b) allows the court to dismiss an action involuntarily for three different causes: dismissal at the close of the plaintiff's evidence for failure to show a right to relief, which operates as a decision on the merits, dismissal for want of prosecution, which is a penalty for dilatoriness, *See* Miss. Code Ann. § 11-53-25 (1972) (dismissal for want of prosecution); and dismissal for failure to comply with "these rules" or any order of the court; *see Sherwin Williams Co. v. Feld Bros. & Co.*, 139 Miss. 21, 28, 103 So. 795, 796 (1925) (plaintiff may be nonsuited by the court for failure to comply with order to make declaration more specific). Unless otherwise specifically ordered by the court, an involuntary dismissal under Rule 41(b) ordinarily operates as an adjudication upon the merits and is with prejudice. *See* 9 Wright & Miller, Federal Practice and Procedure, Civil §§ 2369-2373 (1971). However, past Mississippi practice has tempered this harsh result by allowing dismissed cases to be reinstituted, except in extreme situations. *See*, e. g, *Ross v. Milner*, 194 Miss. 497, 505-06, 12 So.2d 917, 918 (1943) (where order did not recite that cause was dismissed without prejudice, it was considered as being dismissed with prejudice)*; Peoples Bank v. D'Lo Royalties, Inc.*, 206 So.2d 836, 837 (Miss.1968) (dismissal is a drastic punishment which should not be invoked except where conduct of parties has been so deliberately careless as to call for such action).

Rule 41(c) provides that the other subdivisions of Rule 41, stating the procedures for and consequences of dismissals, apply to the dismissal of a counter-claim, cross-claim, or third-party claim.

One exception is allowed for Rule 41(c) matters because the right of voluntary dismissal with notice, MRCP 41(a)(1), is terminated by an answer. This will not work for counter-claims, cross-claims, or third-party claims, since defendant will ordinarily assert these with or subsequent

to his answer. Accordingly, Rule 41(c) provides that a voluntary dismissal by a defendant, or other claimant, of a counter-claim, cross-claim, or third-party claim must be made before a responsive pleading is served or, if none, before the introduction of evidence at the trial. MRCP 41(a)(1) also provides that the service of a motion for summary judgment also terminates the right to dismiss by notice. As a matter of logic and judicial consistency, if a motion for summary judgment defeats plaintiff's right to dismiss, then it should also defeat the right of a defendant to dismiss his counter-claim, cross-claim, or third-party claim. *See* 9 Wright & Miller, *supra*, § 2374.

Rule 41(d) authorizes the clerk to move for dismissal of cases in which there has been no action of record during the preceding 12 months. The clerk is required to give notice of such action to the opposing parties who may counter the clerk's motion to retain the case on the court's docket. This provision supersedes Miss. Code Ann. § 11-53-25 (1972) (clerk shall move for dismissal of any cause pending in which no action has been taken for the two preceding terms). The statute did not require notice of the dismissal -- the parties were deemed to be before the court in cases pending on the active docket. *Ross v. Milner*, *supra*. If a court has implemented the Mississippi Electronic Court System, the notice required by Rule 41(d) may be sent in the same manner as other notices consistent with the Mississippi Electronic Court System procedures. Please refer to the Administrative Procedures for Mississippi Electronic Court System on the Supreme Court’s website at www. mssc.state.ms.us.

Under Rule 41(e), if a plaintiff who has once dismissed an action in any court commences another action on the same claim against the same defendant, the court may require the payment of costs in the prior action before proceeding with the latter. The matter is discretionary with the court. Rule 41(e) by its terms is applicable only when the plaintiff "has once dismissed an action"; thus, it does not cover cases in which there was an involuntary dismissal of the prior action by the court. This accords with prior practice pursuant to Miss. Code Ann. §§ 11-7-127 and 11-53-25 (1972).

## 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.

[Amended February 20, 2004 to correct scrivener's error.]

### Comment

The purpose of Rule 42 is to give the court broad discretion to decide how cases on its docket are to be tried so that the business of the court may be dispatched with expedition and economy while providing justice to the parties. To this end, Rule 42(a) permits consolidation and a single trial of several cases on the court's docket, or of issues within those cases, while Rule 42(b) allows the court to order separate trials of particular issues within a single case.

Consolidation of actions presenting a common issue of law or fact is permitted as a matter of trial convenience and judicial economy. The court is given broad discretion to decide whether consolidation would be desirable; the consent of the parties is not required. It is for the court to weigh the savings of time and effort that consolidation would produce against any inconvenience, delay, or expense that it would cause.

Although the courts take a favorable view of consolidation, the mere fact that a common question is present, and that consolidation is therefore permissible under Rule 42(a), does not mean that the court must order consolidation. Consolidation may be denied if the common issue is not a central one, or if consolidation will cause delay, or will lead to confusion or prejudice. In exercising its discretion to consolidate cases or particular issues, the court must recognize that

on some issues consolidation may be prejudicial. To avoid prejudice, consolidation should be invoked only where the issues of law or fact justifying consolidation predominate over individual issues which will be heard in the consolidated proceedings. The additional expense that consolidation may cost to some of the parties is a factor to be considered though it is not necessarily conclusive. A motion to consolidate may be made as soon as the issues become apparent, even though not yet formally joined. A motion is not required, however, since the court may order consolidation on its own motion. Separate cases should not be jointly considered without an order of consolidation.

Consolidation is not new to Mississippi practice. *See Vicksburg Chemical Co. v. Thornell*, 355 So.2d 299 (Miss. 1978) (object of consolidating actions is to avoid a multiplicity of suits, to prevent delay, to clear congested dockets, to simplify the work of the trial court, and to save numerous costs and expenses); *Planter's Oil Mill v. Yazoo & M. V.R.R. Co.*, 153 Miss. 712, 717-18, 121 So. 138, 140 (1929) (proper conditions existing, the court may consolidate actions on its own motion or on the motion of either party); *Stoner v. Colvin*, 236 Miss. 736, 748-49, 110 So.2d 920, 924 (1959) (courts possess an inherent power to consolidate appropriate actions); V. Griffith, Mississippi Chancery Practice, § 506 (2d ed. 1950) (consolidation by agreement entered on record by solicitors of parties, or by motion of any party, or by the court of its own motion; court has duty to consolidate appropriate actions). The court has complete discretion within the bounds of justice and its jurisdiction to consolidate whatever issues it deems expeditious or economical to consolidate. *Stoner v. Colvin*, *supra* (trial court in its sound discretion has a right to consolidate for trial separate actions by different plaintiffs against common defendants for damages arising out of the same accident; this rule applies to both law and equity actions); *Columbus & G. Ry. Co. v. Mississippi Clinic*, 152 Miss. 869, 871, 120 So.2d 187, 188 (1929) (consolidation in court of law, of two separate actions on appeal from justice of the peace court, where interests of expediency and economy would be served, merges several actions into one action with but one judgment); but *See Stoner v. Colvin*, *supra* (in court of law separate instructions were rendered in two actions which had been consolidated for trial); and *Elliott v. Harrigill*, 241 Miss. 877, 882, 133 So.2d 612, 614 (1961) (consolidation of causes in equity does not make parties to one cause parties to the other, and separate decrees are entered, unless the nature of matters be such that it is clearly proper to include them in one decree); V. Griffith, *supra* § 506 (equity cases preserve identity of the causes, pleadings are carried on as if no consolidation had arisen, and separate decrees are issued); *Wilborn v. Wilborn*, 258 So.2d 804, 806 (Miss. 1972) (refusal to consolidate divorced wife's citation for contempt and husband's petition to modify child support decree was within court's discretion). The granting or denying of an order of consolidation is not a final judgment and thus is not appealable. *See* Miss. Code Ann. § 11-51-3 (1972) (final judgments or decrees appealable).

Rule 42(b) allows the courts to 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 or issues. The court may do so in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy. The procedure authorized by Rule 42(b) may be distinguished from severance under Rule 21 as follows: Separate trials will usually result in one judgment; but severed claims become entirely independent actions to be tried and judgment will be entered thereon independently.

The provision for separate trials in Rule 42(b) is intended to further convenience, avoid delay and prejudice, and serve the ends of justice. It is the interest of efficient judicial administration that is to be controlling, rather than the wishes of the parties. The piecemeal trial of separate issues in a single suit is not to be the usual course. It should be resorted to only in the exercise of informed discretion when the court believes that separation will achieve the purposes of the rule.

If a single issue could be dispositive of the case, and resolution of it might make it unnecessary to try the other issues, separate trial of that issue may be desirable to save the time of the court and reduce the expenses of the parties. If, however, the preliminary and separate trial of an issue will involve extensive proof and substantially the same facts as the other issues, or if any saving in time and expense is wholly speculative, a separate trial should be denied. A separate trial may also be ordered to avoid prejudice, as where evidence admissible only on a certain issue may prejudice a party in the minds of the jury on other issues. For example, this principle may be applied, and a separate trial ordered though a single trial would otherwise be preferable, because in a single trial the jury would learn that defendant is insured. The possibility of such prejudice, however remote, justifies a separate trial if the issues are so unrelated that there is no advantage in trying them together. But if the issues are related, there is considerable authority to the effect that jurors today assume the presence of insurance, that knowledge of the fact of insurance is therefore not prejudicial, and that a separate trial should not be ordered.

Ultimately the question of separate trials should be, and is, within the discretion of the trial court. It must weigh whether one trial or separate trials will best serve the convenience of the parties and court, avoid prejudice, and minimize expense and delay. The major consideration, of course, must be which procedure is more likely to result in a just, final disposition of the litigation.

Any party may move for a separate trial. The motion may properly be made at a pre-trial conference; a motion is not required, however. The court may order a separate trial on its own motion. *See Sherman v. Stewart*, 216 Miss. 549, 556, 62 So.2d 876, 877-78 (1953) (although the

submission for one trial of the issues of accord and satisfaction and the denial of the debt would have been better, the question of separate trials is a question within the sound discretion of the trial judge); *Christopher v. Brown*, 211 Miss. 322, 329, 51 So.2d 579, 582 (1951) (to prevent undue expense and loss of time and delay, discretion is vested in the trial judge to determine when and in what cases separate hearings may be had). An example is when a single issue could dispose of the case and make trial of the other issues unnecessary. *See* Miss. Code Ann. § 11-7-59 (1972) (defense which used to be set up in a plea but is set up in the answer in such a manner as to be clearly distinct and readily separable, and which goes to the entire cause of action, may on motion of either party be separately disposed of before the principal trial of the cause, in the sound discretion of the court). As with MRCP 42(a), an order granting or denying separate trials under 42(b) is not appealable as a final judgment. *See* 9 Wright & Miller, Federal Practice and Procedure, Civil §§ 2381-2392 (1971); 5 Moore's Federal Practice ¶¶ 42.02-.03 (1974).

[Comment amended February 20, 2004.]

## 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) [Abrogated].**

**(c) [Abrogated].**

**(d) 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.

**(e) 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.

**(f) Interpreters.** The court may appoint an interpreter of its own selection and may fix his 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.]

### Advisory Committee Historical Note.

Effective July 1, 1998, Rule 43(f) 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).

**Comment**

Rule 43 is patterned in part after Federal Rule 43. Implicit in Rule 43 is a recognition of the controlling power of the Mississippi Rules of Evidence, which became effective January 1, 1986.

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. *Byrd v. Nix*, 548 So.2d 1317 (Miss.1989).

Rules 43(b) and 43(c), which were originally adopted by the Supreme Court of Mississippi in 1981, have been abrogated by the later adoption of the Mississippi Rules of Evidence. The contents of former Rule 43(b)(1) are now found in Rule 611(a) of the Mississippi Rules of Evidence. Former Rule 43(b)(2) corresponds to Rule 611(b) of the Mississippi Rules of Evidence and former Rule 43(b)(3) is now found in Rule 611(c). Former Rule 43(b)(4) had previously abolished the voucher rule in civil cases. Rule 607 of the Mississippi Rules of Evidence completes the abolition of the voucher rule by abolishing the rule in criminal cases.

Rule 43(c), which pertained to an offer of proof, has been abrogated. Rules 103(a)(2), 103(b), and 103(c) of the Mississippi Rules of Evidence now govern.

Rule 43(d) provides that whenever an oath is required to be taken, a solemn affirmation may be accepted in lieu of the oath. This is in accordance with traditional Mississippi practice. This rule is consistent with Rule 603 of the Mississippi Rules of Evidence.

Rule 43(e) provides that motions based on facts not appearing of record may be heard on affidavit, although the court retains power to direct that they be heard wholly or partly on oral testimony or depositions. Thus the court may rely on affidavit on a motion to dismiss, a motion to quash service of process, a motion challenging the jurisdiction of the court, a motion for summary judgment, or a motion for a new trial.

The provision that the court may direct that motions be heard in whole or in part on oral testimony or depositions is permissive and not mandatory. Motions are usually decided on the papers rather than after oral testimony of witnesses. Although oral testimony may be heard on a motion for summary judgment, the court need not allow this, and its authority to do so should be exercised with care. The purpose of summary judgment -- i. e. giving a speedy adjudication in cases that present no genuine issue of fact -- is defeated if the hearing on the motion becomes a preliminary trial. 9 Wright & Miller, *supra* § 2416.

Rule 43(f) allows the court to appoint an interpreter of its own selection. The rule speaks in general terms and gives the court discretion to determine when it is appropriate to appoint an interpreter. The compensation is to 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 cost in the discretion of the court.

An interpreter should be qualified by knowledge, skill, experience, training, or education to act in that capacity. He should take an oath or affirmation that he will make a true translation. 9 Wright & Miller, *supra* § 2417.

Rule 43(f) should be read in conjunction with Rule 604 of the Mississippi Rules of Evidence.

[Amended effective January 10, 1986; March 13, 1991.]

## 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.

## Comment

The purpose of this rule is to provide a simple and uniform method of proving public records and entry or lack of entry therein.

Rule 44 is a codification of rules for proving official records. Its limited purpose should be clearly understood: Both subdivisions (1) and (2) of Rule 44(a) state that official records "when admissible for any purpose" may be evidenced by the procedures there set out. Rule 44 has not attempted to state what the existence or nonexistence of any official record tends to prove; Rule 44 prescribes how such records are to be qualified for admission in evidence when considered probative of some proposition in the case. 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.

If an official record is otherwise admissible, Rule 44 creates an exception to the documentary originals rule by allowing a copy to be used in place of the original and states several ways in which the copy or record may be authenticated. Even though a document may be an official record and even though it may be within an exception to the hearsay rule, it cannot be admitted unless authenticated as required by this rule by some other permissible means. 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 (*See* the listing of Mississippi Code sections at the end of this comment).

The key term in Rule 44 is "official record;" the term is not defined but should cause no difficulty. An official record need not be a public record in the sense that it is open to public inspection; the term in the counterpart federal rule was defined in one early case in which it was said that "official" means "work done by a person in the employment of the government in the course of the performance of the duties of his positions" and that "record" refers to papers, demands, and writings made in the regular course of business. *United States v. Aluminum Co. of America*, 1 F.R.D. 71, 75-76 (D.C.N.Y.1939). A more helpful approach, rather than defining the term, is to read it as applicable to any document that would be admissible under the official records exception to the hearsay rule. *See Ludlow Corp. v. Arkwright-Boston Mfrs. Mut. Ins. Co.*, 317 So.2d 47 (Miss.1975).

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. *See*, e. g., Miss. Code Ann. § 13-1-77 (1972) (public officers of this state need only certify copies to make them competent); *Middleton v. State*, 214 Miss. 697, 699, 59 So.2d 320, 321 (1952) (copy certified by commissioner of public safety was deemed competent); *Vincent v. State*, 200 Miss. 423, 427, 27 So.2d 556, 556-57 (1946) (certified copy by justice of the peace admissible); and § 13-1-81 (certificate, attestation, or authentication purportedly given by officer of any state or United States is prima facie evidence of official character); § 13-1-79 (copies certified by U.S. officer); § 13-1-99 (copies certified by officers of other states).

Rule 44(a)(2) provides for the authentication of official records of foreign origin by one of four methods: (1) official publication; (2) attested copy; (3) chain-certificate, all accompanied by a final certificate; and, (4) discretion of the court to admit without final certification with a showing of good cause by the proponent. *See* Miss. Code Ann. § 13-1-101 (1972) (copies of foreign law or record admissible when certified by officer having custody and authenticated by certificate by public minister, secretary of legation, or consul of the United States).

Rule 44(b) allows the proving of lack of record by simply stating in writing that the record was not found, and by authentication in the same method as for an official record. *See* Miss. Code Ann. § 13-1-83 (1972) (certificate by official custodian that record cannot be found is admissible).

Rule 44(c) makes it clear that these rules are additional and supplementary and are not exclusive. The following Mississippi Code Annotated (1972) references should also be consulted: §§ 13-1-77 through -117.

## RULE 44.1 [DETERMINATION OF FOREIGN LAW] [OMITTED]

### Comment

Rule 44.1 is omitted from the Mississippi Rules of Civil Procedure because it is more a rule of evidence than of procedure and because Mississippi already has an excellent method for determining the law of foreign jurisdictions: Miss. Code Ann. § 13-1-149 (1972) provides that courts shall take judicial notice of all foreign law. *See Parker v. McCaskey Register Co.*, 177 Miss. 347, 171 So. 337 (1936).

## RULE 45. SUBPOENA

**(a) Form; Issuance.**

(1) Every subpoena shall be issued by the clerk under the seal of the court, shall state the name of the court and the title of the action, and shall 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 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. 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. 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.

(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.

**(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 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.

**(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 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. A copy of all such subpoenas shall be served immediately upon each party in accordance with Rule 5. 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) 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.

(2) 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.

**(f) Sanctions.** On motion of a party or of the person upon whom a subpoena for the production of books, papers, documents, 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.]

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**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.

**Comment**

A "subpoena" is a mandate lawfully issued under the seal of the court by the clerk thereof. Its function is to compel the attendance of witnesses, the production of documents and the inspection of premises so that the court may have all available information for the determination of controversies. 9 Wright & Miller, Federal Practice and Procedure, Civil § 2451 (1971).

Subpoenas are of two types: a subpoena ad testificandum compels the attendance of a witness; a subpoena duces tecum compels the production of documents and things. Both kinds of subpoenas may be issued either for the taking of a deposition or for a trial or hearing; Rule 45 governs the availability and use of both kinds of subpoenas. The rule has no application to subpoenas issued in support of administrative hearings or by administrative agencies; those subpoenas are governed by statute. *See*, e. g., Miss. Code Ann. § 5-1-21 (witnesses before

legislative bodies); § 7-1-49 (examiner of public accounts); § 19-3-51 (county boards of supervisors); § 27-3-35 (tax commission); § 31-3-13(c) (state board of public contracts); § 43-9-13 (old age assistance investigations); § 43-11-11 (investigations of institutions for the aged or infirm); § 43-13-121 (medicaid commission); § 43-33-11 (housing authority); § 49-1-43 (wildlife, fisheries and parks board); § 49-17-21 (air and water pollution board); § 51-3-51 (water commission); § 53-1-35 (oil and gas board); § 59-21-127 (boat and water safety commission); § 61-1-35 (aeronautics commission); § 63-1-53 (hearings to suspend driver's license); § 63-17-97 (motor vehicle commission); § 63-19-29 (motor vehicle sales finance law administrator); § 67-1-37 (alcoholic beverage commission); § 73-7-27 (cosmetology license revocation or suspension); § 73-13-15 (engineer and land surveyor registration board); § 73-21-99 (disciplinary proceedings against pharmacists); § 73-25-27 (disciplinary proceedings against physicians); § 73-29-37 (disciplinary proceedings against polygraph examiners); § 73-35-23 (disciplinary proceedings against real estate brokers); § 75-35-315 (meat inspections); § 75-49-13 (proceedings involving mobile homes); § 75-67-223 (hearings on denials of small loan licenses); § 75-71-709 (securities regulations hearings); § 77-5-17(4) (board of directors of rural electrification authority); § 81-1-85 (bank examinations); § 81-13-1 (hearings on denial of application for license of credit union); § 81-13-17 (examinations of credit union license applications by department of bank supervision); and § 83-5-39(4) (1972) (hearing on charges of unfair business practices by insurance companies).

_____Rule 45(a)(1) provides that a subpoena shall command each person to whom it is directed to attend and give testimony, or to produce and permit inspection of evidence, or to permit inspection of premises, and provides further that a command to produce evidence 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 for the attendance of a witness at the taking of a deposition is issued as of course by the clerk upon proof of service of notice to depose as provided in MRCP 30(b) and 31(a). A notice to depose is not a condition precedent to the issuance of a subpoena for production or inspection.

Under Rule 45(a)(2), all subpoenas (except those pertaining to foreign litigation) shall be issued from the court in which the action is pending and may be served anywhere in the State. Subpoenas for depositions in foreign litigation must be issued by a clerk of a court for the county in which the deposition is to be taken. However, a Mississippi resident may be subpoenaed to attend an examination only in a county where he resides, or is employed or transacts business in person, unless the court fixes another convenient place. A nonresident subpoenaed within the State may be required to attend only in the county where he is served, unless the court fixes another convenient place. Rule 45(b).

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.

See the exclusion in Rule 46(b)(11)(i) of the Rules of Appellate Procedure Admission of Foreign Attorneys Pro Hac Vice.

Rule 45(c)(1) authorizes that subpoenas may be served by a sheriff, his deputy, or any person not a party over the age of eighteen years; this provision permits attorneys to serve subpoenas. The proof of service required by paragraph (c)(2) must show, inter alia, the county in which the subpoena was served, in order to ascertain where a nonresident may be required to appear for examination in accordance with Rule 45(b).

Rule 45(c) requires advance payment of statutory witness fees and mileage; this subsection is complementary to Miss. Code Ann. §§ 25-7-47 through 25-7-59 (1972).

Rule 45(d)(1) sets out the grounds for objecting to any type of subpoena.

Rule 45(d)(2) sets out additional protections available to persons subject to subpoenas for production or inspection. Subsection (d)(2)(A) 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 can be compelled to produce such evidence without being sworn as a witness and deposed. Further, a subpoena shall allow not less than 10 days for production or inspection, unless the court for good cause shown shortens the time. The subpoena must specify with reasonable particularity the subjects to which the desired writings relate. 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.

Paragraph (d)(2)(A) requires that the party serving a subpoena for production or inspection must serve a copy of the subpoena upon all parties to the action immediately after it is served on the person to whom it is directed. Thus, the rule does not contemplate that the party serving a subpoena may delay serving a copy of the subpoena on the other parties to the action until 10 days before the date designated for the production or inspection. A failure to immediately serve a copy of the subpoena on the other parties may be grounds for extending the time for compliance with the subpoena. Service must be made in accordance with Rule 5.

A subpoena for production or inspection is also subject to the provisions of Rule 26(d).

Paragraph 45(d)(2)(C), provides that upon motion the court may (1) quash or modify the subpoena if it is unreasonable or oppressive, or (2) condition the denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things. A subpoena duces tecum is subject to a motion, as just described, and is also subject to the provision for protective orders in Rule 26(c).

_____Rule 45(e) ,which specifies the duties of persons served with a subpoena, does not require the witness to prepare papers for the adverse party or to compile information contained in the documents referred to, but only to produce designated documents. If the subpoena calls for relevant information which must be compiled or selected from records which are largely irrelevant or privileged, the party compelling production should be required to bear the expense of extracting the relevant material. S*ee* 5A *Moore's Federal Practice,* ¶45.05(1) (1975); *Ulrich v. Ethyl Gasoline Corp.,* 2 F.R.D. 357 (W.D.Ky.1942).

The court is authorized by Rule 45(f) to impose an appropriate sanction on a party who is shown to have exercised the subpoena power 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, which ordinarily will include attorney's fees and costs, and may also include compensation for wages lost by a witness in objecting to the subpoena.

_____Disobedience of a subpoena without adequate excuse may be punished as a contempt of the court. MRCP 45(g). An order for contempt may require the person subject to the subpoena to pay the attorney's fees and costs incurred by the party seeking to enforce the subpoena. The rule leaves undefined what is an adequate excuse for failure to obey a subpoena. Adequate excuse would exist when a subpoena purports to require a non-party to attend or produce at a place not within the limits provided by paragraph (b).

[Comment amended effective March 13, 1991; April 18, 1995; July 1, 1997; July 1, 1998; July 1, 2009.]

## RULE 46. EXCEPTIONS UNNECESSARY

An exception at any stage or step of the case or matter is unnecessary to lay a foundation for review whenever a matter has been called to the attention of the court by objection, motion, or otherwise and the court has ruled thereon. However, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

**Comment**

Rule 46 is an adaptation of Miss. Code Ann. § 9-13-31 (1972) and conforms to traditional Mississippi practice. This rule does not repeal or modify the cited statute; an objection noted in the record of a trial or hearing and the court's ruling thereon is sufficient to preserve the matter for appellate review. However, the bill of exception is still necessary to preserve for appellate review matters not appearing of record. *See*, e. g., *Benjamin v. Virginia-Carolina Chem. Co.*, 126 Miss. 57, 87 So. 895 (1921); *Alexander v. Hancock*, 174 Miss. 482, 164 So. 772, 165 So. 126 (1935).

## 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).

**Comment**

Rule 47(a) requires that jurors be examined under oath as to their qualifications; the examination may be by the court or by the attorneys (or parties, if unrepresented). In no event can the court deny counsel their right to examine jurors; such probably would constitute reversible error under Miss. Code Ann. § 13-5-69 (1972).

Rule 47(b) provides that the drawing and selecting of trial jurors shall be as provided by statute. *See* Miss. Code Ann. §§ 13-5-2 *et seq.* (1972).

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 on a side, or deep divisions of interest among 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.

Rule 47(d) is adapted from Miss. Code Ann. § 13-5-67 (1972) and tracks prior practice for empaneling alternate jurors.

[Amended April 18, 1995.]

## 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.

### Comment

The purpose of Rule 48 is to promote trial convenience and efficiency by providing for smaller juries and non-unanimous verdicts.

Rule 48(a) provides that in circuit and chancery courts a decision of nine of the twelve jurors shall be the verdict. A doctrine consistent with past Mississippi procedure. *See* Miss. Code Ann. § 13-5-93 (1972) (nine or more jurors may return verdict in civil suits in chancery and circuit courts). *Ulmerr v. Pistole*, 115 Miss. 485, 76 So. 522 (1917).

The six-man jury is required in county courts by Rule 48(b); provision is made for a non-unanimous verdict. Cf. Miss. Code Ann. § 9-9-33 (1972) (county court jury shall consist of twelve, any nine of whom can return a verdict in a civil case).

Traditionally, Mississippi civil practice has required the use of twelve-person juries. *See Brame v. Garwood*, 339 So.2d 978 (Miss. 1976) (trial court erred in permitting action to be tried to eleven-person jury, over defendant's objection, after juror was excused for personal reasons); *Dement v. Summer*, 175 Miss. 290, 165 So. 791 (1936) (trial by jury is universally held to mean a jury of twelve persons); *Tillman v. Ailles*, 13 Miss. 373 (1845) (verdict by a less number than twelve would be void, but a verdict of a greater number than twelve is not so on that account); but *cf. Wolfe v. Martin*, 2 Miss. 30 (1834) (a jury of thirteen persons empaneled to try an issue is an illegal jury). Rule 48 supersedes Mississippi case authority mandating twelve-person juries in county courts and repeals Miss. Code Ann. § 9-9-33 (1972) (juries in county court actions to consist of twelve persons), but has no application to county courts when convened as a special court of eminent domain. *See* Miss. Code Ann. § 11-27-13 (1972) (in eminent domain

proceedings a jury of twelve shall be empaneled).

## 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).

## Comment

The purpose of Rule 49 is to continue the commonly-used general verdict practice in Mississippi and to also authorize the practice of special verdicts and general verdicts with interrogatories.

Rule 49(a) makes it clear that in the usual case the general verdict will be used. *See* Miss. Code Ann. § 11-7-157 (1972) (no special form of verdict is required).

Rule 49(b) offers, as an alternative to the general verdict, the special verdict, which requires the jury to make specific written findings on every submitted issue of fact. The special verdict is not new in Mississippi civil practice; clearly, it was utilized as early as the 1880's in the civil case of State v. Allen, 69 Miss. 508, 517-18, 10 So. 473, 475 (1891). Apparently, the special verdict was so accepted as an integral feature of civil litigation in this state that the reporters (Brame & Alexander) did not deem the supreme court's comments thereon worthy of headnoting. *State v. Allen, supra*.

Over the years, however, use of the special verdict appears to have waned; in 1946 the Supreme Court of Mississippi stated that ". . . there is no provision in our law whereby a litigant may address interrogatories to a jury and require answers thereto in the form of special verdicts preparatory to a general verdict, which must be in harmony therewith. After verdict, a jury must be polled, but not interrogated otherwise." *Flournoy v. Brown*, 200 Miss. 171, 181, 26 So.2d 351, 355 (1946).

The distinction between special verdicts and jury polls must be borne in mind: the jury poll still is the only recognized means of ascertaining whether a juror was induced to yield to assent to a verdict against his conscientious convictions, *James v. State ex rel. Doss*, 55 Miss. 57, 59 (1877); the special verdict requires that the jury find specifically submitted factual issues. The jury poll practice will continue to be the only method for asking jurors "Is this your verdict?"

At common law the rule was that the special findings of the jury had to cover every material issue, at pain of judgment against the party carrying the burden of proof. *See* C. Wright, Law of Federal Courts § 94 (3d ed. 1976). MRCP 49(b) avoids this pitfall by providing that a party waives his right to jury trial of any omitted issue unless he demands its submission before the jury retires. The court may make a finding on such an omitted issue; if the court does not it will be deemed to have made a finding in accord with the judgment he orders entered.

The use of special verdicts is intended to emphasize the facts, prevent the jury from acting on bias, and make the law more certain. Their use is always in the discretion of the trial judge, who must exercise the practice with prudence:

> . . . this often-desirable practice should be resorted to with discrimination and foresight; it should never be used for mere cross-examination of the jury to create error for the record. Its purpose and best achievement is to enable errors already potential because of confusions of fact or law "to be localized so that the sound portions of the verdict may be saved." . . . It is hence best available, when, as the judge can foresee, the issues can be thus clearly and simply differentiated, to save an appeal on at least that portion which cannot be questioned; it is of more doubtful value in a relatively simple factual situation . . . where the details asked for may not be the whole story. *Morris v. Pennsylvania R. Co.*, 187 F.2d 837, 841 (2d Cir. 1951); C. Wright, *supra*.

Rule 49(c) provides for general verdicts with interrogatories, a practice that is new to Misissippi procedure, but that is well known in the federal courts. *See* Federal Rules of Civil Procedure Rule 49.

Rule 49(d) requires that the court provide to all counsel copies of the written questions that will be submitted to the jury. In practice, the attorneys will prepare proposed questions for the jury and will have same granted or denied in the same manner as instructions. *See* MRCP 51.

[Amended effective March 1, 1989.]

## 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.]

## Comment

Simplistically stated, it is the law in Mississippi that questions of fact are for the jury and questions of law are for the court. *Cantrell v. Lusk*, 113 Miss. 137, 73 So. 885 (1917). Yet there are situations in which the process of applying the law to the facts may sometimes be for the court. *See* generally, authorities cited in 14 Miss. Digest, Trial, key numbers 134-181 (1973). Rule 50 is a device for the court to enforce the rules of law by taking away from the jury cases in which the facts are sufficiently clear that the law requires a particular result. Rule 50 applies only in cases tried to a jury with a power to return a binding verdict. It does not apply to cases tried without a jury nor to those tried to the court with an advisory jury.

Rule 50(a) provides for a motion for a directed verdict at the close of the plaintiff's evidence or at the close of all evidence and before the case is submitted to the jury. The rule 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. This provision requires that the motion for a directed verdict state the specific grounds therefor, which is contrary to prior Mississippi practice. *Cf. Covington County v. Morris*, 122 Miss. 496, 84 So. 462 (1920) (defendant need not point out specific reasons for request for peremptory instruction).

Rule 50(a) also provides that if a motion for a directed verdict made by a party at the close of his opponent's evidence is not granted, the movant may offer evidence as if the motion had not been made without expressly preserving the right to do so. In ruling on the motion for a directed verdict, the court should proceed along the same guidelines and standards that have governed prior peremptory instruction and directed verdict practice in Mississippi: the court should look solely to the testimony on behalf of the opposing party; if such testimony, along with all reasonable inferences which can be drawn therefrom, could support a verdict for that party, the case should not be taken from the jury. *See White v. Thomason*, 310 So.2d 914 (Miss. 1975); *Ezell v. Metropolitan Ins. Co.*, 228 So.2d 890 (Miss. 1969); *Holmes v. Simon*, 71 Miss. 245, 15 So. 70 (1893); but *See Paymaster Oil Mill Co. v. Mitchell*, 319 So.2d 652, 656-7 (Miss. 1975) (suggests different standards for testing the sufficiency of evidence on motions for directed verdict and motion for peremptory instruction or judgment n. o. v.). A motion for a directed verdict, pursuant to MRCP 50(a), supersedes both the former peremptory instruction practice and the demurrer to the evidence.

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 v. Sid Smith & Associates, Inc.*, 610 So.2d 340 (Miss. 1992). A party waives his right to a directed verdict if the motion is made at the close of his opponent's case and thereafter the movant introduces evidence in his own behalf, *Patrick v. Michigan Nat. Bank*, 220 So.2d 273 (Miss. 1969); *Broadhead v. Gatlin*, 243 Miss. 386, 137 So.2d 909 (1962); however, the movant may renew the motion at the close of all the evidence. The renewed motion will be judged in the light of the case as it stands at that time. Even though the court may have erred in denying the initial motion, such error is cured if subsequent testimony on behalf of the moving party repairs the defects of his opponent's case. *See* 9 Wright & Miller, Federal Practice and Procedure, Civil § 2534 (1971).

Rule 50(b), governing motions for a judgment notwithstanding the verdict, effectuates a major change in Mississippi practice: formerly, motions for judgment notwithstanding the verdict were required to be made prior to the close of the term of court rendering the judgment, *Evers v. Truly*, 317 So.2d 414 (Miss. 1975); under Rule 50(b) the motion must be filed within ten days after the judgment is entered, irrespective of the date court is adjourned. MRCP 6(c).

Rule 50(c) authorizes conditional rulings on Rule 50(b) motions. Under this practice there are four courses the trial court may take when a motion in the alternative for a new trial or a judgment notwithstanding the verdict is filed: (1) it may deny the motion for judgment and grant a new trial; (2) it may deny both motions; (3) it may grant both motions; (4) it may grant the motion for judgment but deny the motion for a new trial. Questions of appealability and of the power of the appellate court depend on which of these courses is followed.

1. If the trial court denies the motion for judgment but grants the motion for a new trial, the order, as is true of orders for a new trial generally, is not appealable and the new trial will proceed.

2. If the trial court denies both motions, the verdict stands and the appeal is from the judgment entered on the verdict. Both the refusal of judgment notwithstanding the verdict and errors of law in the trial may be raised on appeal. If the appellate court affirms, the case is finished.

If the appellate court concludes that it was error to deny the motion for judgment, it has the same choices of ordering entry of judgment for the moving party, ordering a new trial, or remanding for the trial court to determine whether there should be a new trial, that it has whenever it reverses a denial of a motion for judgment. In making that choice it will consider, but is not limited to, any grounds that the winning party below has asserted as appellee for grant of a new trial if the decision below is reversed.

If the appellate court concludes that the court below was correct in denying the motion for judgment, it may also consider whether the court below erred in denying the alternative motion for a new trial. The scope of review of the denial of a new trial is the same as that under Rule 59 for denials of new trials generally.

3. The trial court may grant both motions. If it does so the grant of a new trial is conditional only and becomes effective only if the grant of judgment is reversed. The conditional grant of the new trial does not affect the finality of the judgment and appeal can be taken from the grant of judgment. In opposing the motion for judgment the party for whom the verdict was returned is entitled to urge that errors were committed during the trial that at least entitled him to a new trial rather than to any entry of judgment against him. He may file a motion for a new trial within ten days after entry of the judgment notwithstanding the verdict and, whether he has moved for a new trial or not, may argue on appeal that he is entitled to a new trial.

If the appellate court affirms the grant of judgment the case is ended. If it reverses the grant of judgment the new trial must proceed, in accordance with the conditional order by the trial court, "unless the appellate court has otherwise ordered."

4. The trial court may grant the motion for judgment notwithstanding the verdict and conditionally deny the new trial. The party in whose favor the motion for judgment was granted may assert on appeal that the denial of the alternative motion was error, and need not take a cross-appeal to do so. If the denial of the motion for new trial is challenged in this fashion the appellate court, after reversing the grant of judgment, will determine whether judgment should be entered on the verdict or whether there should be subsequent proceedings. 9 Wright & Miller, *supra* § 2540.

[Comment amended effective July 1, 1994; July 1, 1997.]

## 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.

## Comment

Rule 51(a) and (b) tracks the requirements of the Supreme Court of Mississippi in *Newell v. State*, 308 So.2d 68 (Miss. 1975), and *Newell v. State*, 308 So.2d 71 (Miss. 1975), in mandating that the trial judge bear the responsibility for properly instructing the jury. The remainder of Rule 51 is, substantially, identical to Rules 14 and 28, Uniform Mississippi Circuit Court Rules.

Rule 51(b)(1) requires that jury instructions be submitted either at the pretrial hearing (MRCP 16) or, in the event a pretrial hearing is not held, at least twenty-four hours prior to the scheduled time for trial. Rule 16(k) guarantees that instructions may be amended or supplemented as necessary.

Rule 51(b)(2) is intended simply to implement a uniform method for identifying instructions for purposes of the trial record; it is not intended either to indicate to nor conceal from the jury the identify of the originators of instructions.

Rule 51(b)(3) parallels prior Mississippi practice for objecting to instructions. *See* Miss. Code Ann. § 11-7-155 (1972) (instructions become part of record); *Gowan v. Batson*, 288 So.2d 468 (Miss. 1974) (continuing objection during trial to matters on which jury was later instructed preserved objection); *Creel v. General Motors Corp*., 233 So.2d 105 (Miss. 1970) (objection to instruction not made before instruction is delivered to jury is waived).

Rule 51(d) preserves traditional Mississippi practice permitting attorneys to argue the case after the jury has been instructed. Further, the rule ensures that attorneys will have access to the instructions during their arguments and that the instructions may be carried into the jury room by the jury. *See* Miss. Code Ann. § 11-7-155 (1972) (jury may use instructions during deliberations).

## 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.]

## Comment

Rules 52(a) is adapted from Miss. Code Ann. § 11-7-87 (1972); however, the statute indicates that findings of fact may be entered only upon the request of a party, while the rule authorizes the court to enter its findings whether or not requested. In *Tricon Metals & Services, Inc. v. Topp*, 516 So.2d 236 (Miss.1987), the Court stated that in cases of any significant complexity the trial court generally should find the facts specially and state separately its conclusions of law.

Under Rule 52(b) the court, upon the motion of a party or upon its own motion, may amend its findings or make additional findings for up to ten days after the entry of judgment. Again, this ten-day period is computed irrespective of the date a term of court is adjourned. *See* MRCP 6 (c).

The purpose of Rule 52(b) is to enable the appellate court to obtain a correct understanding of the factual issues determined by the trial court as a basis for the conclusions of law and judgment entered thereon. A party who failed to prove his strongest case is not entitled to a second opportunity by moving to amend a finding of fact and conclusion of law; the motion must raise questions of subtance by seeking reconsideration of material findings or conclusions. *See* 9 Wright & Miller, Federal Practice and Procedure, Civil § 2582 (1971).

[Amended effective March 1, 1989.]

## 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).

## Comment

Rule 53 is an amalgamation of Rule 53, Federal Rules of Civil Procedure, and prior Mississippi practice. Mississippi judges have long had the power to appoint masters, referees, and commissioners as assistants to the court. *See* Miss. Code Ann. § 9-5-241 (chancellor may appoint two or more persons in each county to serve as masters); § 9-5-251 (chancellor may appoint special commissioners in any case [Mississippi practice traditionally labeled as a "commissioner" any person appointed to make a judicial sale or to perform a special executive

or ministerial act, V. Griffith, Mississippi Chancery Practice, 598, n. 2 at 636 (2d ed. 1950)]); and § 11-7-137 (1972) (circuit court judges may refer issues to referees).

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).

Rule 53(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.

Rule 53(f) is adapted from Miss. Code Ann. § 9-5-247 (1972). *See Felder v. Wall*, 26 Miss. 595 (1853); *Cobb v. Duke*, 36 Miss. 60 (1858); *Chapman v. Evans*, 44 Miss. 113 (1870); *Gaines v. Coney*, 51 Miss. 323 (1875).

Rule 53(g)(1) contains specific, detailed directions for the making of the master's report. The master must prepare his report in accordance with the scope of his order of reference, setting forth findings of fact and conclusions of law if so required. The report i6 to be filed with the clerk and, unless otherwise directed, it is to be placed in the case file for that action. The clerk is required to notify all parties of the filing of the report. The rule also provides that the master may submit a draft report to counsel to receive their suggestions before finally reporting to the court. Rule 53 (g)(4).

Unless the master's report is manifestly wrong, the court shall accept same; however, parties may, within ten days, object to the report by serving on all other parties notice of their objections. Rule 53 (g)(2). Application to the court for action upon the report and objections to it are by motion and notice as prescribed in Rule 6(d).

Under Rule 53(g)(3) the effect of the master's report is the same regardless of whether the parties have consented to the reference; however, only questions of law arising upon the report may be considered if the parties stipulate that the master's findings of fact shall be final.

Rule 53(h) tracks prior Mississippi practice in allowing the court to require a bond of commissioners appointed to conduct judicial sales. *See* Miss. Code Ann. § 9-5-253 (1972).

[Comment amended effective April 13, 2000.]

## 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) Demand for Judgment.** A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled by the proof and which is within the jurisdiction of the court to grant, even if the party has not demanded such relief in his pleadings; however, final judgment shall not be entered for a monetary amount greater than that demanded in the pleadings or amended pleadings.

**(d) 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.

**Comment**

The first sentence of Rule 54(a) defines "judgment," for the purposes of these rules, to include a decree and any appealable order. Traditionally, in Mississippi courts in equity suits judges rendered a "decree," and an action at law resulted in the entry of a "judgment." There is no longer any purpose in preserving a technical distinction between a decree and a judgment. Therefore, Rule 54(a) indicates that a judgment at law and a decree in equity are to be treated in the same fashion.

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 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 Rule 58; however, it is crucial to the effectiveness of the judgment and for measuring the time periods for appeal and the filing of various motions. *See* 10 Wright & Miller, Federal Practice and Procedure, Civil § 2651 (1973).

Rule 54(b) is designed to facilitate the entry of judgments 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 more than one claim or party. It was proposed because of the potential scope and complexity of civil actions under these rules, given their extensive provisions for the liberal joinder of claims and parties. The basic purpose of Rule 54(b) is to avoid the possible injustice of a delay in entering judgment on a distinctly separate claim or as to fewer than all of the parties until the final adjudication of the entire case by making an immediate appeal available.

The rule does not require that a judgment be entered when the court disposes of one or more claims or terminates the action as to one or more parties. Rather, it gives the court discretion to enter a final judgment in these circumstances and it provides much needed certainty in determining when a final and appealable judgment has been entered. If the court chooses to enter such a final order, it must do so in a definite, unmistakable manner.

Absent a certification under Rule 54(b), any order in a multiple party or multiple claim action, even if it appears to adjudicate a separable portion of the controversy, is interlocutory.

If the court decides that an order that does not dispose of all the claims of all the parties and that is not appealable under any other statute or rule should be given the status of a final judgment, Rule 54(b) requires it to take two separate steps before an appeal can be perfected. The court must make "an express determination that there is no just reason for delay" and it must make "an express direction for the entry of judgment."

When the court is asked to direct the entry of a judgment under Rule 54(b), it must consider whether the entire case as a whole and the particular disposition that has been made and for which the entry of a judgment is sought falls within the scope of the rules. The general requirements are that the case include either multiple claims, multiple parties, or both, and that either one or more but fewer than all the claims have been decided, or that all the rights and liabilities of at least one party have been adjudicated.

Despite its apparently broad scope, Rule 54(b) may be invoked only in a relatively select group of cases and applied to an even more limited category of decisions. The rule itself sets forth three basic conditions on its applicability. The first requirement is that either multiple claims for relief or multiple parties be involved. If there are multiple parties, there need only be one claim in the action. All of the rights or liabilities or one or more of the parties regarding that claim must have been fully adjudicated. A decision that leaves a portion of the claim pending as to all defendants does not fall within the ambit of Rule 54(b). Whether multiple parties are before the court is, basically, a simple question that should pose no problems.

The second prerequisite for invoking Rule 54(b) is that at least one claim or the rights and liabilities of at least one party must be finally decided. The words "final judgment" in Rule 54(b) should not be construed too narrowly. A dismissal for lack of subject matter or personal jurisdiction may dispose of a claim completely and thus bring it within the scope of the rule; however, a dismissal for failing to state a claim upon which relief may be granted, made with leave to amend, clearly does not finally decide that claim and Rule 54(b) would not apply.

The third prerequisite to the issuance of a Rule 54(b) certificate is that the court must find that there is no just reason for delaying an appeal. A request that this determination be made is addressed to the trial judge's discretion and whether it will be granted depends on the facts of each case. *See* 10 Wright & Miller, *supra* § 2656.

Rule 54(c) has two central elements. The first sentence in the rule provides that a default judgment shall not give relief "different in kind from" or that "exceeds in amount that prayed for in the demand for judgment." The second sentence in Rule 54(c) provides that in non-default cases the judgment need not be limited in kind or amount by the demand, but may include the relief to which the successful party is deemed entitled. The rule 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(c) 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. *But See*, *Cain v. Robinson*, 523 So.2d 29 (Miss. 1988). 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(d): These are costs, fees, and expenses. Costs refers 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(d) 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. *See* Miss. Code Ann. § 11-53-27 (1972) (successful party to recover costs, generally).

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. 10 Wright & Miller, *supra* § 2666. *See* also 6 Moore's Federal Practice ¶¶ 54.01-.43 (1972).

[Amended effective February 1, 1990.]

## 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.

### Comment

The purpose of Rule 55 is to provide a uniform procedure for acting upon and setting aside

actions upon parties' defaults.

Prior to obtaining a default judgment, Rule 55(b), there must be an entry of default as provided by Rule 55(a). An entry of default may be made by the clerk only with regard to a claim for affirmative relief against a party who has failed to plead or otherwise defend; *See* MRCP App.B, Form 36. These elements of default must be shown by an affidavit or other competent proof.

Before a default can be entered, the court must have jurisdiction over the party against whom the judgment is sought, which also means that he must have been effectively served with process. *Arnold v. Miller*, 26 Miss. 152 (1853). If the court has jurisdiction over an action seeking affirmative relief, a default may be entered against any party who fails to plead or otherwise defend within the time allowed by Rule 12(a).

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 Rule 7(a).

Thus, plaintiff's failure to reply to a counter-claim may entitle defendant to an entry of default on the counter-claim. The same is true with regard to cross-claims.

The words "otherwise defend" refer to the interposition of various challenges to such matters as service, venue, and the sufficiency of the prior pleading, any of which might prevent a default if pursued in the absence of a responsive pleading. The authority in Rule 55(a) for the clerk to enter a default does not require that to escape default the defendant must not only file a sufficient answer to the merits but must also have a lawyer or be present in court when the case is called for trial; thus, a motion challenging the complaint for failure to state a claim upon which relief can be granted is within the notion of "otherwise defend."

The mere appearance by a defending party will not keep him from being in default for failure to plead or otherwise defend, but if he appears and indicates a desire to contest the action, the court can exercise its discretion and refuse to enter a default. This approach is in line with the general policy that whenever there is doubt whether a default 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. As a result, a party who has filed a responsive pleading or otherwise defended may still find himself in default for noncompliance with the rules at some later point in the action. 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 should be made by the clerk without any action being taken by the court. The clerk's function, however, is not perfunctory. Before he can enter a default he must examine the affidavits filed and satisfy himself that they meet the requirements of Rule 55(a). The fact that Rule 55(a) gives the clerk the authority to enter a default is not a limitation on the power of the court to do so.

Although an appearance by a defending party does not immunize him from being in default for failure to plead or otherwise defend, it does entitle him 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 can become a 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. Rule 54(a).

The ability of the court to exercise its discretion and refuse to enter a default judgment is made effective by the two requirements in Rule 55(b) that an application must be presented to the court for the entry of judgment and that notice of the application must be sent to the defaulting party if he has appeared. The latter requirement enables the defaulting party to show cause to the court why a default judgment should not be entered or why the requested relief should not be granted. A party's failure to appear or be represented at any stage of the proceedings following an initial appearance does not affect this notice requirement. Service of the notice must be made at least three days before the hearing on the application, and must afford the party an opportunity to appear at the hearing. The purpose of this portion of Rule 55(b) is simple: It is intended to protect those parties who, although delaying in a formal sense by failing to file pleadings within the thirty day period, have otherwise indicated to the moving party a clear purpose to defend the suit. On the other hand, when a defaulting party has failed to appear,

thereby manifesting no intention to defend, he is not entitled to notice of the application for a default judgment under this rule.

In determining whether to enter a default judgment, the court is free to consider a number of factors that may appear from the record. Among these are the amount of money potentially involved; whether material issues of fact or issues of substantial public importance are at issue, whether the default is largely technical; whether plaintiff has been substantially prejudiced by the delay involved; and whether the grounds for default are clearly established or are in doubt. Furthermore, the court may consider whether the default was caused by a good-faith mistake or excusable neglect, how harsh an effect a default judgment might have, and whether the court thinks it later would be obliged to set aside the default on defendant's motion.

Once the default is established, defendant has no further standing to contest the factual allegations of plaintiff's claim for relief. If he wishes an opportunity to challenge plaintiff's right to recover, his 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.

Once the court determines that a judgment by default should be entered, it will determine the amount and character of the recovery that should be awarded. If the defendant does not contest the amount prayed for in the complaint and the claim is for a sum certain or a sum that can be made certain by computation, the judgment generally will be entered for that amount without any further hearing.

If the sum is not certain or capable of easy computation the court may hold whatever hearing or inquiry it deems necessary; it may even direct an accounting or a reference to a master. *See* MRCP 53.

When defendant contests the amount of the claim, a full hearing may be required on the issue of damages since a default does not concede the amount demanded. This proceeding is the same as any other trial except that it is limited to the question of damages.

Rule 55(c) differentiates between relief from the entry of default and relief from a default judgment. This distinction reflects the different consequences of the two events and the different procedures that bring them about. The clerk of the court may enter a default upon the application of the nondefaulting party; the entry simply is an official recognition of the fact that one party is in default. The entry is an interlocutory step that is taken under Rule 55(a) in anticipation of a

final judgment by default under Rule 55(b).

In sharp contrast, a final default judgment is not possible against a party in default until the measure of recovery has been ascertained, which typically requires a hearing, in which the defaulting party may participate; in some situations a trial may be made available to determine an issue of damages. Moreover, the entry of a default judgment is a final disposition of the case and is an appealable order.

The distinction between an entry of default and a default judgment also has significance in terms of the procedure for setting them aside. The party against whom a default has been entered typically will attempt to have his default set aside in order to enable the action to proceed. A motion for relief under Rule 55(c) is appropriate for this purpose even though there has not been a formal entry of default. For example, when defendant fails to answer within the time specified by the rules, he is in default even if that fact is not officially noted. Therefore, he must request that the default be "excused" and secure leave to answer before his responsive pleading will be recognized.

Relief from a default judgment must be requested by a formal application as required by Rule 60(b). Because the request is for relief from a final disposition of the case, the party in default must take affirmative action to bring the case before the trial court a second time. A motion for relief under Rule 55(c) is not the equivalent of or an alternative to appeal. Of course, if the motion is denied, it is ripe for immediate appeal, but the right to appeal may be lost for failure to pursue it in a timely fashion.

Rule 55(d) sets out two relatively straight-forward propositions. The first sentence of the subdivision states that the provisions of Rule 55 are applicable to any party seeking relief, whether a plaintiff, third-party plaintiff, counterclaimant, or cross-claimant. According to the second sentence of Rule 55(d), which simply serves as a cross-reference, a default judgment in any case is "subject to the limitation of Rule 54(d)." The latter provision states that a default judgment "shall not be different in kind from or exceed in amount that prayed for in the demand for judgment."

For detailed discussions of Federal Rule 55, after which MRCP 55 is patterned, *see* 6 Moore's Federal Practice ¶¶ 55.01-.11 (1972), and 10 Wright & Miller, Federal Practice and Procedure, Civil §§ 2681-2690, 2692-2701 (1973).

## 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.

## Comment

The purpose of Rule 56 is to expedite the determination of actions on their merits and eliminate unmeritorious claims or defenses without the necessity of a full trial.

Rule 56 permits any party to a civil action to move for a summary judgment on a claim, counter-claim, or cross-claim when he believes that there is no genuine issue of material fact and that he is entitled to prevail as a matter of law. The motion may be directed toward all or part of a claim or defense and it may be made on the basis of the pleadings or other portions of the record, or it may be supported by affidavits and other outside material. Thus, the motion for a summary judgment challenges the very existence or legal sufficiency of the claim or defense to which it is addressed; in effect, the moving party takes the position that he is entitled to prevail

as a matter of law because his opponent has no valid claim for relief or defense to the action, as the case may be.

Rule 56 provides the means by which a party may pierce the allegations in the pleadings and obtain relief by introducing outside evidence showing that there are no fact issues that need to be tried. The rule should operate to prevent the system of extremely simple pleadings from shielding claimants without real claims or defendants without real defenses; in addition to providing an effective means of summary action in clear cases, it serves as an instrument of discovery in calling forth quickly the disclosure on the merits of either a claim or defense on pain of loss of the case for failure to do so. In this connection the rule may be utilized to separate formal from substantial issues, eliminate improper assertions, determine what, if any, issues of fact are present for the jury to determine, and make it possible for the court to render a judgment on the law when no disputed facts are found to exist.

A motion for summary judgment lies only when there is no genuine issue of material fact; summary judgment is not a substitute for the trial of disputed fact issues. Accordingly, the court cannot try issues of fact on a Rule 56 motion; it may only determine whether there are issues to be tried. Given this function, the court examines the affidavits or other evidence introduced on a Rule 56 motion simply to determine whether a triable issue exists, rather than for the purpose of resolving that issue. Similarly, although the summary judgment procedure is well adapted to expose sham claims and defenses, it cannot be used to deprive a litigant of a full trial of genuine fact issues.

Rule 56 is not a dilatory or technical procedure; it affects the substantive rights of litigants. A summary judgment motion goes to the merits of the case and, because it does not simply raise a matter in abatement, a granted motion operates to merge or bar the cause of action for purposes of res judicata. A litigant cannot amend as a matter of right under Rule 15(a) after a summary judgment has been rendered against him.

It is important to distinguish the motion for summary judgment under Rule 56 from the motion to dismiss under Rule 12(b), the motion for a judgment on the pleadings under Rule 12(c), or motion for a directed verdict permitted by Rule 50.

A motion under Rule 12(b) usually raises a matter of abatement and a dismissal for any of the reasons listed in that rule will not prevent the claim from being reasserted once the defect is remedied. Thus a motion to dismiss for lack of subject matter or personal jurisdiction, improper venue, insufficiency of process or service of process, or failure to join a party under

Rule 19, only contemplates dismissal of that proceeding and is not a judgment on the merits for either party. Similarly, although a motion to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief can be granted is addressed to the claim itself, the movant merely is asserting that the pleading to which the motion is directed does not sufficiently state a claim for relief; unless the motion is converted into one for summary judgment as permitted by the last sentence of Rule 12(b), it does not challenge the actual existence of a meritorious claim.

A motion for judgment on the pleadings, Rule 12(c), is an assertion that the moving party is entitled to a judgment on the face of all the pleadings; consideration of the motion only entails an examination of the sufficiency of the pleadings.

In contrast, a summary judgment motion is based on the pleadings and any affidavits, depositions, and other forms of evidence relative to the merits of the challenged claim or defense that are available at the time the motion is made. The movant under Rule 56 is asserting that on the basis of the record as it then exists, there is no genuine issue as to any material fact and that he is entitled to a judgment on the merits as a matter of law. The directed verdict motion, which rests on the same theory as a Rule 56 motion, is made either after plaintiff has presented his evidence at trial or after both parties have completed their evidence; it claims that there is no question of fact worthy of being sent to the jury and that the moving party is entitled, as a matter of law, to have a judgment on the merits entered in his favor.

A Rule 12(c) motion can be made only after the pleadings are closed, whereas a Rule 56 motion always may be made by defendant before answering and under certain circumstances may be made by plaintiff before the responsive pleading is interposed. Second, a motion for judgment on the pleadings is restricted to the content of the pleading, so that simply by denying one or more of the factual allegations in the complaint or interposing an affirmative defense, defendant may prevent a judgment from being entered under Rule 12(c), since a genuine issue will appear to exist and the case cannot be resolved as a matter of law on the pleadings.

Subsections (b) and (h) are intended to deter abuses of the summary judgment practice. Thus, the trial court may impose sanctions for improper use of summary judgment and shall, in all cases, award expenses to the party who successfully defends against a motion for summary judgment.

For detailed discussions of Federal Rule 56, after which MRCP 56 is patterned, *See* 10 Wright & Miller, *Federal Practice and Procedure*, Civil §§ 2711-2742 (1973); 6 Moore's Federal Practice ¶¶ 56.01-.26 (1970); C. Wright, Federal Courts § 99 (3d ed. 1976); *See* also *Comment*,

*Procedural Reform in Mississippi: A Current Analysis*, 47 Miss.L.J. 33, 63 (1976).

## 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.]

**Comment**

The purpose of Rule 57 is to create a procedure by which rights and obligations may be adjudicated in cases involving an actual controversy that has not reached the stage at which either party may seek a coercive remedy, or in which the party entitled to such a remedy fails to sue for it.

Actions for declaratory judgment represent a comparatively recent development in American jurisprudence. The traditional and conventional concept of the judicial process has been that the courts may act only when a complainant is entitled to a coercive remedy, such as a judgment for damages or an injunction. Until a controversy had matured to a point at which such relief was appropriate and the person entitled thereto sought to invoke it, the courts were powerless to act.

At times, however, there may be an actual dispute about the rights and obligations of the parties, and yet the controversy may not have ripened to a point at which an affirmative remedy is needed. Or this stage may have been reached, but the party entitled to seek the remedy may fail to take the necessary steps. For example, the maker of a promissory note may have stated to the payee that the instrument would not be honored at maturity because, perhaps, his signature is claimed to have been forged, or procured by fraud, or affixed without his authority. The payee had to wait until payment was due before appealing to the courts. It might well have been important for him to ascertain in advance whether the note was a binding obligation and whether he might rely on it and list it among his assets. Nevertheless, he could receive no judicial relief

until the instrument became due and was dishonored. Or it might have been necessary for a person to determine whether he was bound by some contractual provision that he deemed void. In that event, if he desired to contest the matter, he had to assume the risk and to hazard the consequences of committing a breach and then await a suit.

In such situations the declaratory judgment remedy provides a useful solution. This remedy enlarges the judicial process and makes it more flexible by putting a new implement at the disposal of the court. Use of this procedure is always discretionary with the court. The jurisdiction of the courts is not expanded and requests for declaratory judgments may be heard only in cases that otherwise are within their jurisdiction.

Any doubt or difficulty about the procedure in an action for a declaratory judgment should disappear if the action is regarded as an ordinary civil action, as Rule 57 clearly intends. The incidents of pleading, process, discovery, trial, and judgment are the same. Only when the nature of the factual situation requires is a prayer for declaratory relief appropriate. The request for a declaratory judgment is but a normal part of the ordinary civil action.

As Rule 57 expressly provides, the procedure for obtaining a declaratory judgment must be "in accordance with these rules." Thus the requirements of pleading and practice in actions for declaratory relief are exactly the same as in the other civil actions. Consequently, the action is commenced by filing a complaint with the clerk and the issuance of a summons as provided in Rules 3 and 4. A declaratory judgment may be obtained by "any interested party." The liberal rules of joinder of parties provided by Rules 14 and 17 to 25 are equally beneficial in declaratory judgment actions and the requirements of compulsory joinder of those needed for just adjudication, set out in Rule 19, are fully applicable. The broad joinder of claims, counter-claims, and cross-claims, made available by Rules 13 and 18, is available in a declaratory action. Similarly, declaratory relief may be sought by a counter-claim or cross-claim. As in any other action, the scope of relief to be granted in the action is limited to the issues made by the pleadings and the evidence, and the decree can be no broader than the issue tried. Rule 54(c) applies, however, and the court is to give whatever relief is justified by the evidence, regardless of the demand in the complaint, except in the case of default. Summary judgment is as available in these actions as in any others.

A plaintiff may ask for a declaratory judgment either as his 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.

The granting of a declaratory judgment rests in the sound discretion of the trial court exercised in the public interest. It is always the duty of the court to strike a proper balance between the needs of the plaintiff and the consequences of giving the desired relief. The two principal criteria guiding the policy in favor of rendering declaratory judgments are: (1) when the judgment will serve a useful purpose in clarifying and setting the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding.

One of the most important considerations that may induce a court to deny declaratory relief is that the judgment sought would not settle the disputes between the parties. A declaratory action need not be dismissed because it could not settle all possible differences between the parties, but the courts should look with disfavor on piecemeal litigation of the disputed matters.

Rule 57(b) was amended in 2000 to authorize an injured party, where an insurer has indicated that it may deny coverage of the injured party's claim, to seek a declaratory judgment establishing coverage. The traditional rule in Mississippi barred any type of direct action by an injured party against an insurer. *Crum v. Mississippi Mun. Serv. Co., Inc.*, 1998 WL 378333 (N.D. Miss. 1998), *citing Hunt v. Preferred Risk Mut. Ins. Co.* 568 So. 2d 253; *Westmorland v. Raper*, 511 So. 2d 884 (Miss. 1987); and *Clark v. City of Pascagoula*, 507 So. 2d 70 (Miss. 1987). The amendment modifies the traditional rule in the interest of judicial economy by allowing a direct action for the limited purpose of a declaratory judgment.

Allowing the injured party to seek a declaration that the injured party's claim is covered by the defendant's policy may reduce litigation costs. First, it may avoid unnecessary litigation when the policy is the only asset that might satisfy the injured party's claim, because a determination of non-coverage would avoid the need of trial of the claim against the insured. In addition, if the injured party brings the claim for declaratory judgment together with the claim against the insured, the rule may allow all of the issues growing out of an incident to be resolved in a single judgment.

As emphasized elsewhere in this Comment, whether the insured may or should be joined in the declaratory judgment action, and what other claims may be asserted, are issues to be determined under the existing rules governing joinder of claims and parties. Where such joinder is appropriate or necessary, the court retains discretion under Rule 42(b) to order separate trials in whichever sequence the court finds most appropriate. 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.

The amended rule does not affect the long-recognized right of an insurer to bring an action for a declamatory judgment that a policy does not cover a particular claim. See, e.g., *Coleman v. Mississippi Farm Bureau Ins. Co.*, 708 So. 2d 6 (Miss. 1998). Nor does it affect the right of the insured to bring suit to establish coverage.

Allowing the injured party to assert a claim for declaratory judgment does not alter M.R.E. 411, which limits the admissibility of evidence of insurance coverage in an action by the injured party against an insured for damages.

[Amended effective July 27, 2000.]

## 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.]

### Comment

The purpose of Rule 58 is simply to provide a precise post-trial date from which periods of time may be computed. Throughout these rules there are provisions for events which, when performed, commence the running of a time period within which a responsive event must be performed; e. g., a defendant must serve his answer within thirty days after service on him of the summons and complaint, and a plaintiff must serve his reply to a counter-claim within thirty days, Rule 12(a); answers to interrogatories to parties must be served within thirty days after service of same, Rule 33(a); and objections to a master's report must be served within ten days after notice of the report's having been filed, Rule 53(g)(1).

The times for taking post-trial action are computed from the date judgment is entered, as provided in Rule 58; hence, a motion for a new trial must be filed within ten days of entry of judgment, Rules 6(b), 59(b); a motion to alter or amend a judgment must be filed within ten days of entry of judgment, Rules 6(b), 59(e); a motion for a stay of execution must be filed within ten days of entry of judgment, Rule 62(a); and a motion for a directed verdict or for judgment, n. o. v. must be filed within ten days of entry of judgment, Rule 50(b).

Rule 58, as it now reads, requires that all final judgments must be entitled "Judgment." However, failure to properly title a judgment which fully adjudicates all claims in a case as to all parties will not be deemed to prevent that judgment form being fully effective so long as it has been entered as required in M.R.C.P. 79(a). Where a notice of appeal in a civil case is not timely filed, if the failure to timely file was caused by an inappropriate or misleading title of judgment, such failure may, under proper circumstances, constitute "excusable neglect" under M.R.A.P. 4(g). As now amended, the rule effectively overrules *Thompson v. City of* Vicksburg, 813 So. 2d 717 (Miss. 2002), Mullen *v. Green Tree Financial Corp.-Miss*, 730 So. 2d 9 (Miss. 1998), and *Roberts v. Gafe Auto Co.*, 653 So. 2d 250 (Miss. 1994) insofar as they hold that strict compliance with the titling requirement is mandatory and prevents finality, even in the absence of prejudice.

[Comment amended effective July 1, 1997; amended effective May 27, 2004.]

## 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).

**Comment**

Rule 59 authorizes the trial judge to set aside a jury verdict as to any or all parts of the issues tried and to grant a new trial as justice requires. This practice is not new to Mississippi, but the procedures set forth in this rule are. The grounds for granting new trials remain the same as under prior state practice; generally stated, however, the court has the power and duty to set aside a verdict and order a new trial whenever, in its sound judgment, such action is required. *See* generally 11 Miss. Digest, New Trial, Key numbers 13-108 (1972).

The motion must be filed within ten days after the entry of judgment. This is a departure from prior Mississippi practice, *National Cas. Co. v. Calhoun*, 219 Miss. 9, 67 So.2d 908 (1953) (new trial may be ordered any time prior to expiration of court term), and is authorized by MRCP 6(c). The ten-day period cannot be enlarged. MRCP 6(b)(2).

When the motion for new trial is based upon affidavits, they shall be filed and served with the motion; the opposing party then has a maximum of thirty days in which to serve counter-affidavits. MRCP 59(c).

Rule 59(d) allows the court on its own initiative to order a new trial, even though there was no motion for a new trial, for any reason for which the court might have granted a new trial on the motion of a party. *Sanders v. State*, 239 Miss. 874, 125 So.2d 923 (1961)*; National Cas. Co. v. Calhoun, supra*. If the court exercises this power, it must specify in its order the grounds for the new trial.

If the court is acting entirely on its own initiative in ordering a new trial, it must make the order not later than ten days after the entry of judgment and may not make such an order after that period has expired.

A motion to alter or amend must be filed within ten days after the entry of judgment; the court is not permitted to extend this time period

See Rule 60(c) for reconsideration of an order transferring a case to another court.

[Comment amended effective July 1, 1997; amended effective July 1, 2008.]

## 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.]

## Comment

Rule 60 (a) prescribes an efficient method for correcting clerical errors appearing in judgments, orders, or other parts of a trial record; errors of a more substantial nature must be corrected in accordance with MRCP 59(e) or 60(b). Thus, the Rule 60(a) procedure can be utilized only to make the judgment or other document speak the truth; it cannot be used to make it say something other than was originally pronounced. *See*, e. g., *West Va. Oil & Gas Co. v. Breece Lumber Co.*, 213 F.2d 704 (5th Cir. 1964). This procedure accords with prior Mississippi practice. *See* Miss. Code Ann. § 11-1-19 (1972); *Ralph v. Prester*, 28 Miss. 744 (1855) (this statute applies solely to the correction of judgments and decrees and cannot be extended so as to supply a judgment never rendered); *Rawson v. Blanton*, 204 Miss. 851, 35 So.2d 65 (1948) (judgment which is erroneous as to plaintiff's name involves merely a clerical error which may be corrected in the supreme court without reversal); *Healy v. Just*, 53 Miss. 547 (1876) (there is no time limit within which a correction to a judgment may be made); *Wilson v. Town of Handsboro*, 99 Miss. 252, 54 So. 845 (1911) (all courts have inherent power to correct clerical errors at any time and to make the judgment entered correspond to that rendered).

Under Rule 60 (a), evidence dehors the record may be considered in making the correction; this also accords with prior Mississippi practice. *See Wilson v. Town of Handsboro, supra* (In making a determination as to whether the correction should be permitted, any evidence of parol or other kind is competent which throws material light on the truth of the matter. "The object of every litigation is to obtain . . . a final determination of the rights of the parties. That determination is invariably what the judges direct, and not invariably what the clerks record. The power of the court to make the record express the judgment of the court with the utmost accuracy ought not to be restricted."). *See* also 6A Moore's Federal Practice ¶¶ 60.01-.08 (1971); 11 Wright & Miller, Federal Practice and Procedure, Civil §§ 2851-2856 (1973).

Rule 60(b) specifies certain limited grounds upon which final judgments may be attacked, even after the normal procedures of motion for new trial and appeal are no longer available. The rule simplifies and amalgamates the procedural devices available in prior practice. Prior to MRCP 60(b), Mississippi recognized the following procedural devices for relief from judgments, other than by appeal:

*Statute for Correction of Misrecitals*, Miss. Code Ann. § 11-1-19 (1972). This statute, referred to in the preceding discussion of MRCP 60(a), *supra*, applied solely to corrections of judgments and decrees and could not be extended to supply a decree or judgment never rendered. *See Ralph v. Prester, supra*; *Rawson v. Blanton, supra*; V. Griffith, Mississippi Chancery Practice, § 634 (2d ed. 1950).

*Writ of Error Coram Nobis*. Generally, this device was for review of errors of fact, not of law, which substantially affected the validity of the judgment but which were not discovered until after rendition of the judgment. *See Petition of Broom*, 251 Miss. 25, 168 So.2d 44 (1964). It was instituted as an independent action.

*Bill of Review for Error Apparent*. This device was an original bill, and was filed and docketed as such. It cured a material error of law apparent on the face of the decree and the pleadings and proceedings on which it is based, exclusive of the evidence. However, Miss. Code Ann. § 11-5-121 (1972) placed a two-year limitation upon the period of time after the judgment was entered for filing the bill. *See Brown v. Wesson*, 114 Miss. 216, 74 So. 831 (1917); V. Griffith, *supra* § 635.

*Bill of Review Based on Newly Discovered Evidence*. Leave of court was required for the filing of a bill of review based on newly discovered evidence, but after leave was obtained

the bill was considered as part of the action it sought to challenge. *See* V. Griffith, *supra* §§ 636, 441. The two-year limitations of Miss. Code Ann. § 11-5-121 (1972) applied.

*Bill in the Nature of a Bill of Review*. This bill was available as an original action for vacating judgments tainted by fraud, surprise, accident, or mistake as to facts, not to law. *See Corinth State Bank v. Nixon*, 144 Miss. 674 110 So. 430 (1926); *City of Starkville v. Thompson*, 243 So.2d 54 (Miss. 1971); V. Griffith, *supra* § 642. This device did not require leave of court for filing, nor was it limited to two years' availability. *Cf.* Bill of Review for Error Apparent and Bill of Review Based on Newly Discovered Evidence, *supra*.

Motions for relief under MRCP 60(b) are filed in the original action, rather than as independent actions themselves. Further, motions seeking relief from judgments tainted by fraud, misrepresentation, or other misconduct of an adverse party, MRCP 60(b)(1), accident or mistake, 60(b)(2), or newly discovered evidence, 60(b)(3), must be made within six months after the judgment or order was entered. Aside from these two features, Rule 60(b) does not depart significantly from traditional Mississippi practice with respect to relief from judgments, but it dispenses with the arcane writs and technical requirements of prior practice. Importantly, a Rule 60(b) motion does not operate as a stay or supersedeas; further, in the courts governed by these rules, Rule 60 supersedes the devices discussed above for relief from judgments and orders.

## 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.

### Comment

MRCP 61 is identical to Federal Rule 61 and accords with prior Mississippi practice. *See*, e. g., *Nelms & Blum Co. v. Fink*, 159 Miss. 372, 131 So. 817 (1930) (supreme court will not reverse on basis of argument of counsel unless it is palpably evident that there has been prejudice injected or misstatement of material facts); *Yazoo & M. V. R. Co. v. Williams*, 87 Miss. 344, 39 So. 489 (1905) (errors in instructions will not be cause for reversal where interests of complaining party have not been prejudiced thereby); *Freeze v. Taylor*, 257 So.2d 509 (Miss. 1972) (granting of abstract instruction is not ordinarily reversible error unless it tends to confuse and mislead the jury). No judgment shall be reversed on the ground of misdirection to the jury, or the improper admission or exclusion of evidence, or for error as to the matter of pleading or procedure, unless it shall affirmatively appear, from the whole record, that such judgment has resulted in a miscarriage of justice.

For discussions of Federal Rule 61, *See* 11 Wright & Miller, Federal Practice and Procedure, Civil §§ 2881-2888 (1973); 7 Moore's Federal Practice Civil ¶¶ 61.01-.12 (1974).

## 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 ten days after the later of its entry or the disposition of a motion for a new trial. 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.** In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60(b), or of a motion to set aside a verdict made pursuant to Rule 50(b), or of 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).

## Comment

Rule 62(a) provides for automatic stays of judgments, with certain exceptions, until ten days after the later of either the entry of a judgment or the disposition of a motion for a new trial, whichever last occurs. This stay applies only to judgments as defined in Rule 54(a), and it only prevents enforcement of the judgment; it does not affect the appealability of the judgment nor prevent the time for appeal from running. *See Davidson v. Hunsicker*, 224 Miss. 203, 79 So.2d 839 (1955) (a judgment is not final until the motion for a new trial is overruled; the time period for perfecting an appeal commences on the day after the motion for a new trial is overruled); but

cf. Miss. Code Ann. § 13-3-111 (1972) as amended by 1976 Miss. Laws, ch. 331 (clerks shall issue executions on all judgments and decrees after close of term of court at request and on the cost of the prevailing party).

The automatic stay permits the party against whom judgment has been entered to determine what course of post-judgment action he wishes to follow. If he desires to attack the judgment in the trial court by a motion for a new trial or a similar post-trial motion, he can make his motion, thereby obtaining a stay pending disposition of the motion. If he prefers to appeal, he can file a notice of appeal and seek a stay pending appeal as provided in Rule 62(c) and (d).

The automatic stay becomes ineffective ten days after the later of the entry of judgment or the disposition of a motion for a new trial. Even though further stays are available, they only can be had in accordance with the other subdivisions of Rule 62 and are not automatic but must be ordered by the court. *See* 11 Wright & Miller, Federal Practice and Procedure, Civil §§ 2901-2903 (1972); 7 Moore's Federal Practice ¶¶ 62.01-.10 (1972).

By expressed provision in Rule 62(a), different treatment is given to two classes of cases. These are: (1) an interlocutory or final judgment in an action for an injunction; and (2) an interlocutory or final judgment in a receivership action. In these two classes of actions the judgment is not stayed during the period after its entry and until an appeal is taken, or during the pendency of an appeal, "unless otherwise ordered by the court." Thus the automatic stay does not apply in these two classes of cases, nor can a stay pending appeal be obtained in these cases merely by filing a supersedeas bond. But the trial court, under Rule 62(c), and the appellate court, under Rule 62(g), have ample power to make whatever order is appropriate in injunction cases, and Rule 62(a) permits the trial court to order a stay in receivership cases in which an accounting has been ordered. As is obvious from the fact that this class of cases is excepted from the automatic stay of Rule 62(a), the court should not grant a stay in such cases as a matter of course but should consider carefully the harm that a stay might cause to the party who has obtained the judgment and balance this against the harm that denial of a stay would cause to the losing party. *See*, e. g, *Powell v. Maryland Trust Co*., 125 F.2d 260 (4th Cir.), cert. denied 316 U.S. 671 [62 S. Ct. 1041, 86 L.Ed. 1746] (1942) (stay ordered in receivership action); *American St. Gobain Corp. v. Armstrong Glass Co.*, 300 F. Supp. 419 (D.Tenn.), appeal dismissed 418 F.2d 571 (6th Cir. 1969) (stay refused). *See* also 11 Wright & Miller, *supra* § 2902; 7 Moore's Federal Practice, *supra* ¶ 62.03.

A post-trial motion seeking relief under Rule 60(b) does not stay the judgment. The party in whose favor the judgment runs is free to have execution on it or to bring proceedings to

enforce it after the expiration of the automatic stay provided for in Rule 62(a). But if a post-trial motion is made, the court is given discretion in Rule 62(b) to stay execution or enforcement of the judgment pending disposition of the motion.

A stay under Rule 62(b) is discretionary with the court and may be "on such conditions for the security of the adverse party as are proper." A stay may be granted under Rule 62(b) on a motion to alter or amend a judgment under Rule 59(e), a motion for relief from a judgment under Rule 60, a motion for judgment notwithstanding the verdict under Rule 50, or a motion for amendment to the findings or for additional findings under Rule 52(b).

There is no automatic stay in actions for injunctions and in such an action a judgment, whether interlocutory or final, may be stayed only by order of court. If no stay has been obtained, an injunction remains in effect. If the court has denied an injunction and there has been no stay, defendant is free to take the action sought to be enjoined, and if the event sought to be enjoined transpires before the appeal is heard, the appeal should be dismissed as moot. *See* 11 Wright & Miller, *supra* § 2904.

An application under Rule 62(c) or (g) necessarily goes to the discretion of the court. The governing considerations are the same whether the application is to the trial court under subdivision (c) or to an appellate court under subdivision (g). Thus it is generally required that (A) the applicant make a strong showing that he is likely to succeed on the merits of the appeal; (B) the applicant establish that unless a stay is granted he will suffer irreparable injury; (C) no substantial harm will come to other interested parties; (D) a stay would do no harm to the public interest. *See* Wright & Miller, *supra*; *Belcher v. Birmingham Trust Nat. Bank*, 395 F.2d 685 (5th Cir. 1968); *Pitcher v. Laird*, 415 F.2d 743 (5th Cir. 1969); *Fortune v. Molpus*, 431 F.2d 799 (5th Cir. 1970); *Beverly v. United States*, 468 F.2d 732 (5th Cir. 1972).

If the court is satisfied that these considerations or other relevant considerations indicate that an injunction should be stayed pending appeal, a stay will be granted. Otherwise the stay will be denied. *See Corpus Christi Ind. School Dist. v. Cisneros*, 404 U.S. 1211 [92 S. Ct. 9, 30 L.Ed.2d 15] (1971) (stay granted); *Dandridge v. Jefferson Parish School Bd.*, 404 U.S. 1219 [92 S. Ct. 18, 30 L.Ed.2d 23] (1971) (stay denied).

Subdivision (d) of Rule 62 tracks prior Mississippi practice with respect to stays and supersedeas, subject to the subdivision (a) exceptions discussed above.

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.

Subdivision (f) exempts the State of Mississippi from giving security to obtain a stay of judgment. This tracks prior practice under Miss. Code Ann. § 11-51-101 (1972).

Rule 62(g) is merely a declaration that whatever power an appellate court may possess to stay proceedings during the pendency of an appeal is not infringed by any provision of Rule 62.

Rule 62(h) provides that if a court has ordered a final judgment under the conditions stated in Rule 54(b), which allows the court to give judgment as to fewer than all of the claims or parties in a case, the court may stay enforcement of that judgment until the entry of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit of the judgment to the party in whose favor it was entered. Thus the court is given a choice in the matter: It may refuse a stay and allow immediate enforcement of the partial judgment it has entered, or it may grant the stay and prevent enforcement of that judgment until judgment has been given on the whole case. If a stay is entered, the court, if it sees fit, may require the party against whom a judgment has been entered to file a bond securing payment of that judgment with interest.

[Comment amended effective July 1, 1997.]

## RULE 63. DISABILITY OF A JUDGE

**(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.

### Comment

Rule 63 authorizes the substitution of trial judges in pending actions in the event of disability of the judge before whom the action was commenced. This authority applies equally to the several judges in multi-judge districts as well as to judges of single-judge districts.

Importantly, this rule has nothing to do with the authority by which substitute judges are detailed or assigned under law to the subject court; such is provided by statute. *See*, e. g., Miss. Const. § 165 and Miss. Code Ann. §§ 9-1-13, -15, 11-1-11, and -15 (1972) (governor to commission special judges and to fill judicial vacancies; parties may agree upon attorney to serve as judge; proceedings in vacation when judge disqualified). The rule merely provides that such substitute judge can perform certain judicial functions which heretofore may not have been permitted.

For a discussion of Federal Rule 63, after which MRCP 63 was patterned, *See* 11 Wright & Miller, Federal Practice and Procedure, Civil §§ 2921 *et seq*. (1973), and 7 Moore's Federal Practice ¶¶ 63.01 et seq. (1972).

# 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).

### Comment

The unpredictability of substantive elements of law applicable to seizures of persons or property as security for satisfying a judgment that ultimately may be entered, due to recent opinions of the Supreme Court of the United States, renders it impractical at this time to draft a comprehensive procedural rule governing this area; *See*, e. g., *Sniadach v. Family Finance Corp.*, 395 U.S. 337 [89 S. Ct. 1820, 23 L.Ed.2d 349] (1969); *Fuentes v. Shevin*, 407 U.S. 67 [92 S. Ct. 1983, 32 L.Ed.2d 556] (1972); and *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 [94 S. Ct. 1895, 40 L.Ed.2d 406] (1974). It is intended that a comprehensive rule governing such procedure be drafted in the future as the substantive law stabilizes.

Accordingly, Rule 64 provides that the provisional remedies available under Mississippi law for the seizure of persons or property as security for satisfying a judgment that ultimately may be entered in a civil action continue to be available under the MRCP. Those remedies are to be resorted to in accordance with statutory law; *see*, e. g., Miss. Code Ann. §§ 11-19-1 et seq.

(ejectment); §§ 11-29-1 et seq. (sequestration); §§11-31-1 *et seq.* (attachment in chancery); § 11-33-1 et seq. (attachment at law); §§ 11-35-1 et seq. (garnishment); §§ 11-37-101 *et seq.* (replevin); §§ 11-38-1 *et seq.* (claim and delivery); and §§ 11-43-1 et seq. (habeas corpus).

For discussions of Federal Rule 64, after which MRCP 64 was patterned, *see* 7 Moore's Federal Practice ¶¶ 64.01-.10 (1972); 11 Wright & Miller, Federal Practice and Procedure, Civil §§ 2931-2936 (1973).

## 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.

## Comment

Rule 65 makes several procedural changes in seeking and obtaining injunctive relief in Mississippi, but the rule neither restricts nor enlarges the jurisdiction of courts to exercise, or the propriety of exercising, injunctive relief; an injunction will continue to be available in those situations where it would have been available prior to these rules.

In prior Mississippi injunctive relief practice, injunctions were divided into two functional categories -- prohibitory injunctions and mandatory injunctions -- and, further, into two durational subcategories -- interlocutory and final. *See* Miss. Code Ann. §§ 11-13-1 through 39 (1972); V. Griffith, Mississippi Chancery Practice, § 442 (2d ed. 1950). Rule 65 has no effect on or application to final, or permanent, injunctive relief; however, the rule divides what have been referred to interchangeably as "interlocutory," "temporary," or "preliminary" injunctions (*See* V. Griffith, *supra*,) into two subcategories: preliminary injunctions, Rule 65(a), and temporary restraining orders, Rule 65(b). The latter may be issued ex parte without an adversary hearing in order to prevent an immediate, irreparable injury and are of limited duration -- they typically will remain in effect for a maximum 20 days. On the other hand, Rule 65(a)(1) requires that notice be given to the opposing party before a preliminary injunction may be issued. Some type of a hearing also implicitly is required by subdivision (a)(2), which provides either for the consolidation of the trial on the merits with the preliminary injunction hearing, or the inclusion in the trial record of any evidence received at the Rule 65(a) hearing. Furthermore, a preliminary injunction normally lasts until the completion of the trial on the merits, unless it is dissolved earlier by court order or the consent of the parties. Therefore, its duration varies and is controlled by the nature of the situation in which it is utilized.

Rule 65(a) deals with the procedure on an application for a preliminary injunction. Broadly defined, a preliminary injunction, under these rules, is an injunction issued to protect the plaintiff from irreparable injury and to preserve the court's power to render a meaningful decision after a trial on the merits. 11 Wright & Miller, Federal Practice and Procedure, Civil § 2947 (1973). Thus, the court may issue a preliminary injunction even though plaintiff's right to relief still is uncertain.

The circumstances in which a preliminary injunction may be granted are not prescribed by these rules; the grant or denial of a preliminary injunction remains a matter for the trial court's discretion, exercised in conformity with traditional equity practice. *See* V. Griffith, *supra*.

Although the fundamental fairness of preventing irremediable harm to a party is an important factor on a preliminary injunction application, the most compelling reason in favor of entering a Rule 65(a) order is the need to prevent the judicial process from being rendered futile by defendant's action or refusal to act. On the other hand, judicial intervention before the merits have been finally determined frequently imposes a burden on defendant that ultimately turns out to have been unjustified. Consequently, the preliminary injunction is appropriate whenever the policy of preserving the court's power to decide the case effectively outweighs the risk of imposing an interim restraint before it has done so.

Rule 65(b) provides for injunctive relief without notice to the adverse party. This relief, known as a temporary restraining order, can be accorded without notice provided that the verified facts of the complaint clearly justify plaintiff's apprehension about the threat of irreparable injury.

Once entered, a temporary restraining order expires by its terms. During the time it is in effect, extensions for good cause are permissible; the method of attack by the restrained party is by motion to dissolve or modify. Upon application having been made for a temporary restraining order, the court must immediately set a hearing on the companion motion for a preliminary injunction. If the temporary restraining order application is denied, the plaintiff should press for the hearing on the motion for a preliminary injunction. If the temprary restraining order is granted, then the restrained defendant should press to set the hearing on the preliminary injunction motion or on his motion to dissolve.

Under Rule 65(a)(2) the court can consolidate the hearing on the preliminary injunction with the trial of the action on the merits; in the event consolidation is not ordered, the record upon the hearing of the motion for preliminary injunction becomes a part of the record at the trial on the merits.

Rule 65(c) continues to traditional practice of requiring security in injunction proceedings, and vests in the sound discretion of the court the determination of the amount of security that will be required. Cf. Miss. Code Ann. §§ 11-13-3 through -7, and -13 (1972). Agencies and officers of the State of Mississippi are exempted from the requirements for posting security as a prerequisite to obtaining an injunction; this accords with prior practice. *See* Miss. Code Ann. § 11-13-9 (1972).

Rule 65(d) is designed to protect those who are enjoined by informing them specifically of what they are required to do or refrain from doing pursuant to the injunction or restraining order; the ordinary person reading the court's order should be able to ascertain readily from the document itself exactly what conduct is proscribed or mandated. *See* 11 Wright & Miller, Federal Practice and Procedure, Civil § 2955 (1972); *Brumby Metals, Inc. v. Bargen*, 275 F.2d 46 (7th Cir. 1960) (An injunction may be set aside on appeal when "anyone reading the inunction order cannot ascertain from the four corners of the order itself exactly what conduct was enjoined.").

Rule 65 (e) is a reaffirmation that the injunctive powers Mississippi courts have had prior to the rule remains intact, being neither abridged nor enlarged by the rule. *See* Miss. Code Ann. § 9-9-23 (county court may not issue writs of injunction, but may, when expressly directed in writing by chancery court or circuit court, hear application for injunctive reliefs.

For detailed discussions of Federal Rule 65, after which MRCP 65 was patterned, *See* 11 Wright & Miller, *supra* §§ 2941-2962; 7 Moore's Federal Practice ¶¶ 65.01-.21 (1972).

## 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.

### Comment

Each surety, by entering into a bond, stipulation, or other undertaking required or permitted by these rules, submits himself to the jurisdiction of the court and irrevocably appoints, the clerk of the court as his agent upon whom any papers affecting liability on the bond or undertaking may be served; hence, a simple motion practice, rather than an independent action, is provided for the enforcement of the surety's liability. The motion and such notice thereof as the court prescribes may be served on the clerk of the court, who has a duty forthwith to mail copies to the surety if his addres, s is known.

Illustrative of situations in which the giving of security might be permitted as required by the rules are the following:

(1) as a condition to the various provisions for a stay of proceedings to enforce a judgment; MRCP 62 (c), (h);

(2) as a condition to the granting of a temporary restraining order or preliminary injunction; MRCP 65;

(3) for security for costs; MRCP 3(b).

*See* also 7 Moore's Federal Practice ¶¶ 65.1.01-.05 (1974); 11 Wright & Miller, Federal Practice and Procedure, Civil §§ 2971-2974 (1973).

## 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.

### Comment

Rule 66 is a limitation on parties' authority to dismiss civil actions without leave of court. Cf. MRCP 41. When litigation has reached the point that appointment of a receiver is necessitated and one is appointed, then the court has taken such an active involvement in the action that it must, in the interest of guaranteeing equal security for all parties, ensure that the action is not concluded until the object of the receivership is adjudicated.

With the exception of limiting parties' rights to dismiss without leave of court, Rule 66 provides that proceedings involving receivers are adjudicated in accordance with the provisions of the Mississippi Rules of Civil Procedure.

Procedurally, Rule 66 does not depart from prior Mississippi receivership practice. *See* Miss. Code Ann. §§ 11-5-151 through -167 (1972); V. Griffith, Mississippi Chancery Practice, §§ 466-482 (2d ed. 1950).

## 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.

### Comment

Rule 67 applies in an action "in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other things capable of delivery." A party may deposit with the court all or any part of the sum or thing, but must give notice to every other party and must obtain leave of court to make the deposit.

The purpose of the deposit is to relieve the depositor of responsibility for a fund in dispute. It is useful in cases of interpleader and of tender of an undisputed sum. However, this procedural device does not institute a civil action joining the claimants of the disputed res, as does an interpleader action. Cf. MRCP 22; *See* also V. Griffith, Mississippi Chancery Practice, §§ 522-526 (2d ed. 1950) (tender and payment into court).

## 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.

### Comment

Rule 68 is intended to encourage settlements, avoid protracted litigation, and protect the party who is willing to settle from the burden of costs that subsequently accrue.

Although the privilege of an offer of settlement is extended only to the party defending against a claim, it furnishes a just procedure to all parties concerned. It is fair to the claimant because it does the defending party no good to make an offer of judgment that is not what the claimant might reasonably be expected to recover; he will not free himself of the costs if the judgment recovered is more than the offer. Likewise, it is fair to the defending party because it allows him to free himself of the court costs by offering to make a settlement. Finally, it benefits the court because it encourages settlements and discourages vexatious suits. *See* 12 Wright & Miller, Federal Practice and Procedure, Civil §§ 3001-3005 (1973); 7 Moore's Federal Practice ¶¶ 68.01-.06 (1974).

MRCP 68 requires an offer of judgment to be made at least fifteen days before the trial is scheduled to begin; the offer must be accepted, if at all, at least five days before trial to prevent the accrual of costs. This provision will also tend to prevent parties from making needless

preparation for trial. Cf. Fed.R.Civ.P. 68 (offer must be made at least ten days before trial; must be accepted before trial day).

## 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.

### Comment

Rule 69(a) provides that the traditional Mississippi legal devices continue to be available for the enforcement of judgments, and that the statutory procedures governing their use still prevail; there is no departure from prior law; *See* generally Miss. Code Ann. § 11-5-81 (fieri facias and garnishment to enforce chancery decrees for money); § 11-5-83 (sheriff to execute decrees); § 11-5-85 (decree to operate as conveyance); §§ 11-35-1 to 11-35-61 (general garnishment procedures); § 13-3-111 (time when execution shall be issued); § 13-3-113, *et seq*. (issuance, execution, and return of execution) (1972).

Rule 69(b) authorizes examinations of judgment debtors by two different processes. The creditor may proceed for an examination pursuant to Miss. Code Ann. §§ 13-1-261 *et seq*. (1972), the examination of judgment debtor statutes, or he may proceed pursuant to the discovery provisions of the Mississippi Rules of Civil Procedure.

[Amended effective September 1, 1987.]

## 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.

### Comment

The purpose of Rule 70 is to provide ample power to the courts for dealing effectively with parties who seek to thwart judgments by refusing to comply with orders or perform specific acts.

Rule 70 applies only after judgment is entered; Rules 64 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 or to perform only other specific acts and the party has failed to comply within the time specified. *See* 7 Moore's Federal Practice ¶¶ 70.01-.03 (1974); 12 Wright & Miller, Federal Practice and Procedure, Civil §§ 3021, 3022 (1973).

This rule is intended primarily to preclude recalcitrant parties from frustrating court orders for the performance of specific acts; however, the rule relies upon specific orders, issued by the

court or by the clerk, rather than upon arcane writs, to achieve performance pursuant to, or conformity with, judgments. Thus, under Rule 70(a) the court may designate a person to perform that act which a party refuses or fails to perform. *See*, e. g., *Carpenter v. Douglass*, 104 Miss. 83, 61 So. 161 (1913) (the court has power to appoint a commissioner to execute deeds if necessary to effectuate fully the ends of justice); Miss. Code Ann. § 11-5-85 (1972) (court may appoint commissioner to execute writing).

In the event all interest in realty or personalty is divested out of one party and vested in another by a judgment, Rule 70(b) provides that the judgment itself serves as the instrument of conveyance of such title. This procedure also conforms to the traditional Mississippi practice on writs of assistance and possession. *See* V. Griffith, Mississippi Chancery Practice, § 651 (2d ed. 1950).

Rule 70(c) authorizes the same procedure as the traditional writ of seizure in Mississippi practice for the taking of personalty from one in possession thereof and physically placing it in the possession of the successful litigant. This practice is referred to in some jurisdictions as a writ of assistance or sequestration; whatever its label the practice is familiar to Mississippi practitioners. *See* V. Griffith, *supra* § 663, nn. 70, 71, at 663. This rule also authorizes that possession of realty be surrendered to the successful litigant out of possession, as was formerly done pursuant to the writ of assistance, or writ of possession, as it was often called. *See* V. Griffith, *supra* § 651.

Finally, Rule 70(d) recites that courts may avail themselves of the traditional powers of contempt to enforce judgments; *See* Miss. Code Ann. §§ 9-1-17, 9-5-87 (1972); V. Griffith, *supra* §§ 664 et seq.

## 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.

### Comment

Rule 71 makes all orders fully enforceable in favor of and against all persons who are properly affected thereby, even though not parties to the action. For example, a court may make an order in favor of one not a party, such as when a foreclosure sale is made and the court orders the property delivered to the purchaser or his assignee; the purchaser or his assignee is then entitled to any process available to enforce the order that would otherwise be available to a party to the action. *See*, e. g, *Woods v. O'Brien*, 78 F. Supp. 221 (D.Mass.1948); *United States v. Hackett*, 123 F. Supp. 104 (W.D.Mo.1954); *See* also 7 Moore's Federal Practice, ¶¶ 71.01-.04 (1974); 12 Wright & Miller, Federal Practice and Procedure, Civil §§ 3031-3033 (1973).

Rule 71 has been drafted so as to exclude specifically creditors of a party to a divorce proceeding. For example, if the court ordered the husband to pay for certain household appliances to be used by the ex-wife, the vendor of the appliances would not be entitled to take advantage of this rule.

## RULE 71A. [EMINENT DOMAIN]
## [RESERVED]

### Comment

No counterpart to Federal Rule 71A, Condemnation of Property, has, as yet, been proposed for inclusion in the Mississippi Rules of Civil Procedure. More time than has thus far been available will be required for drafting a comprehensive rule governing eminent domain proceedings in Mississippi. Indeed, Federal Rule 71A drew more attention from the Federal Advisory Committee on Rules of Civil Practice and Procedure, and was drafted over a longer period of time, than any of the other federal rules; the rule was on the drawing boards from 1937 until 1951. *See* 12 Wright & Miller, Federal Practice and Procedure, Civil § 3041 (1972).

MRCP 71A is reserved for future consideration.

## CHAPTER IX. APPEALS
## RULES 72 TO 76. [OMITTED]

### Comment

Federal Rules 72-76 formerly covered the subject of appeals. Those rules were abrogated by the Supreme Court of the United States on July 1, 1968. Rules 72-76 of the Mississippi Rules of Civil Procedure are omitted in the interest of maintaining a rules numbering system that corresponds with their federal counterpart.

New procedures for taking appeals to the Mississippi Supreme Court were adopted as of January 1, 1988, officially designated Mississippi Supreme Court Rules, and may be cited as Miss.Sup.Ct.R. No. __. They modify or supplant the previous Supreme Court Rules and statutes pertaining thereto and should be followed in order to perfect an appeal to that Court.

[Amended effective March 1, 1989.]

## 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).

**Comment**

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) papers may be filed out of business hours by delivering them to the clerk or deputy clerk, or in case of exceptional necessity, the judge. *See* Miss.Const. § 24 (all courts shall be open).

Rule 77(b) requires that the "trial of all cases 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 geographic area served by the court without the consent of all parties affected thereby. *See* V. Griffith, Mississippi Chancery Practice, § 557 (2d ed. 1950).

Rule 77(c) requires that the clerk's office, with the clerk or a deputy in attendance, be open during business hours on all days except Saturdays, Sundays, and legal holidays Rule 77(c) also provides that the clerk may issue process and make record entries that do not require the allowance or the order of the court, such as motions and applications for issuance of process, for issuing final process to enforce and execute a judgment, and for entering defaults. *See* Miss. Code Ann. § 9-1-27 (1972).

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. This rule is substantially the same as Rule 77(d) of the Federal Rules of Civil Procedure.

Rule 77(d) was amended in 1997 to provide that parties may serve notice of the entry of a judgment or order on all other parties. This revision was a companion to a concurrent amendment adding present subsection (h) to Rule 4 of the Mississippi Rules of Appellate Procedure, whose purpose is to permit trial courts to ease strict sanctions now imposed on appellants whose notices of appeal are filed late because of their failure to receive notice of entry

of a judgment or order. *See, e.g., Bank of Edwards v. Cassity Auto Sales, Inc.*, 599 So. 2d 579 (Miss. 1992); *Schmitt v. Capers*, 573 So. 2d 773 (Miss. 1990); *Moore v. Wax*, 554 So. 2d 312 (Miss. 1989); *Tandy Electronics, Inc. v. Fletcher*, 554 So. 2d 308 (Miss. 1989). MISS. R. APP. P. 4(h) now provides a limited opportunity for relief in circumstances where the notice of entry of a judgment or order, required to be mailed by the clerk of the trial court pursuant to MISS. R. CIV. P. 77(d), is either not received by a party or is received so late as to impair the opportunity to file a timely notice of appeal.

Failure to receive notice may have increased in frequency with the growth in the caseload in the clerks' offices. The present strict rule imposes a duty on counsel to maintain contact with the court while a case is under submission. Such contact is more difficult to maintain as caseloads have increased, and can be a burden to the court as well as counsel.

MISS. R. CIV. P. 77(d) and MISS. R. APP. P. 4(h) thus combine to place a burden on prevailing parties who desire certainty that the time for appeal is running. Such parties can take the initiative to assure that their adversaries receive effective notice. An appropriate procedure for such notice is provided in Rule 5. While these Rules lighten the responsibility of the clerks' offices, they do not diminish the workload, for the clerk's duty to give notice of entry of judgments and orders is maintained.

[Amended effective February 1, 1990; July 1, 1997.]

## 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).

### Comment

Rule 78 requires each court to provide for the manner of submission and determination of motions requiring notice and a hearing.

The second paragraph of the rule permits any court to expedite its business by the adoption of local rules or orders providing for the submission and determination of "motions without oral hearing upon brief written statements of reasons in support and opposition."

Motion practice has been accomplished in numerous ways in Mississippi prior to the adoption of these rules. For an idea of the variety of practices in the courts *See*, e. g, Local Rule I.C. -- E., Sixth Chancery Court District; Local Rule Designating Vacation Day, and Local Rule for Procedures for Vacation Day Hearings in Greenwood, Seventh Chancery Court District; Local Rule 13, Eighth Chancery Court District; Local Rule 2, Seventeenth Chancery Court District;

Local Rule 5, Thirteenth Circuit Court District; Local Rule 7(a), Sixteenth Circuit Court District; Local Rule 5, Eighteenth Circuit Court District; Local Rule 8, Bolivar County Court.

Rule 78 does not alter any local rules governing motion practice; however, the rule must be considered in the light of MRCP 83, which requires that all local rules be forwarded to and published by the Supreme Court of Mississippi.

[Comment amended effective March 1, 1989.]

## 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).

### Comment

Rule 79(a) requires that the clerk of each court maintain a general docket, which is a chronological log of activities in civil actions. The requirements of this rule add nothing new to traditional Mississippi practice. *See* Miss. Code Ann. §§ 9-5-201 (chancery clerk to maintain general docket for chancery court); 9-7-171 (circuit clerk to maintain general docket for circuit court); 9-9-29 (circuit clerk to maintain general docket for county court) (1972). Rule 79(a) also specifies that the docket entries reflect the date on which the 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.

The minute book required to be maintained by Rule 79(b) is also familiar to Mississippi practitioners, *See* Miss. Code Ann. §§ 9-1-33 (minutes of circuit, chancery, and county courts to be maintained by clerk of each), 9-5-135 (chancery clerk to maintain minute book for chancery court). Rule 79(b) makes no changes in minute book practices.

Rule 79(c) merely requires that clerks of court keep suitable indexes of the civil docket; again, this tracks prior practice. *See*, e. g., Miss. Code Ann. § 9-5-201 (1972) (general docket shall be duly indexed). Subdivision (d) directs that clerks shall maintain such other records as may be required and recognizes that exact-copy photocopying Is a most useful and acceptable tool for the record-keeping functions.

Rule 79(e) is intended to ensure that the removal of case files from the clerk's office Is an exceptional, rather than routine, practice. Under the notice pleadings provision of the Mississippi Rules of Civil Procedure, "every order required by its terms to be served, every pleading subsequent to the original complaint . . ., every paper relating to discovery required to be served . . ., every written motion . . ., and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served on each of the parties." MRCP 5(b). Since each party in a civil action will have copies of all such papers, their office files should be as complete as the court's file, thereby obviating any need to remove the court's file. This provision modifies Miss. Code Ann. § 9-5-165 (1972) only to the extent it limits removal of court files.

## RULE 80. [STENOGRAPHIC REPORT OR TRANSCRIPT AS EVIDENCE] [OMITTED)]

### Comment

When Federal Rule 80 was adopted, subdivisions (a) and (b) permitted a court to appoint a stenographer to make a transcript of testimony in a particular case or to appoint official stenographers, and to tax their fees as costs of the action. The Court Reporter Act of 1948, 28 U.S.C.A. § 753, superseded subdivisions (a) and (b) of the federal rule. 12 Wright & Miller, Federal Practice and Procedure, Civil § 3121 (1973). All that remains of Federal Rule 80 is subdivision (c), which states as follows:

> *Stenographic Report or Transcript as Evidence*. Whenever the testimony of a witness at a trial or hearing which was stenographically reported is admissible in evidence at a later trial, it may be proved by the transcript thereof duly certified by the person who reported the testimony.

Mississippi has made 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). Additionally, Mississippi has a statutory equivalent of Federal Rule 80(c), Miss. Code Ann. § 9-13-43 (1972); therefore, no rule is necessary to make an official transcript acceptable proof of testimony.

## 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).

**Comment**

Rule 81 complements 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); 43-23-1, et seq., (family court proceedings); 23-5-187 (election contests); 31-13-1, *et seq.*, (bond validation); 41-21-61, *et seq.*, (persons in need of mental treatment); 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); 11-1-33 (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, such as security for costs, form of summons and methods of service of process and notices, service and filing of pleadings, computation of time, pleadings and motions, discovery, subpoenas, judgments and the like, the M.R.C.P. govern.

Rule 81(b) recognizes that M.R.C.P. are limited in applicability to ex parte matters and that such may be disposed of as summarily as any pertinent statutes permit. 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); *Duling v. Duling's Estate*, 211 Miss. 465, 52 So.2d 39 (1951).

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 nature 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)(1) enumerates those actions which are 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.

Rule 81(d)(2) enumerates those actions which are 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.

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)(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. 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.

Rule 81(e) provides that the forms of relief formerly obtainable under the listed writs continue to be available under the M.R.C.P., but that such actions are not to be considered as special forms of action. Rather, the relief obtainable heretofore pursuant to those special forms of action are still available as a civil action, or as a motion, in which the object of the former writ is now the prayer for relief.

Rule 81(f) modernizes legal terminology and is intended to ensure that conflicts need not arise over the technical labels applicable to the proceedings detailed in these rules. This method was selected to eliminate the necessity for rewriting numerous statutes which, while not changed or modified in sub stance, contain a term or terms inconsistent with those in the M.R.C.P.

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

## 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.]

### Comment

Rule 82(a) reaffirms that nothing in the Mississippi Rules of Civil Procedure shall be construed as extending or limiting the jurisdiction of any state court.

Subdivisions (b) and (d) pertain to venue. Generally, venue is controlled by statute in Mississippi, *See* Miss. Code Ann. §§ 11-11-1 through -59 (1972), and the Mississippi Rules of Civil Procedure follow the statutes.

The rule adopts the recommendation of the dissenting opinions in *Gillard v. Great Southern Mortgage & Loan Corp.*, 354 So. 2d 794 (Miss. 1978), and requires that the cost of transferring an action to a court wherein venue is proper shall be borne by the plaintiff. *See Gillard,* at 798-801 (Sugg and Broom, JJ., dissenting opinions). Additionally, Rule 82(d) secures to the plaintiff the right to select the court to which the action shall be transferred in the event it is originally brought in the wrong court and there are two or more other courts in which it could properly be filed.

Until the adoption of Rule 82(e), Mississippi had not recognized the doctrine of forum non-conveniens as applicable to the selection of forums within the state. *Clark v. Luvel Dairy Products, Inc.*, 731 So. 2d 1098 (Miss. 1998). Rule 82(e) now recognizes intrastate forum non-conveniens as to actions filed after its adoption on February 19, 2004. The rule recognizes that venue is essentially a legislative matter. However, where there are multiple venues which are all allowable under the statutes, and there are circumstances under which the inconvenience or disadvantage to one or more parties is substantial and a transfer to another county will not work a substantial hardship on the plaintiff, the court will now transfer the case or claim to the more convenient county. The doctrine is one of reason and common sense to be applied to avoid significant geographical disadvantage.

It has been said that modern advancements in technology and transportation have rendered the notion of intrastate forum non-conveniens obsolete. This is an overstatement. Although there is no doubt that many of the logistical difficulties of the past are now of lesser significance, the costs of travel, housing, the proximity of parties, witnesses, and non-trial staff and records remain factors for consideration in determining whether the burdens imposed by the plaintiff's choice of venue justify transfer.

[Comment amended February 20, 2004.]

## 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.]

### Comment

Rule 83 guarantees the right of trial judges to prescribe local rules of court, not inconsistent with the Mississippi Rules of Civil Procedure, as may be necessary to implement the MRCP; *see*, e. g., MRCP 16 (pre-trial procedures); 40 (trial calendaring); and 78 (motion day). All local rules must be filed with the Supreme Court of Mississippi. No uniform rules or local rules of any circuit, chancery or county court shall be effective unless approved by the Supreme Court.

[Amended March 10, 1994, effective retroactively from and after January 1, 1993; amended October 13, 1995, effective from and after April 14, 1994.]

## 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 _____ , 19__.

_____

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 __ _____ , 19_, 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 _____, 19__, 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 _____, 19_, 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_____

Social Security No._____

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 _____19 __.

_____

Notary Public

(Seal) My Commission Expires:_____

[Adopted effective March 1, 1985; amended effective May 2, 1985; amended March 17, 1995.]

## 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 _____ , 19 ___.

_____

Clerk of _____ County,

Mississippi

_____

_____

(Seal)

_____[This form shall appear on the reverse side of Form 1AA: Summons (Sheriff)]

RECEIVED THIS ___ DAY OF _____, 19 __.

BY_____

SHERIFF

**SHERIFF'S RETURN**

State of Mississippi )

County of_____)

( ) I personally delivered copies of the summons and complaint on the ___ day of _____ __, 19__, 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 ___, 19_, 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 _____, 19__, 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 _____, 19 __.

_____
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.]

## 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 _____, 19 __ .

_____

Notary Public

My Commission Expires_____

(Seal)

[Adopted effective March 1, 1985; amended effective May 2, 1985; amended March 17, 1995.]

## 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 _____, 19__, 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 _____, 19 __.

_____

Clerk of _____ County,

Mississippi

_____

_____

(Seal)

[Adopted effective March 1, 1985; amended effective May 2, 1985.]

## 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 _____ 19__, 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 _____ , 19__ .

_____

(Seal) Clerk of _____ County,

Mississippi

(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.]

## 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 _____, 19__, 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 _____, 19 __.

_____

(Seal) Clerk of County,

Mississippi

## 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.]

## FORM 2. COMPLAINT ON A PROMISSORY NOTE

1. Defendant on or about _____, 19__, 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 ____, 19__, 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 _____, 19__, 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 _____, 19__, 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 _____, 19__.

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_____, 19__.

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 _____, 19__.

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 _____. 19__, 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 _____, 19__, 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 _____, 19__, 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 ____, 19_, defendant issued a policy whereby the defendant insured the life of _____ who died on the __ day of _____ , 19_, 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 ____. 19_, 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 _____, 19_, 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 ___. 19__, 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 _____, 19__, 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 _____, 19__, 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 _____, 19__, 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 _____, 19__, 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 _____, 19__, 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 _____, 19__, 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 _____, 19_, 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 _____, 19__.

_____

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 _____, 19__; that letters of administration upon the estate of the said were issued on the ___day of _____, 19__, 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 _____, 19__): 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 _____, 19__.

_____

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 _____, 19___, 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 _____, 19__.

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 _____, 19__.

_____

Notary Public

## FORM 37. DOCKET OF ENTRY OF DEFAULT

Default entered against defendant _____ this ___day of _____, 19__.

## 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 _____, 19__.

_____

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.]