MISSISSIPPI RULES OF APPELLATE PROCEDURE

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Appendix 2.

Appendix 3.

MISSISSIPPI RULES OF APPELLATE PROCEDURE

Adopted Effective January 1, 1995

APPLICABILITY OF RULES

RULE 1. SCOPE OF RULES

These rules govern procedure in appeals to the Supreme Court of Mississippi and the Court of Appeals of the State of Mississippi, and proceedings on petitions for writs or other relief which the Supreme Court or the Court of Appeals or a justice of the Supreme Court or judge of the Court of Appeals is empowered to grant. When these rules provide for the making of a motion in the trial court, the procedure for making such motion shall be in accordance with the practice of the trial court.

Advisory Committee Historical Note

Effective January 1, 1995, Miss.R.App.P. 1 replaced Miss.Sup.Ct.R. 1, embracing proceedings in the Court of Appeals. 644-647 So.2d XXIII-XXIV (West Miss.Cases 1994).

[Adopted August 21, 1996.]

Comment

These rules are not to be construed to extend or limit jurisdiction of the Supreme Court, except that Rule 5 is intended to expand the occasions upon which the Court may exercise its power to hear interlocutory appeals. *See Southern Farm Bureau Cas. Ins. v. Holland*, 469 So. 2d 55, 62-64 (Miss. 1985), (Anderson, J., concurring). The jurisdictional statute permits interlocutory appeals "in cases particularly provided for by law." Miss. Code Ann. § 9-3-9 (Supp. 1994). These rules are "law." *See Newell v. State*, 308 So. 2d 71 (Miss. 1975).

Rules which provide for the making of a motion in the trial court include Rules 4(g), extension of time to appeal; 6, determination of *in forma pauperis* status; 8(b), stay on appeal to be first sought in trial court; and 10(e) correction of record on appeal. Trial court practice is governed by the Mississippi Rules of Civil Procedure, Mississippi Rules of Evidence, Mississippi Rules of Criminal Procedure, applicable uniform rules, and local rules where adopted pursuant to M.R.C.P. 83 or MRCrP 1.9. The term "trial court" in these rules includes a circuit or chancery court sitting as an appellate court. Rule 46(b) concerning the admission of foreign attorneys governs admission in trial courts, in administrative agencies, and in the appellate courts.

The Mississippi Rules of Appellate Procedure, effective January 1, 1995, are based on the Mississippi Supreme Court Rules and were adopted to include procedure in the Court of Appeals of the State of Mississippi pursuant to Miss. Code Ann. §9-4-1 *et seq.* (Supp. 1994).

RULE 2. PENALTIES FOR NONCOMPLIANCE WITH RULES; SUSPENSION OF RULES

(a) Dismissal of Appeal.

(1) *Mandatory Dismissal.* An appeal shall be dismissed if the notice of appeal was not timely filed pursuant to Rules 4 or 5.

(2) *Discretionary Dismissal.* An appeal may be dismissed upon motion of a party or on motion of the appropriate appellate court (i) when the court determines that there is an obvious failure to prosecute an appeal; or (ii) when a party fails to comply substantially with these rules. When either court, on its own motion or on motion of a party, determines that dismissal may be warranted under this Rule 2(a)(2), the clerk of the Supreme Court shall give written notice to the party in default, apprising the party of the nature of the deficiency. If the party in default fails to correct the deficiency within fourteen (14) days after notification, the appeal shall be dismissed by the clerk of the Supreme Court. The attorney for the party in default has the burden to correct promptly any deficiency or to see that the default is corrected by the appropriate official. Motions for additional time in which to file briefs will not be entertained after the notice of the deficiency has issued.

(b) Other Sanctions. The Supreme Court or the Court of Appeals may, after reasonable notice given by the clerk of the Supreme Court and opportunity to show cause to the contrary, and after hearing, if requested, impose such sanctions as may be appropriate on any party, court reporter, trial court clerk, or attorney who fails to comply with these rules or any order issued pursuant to these rules. Trial court judges have concurrent jurisdiction to sanction any party, court reporter, trial court clerk, or attorney who fails to comply with Rules 3, 10, and 11. A copy of any such sanction order shall be served on the clerk of the Supreme Court and may be reviewed by the Supreme Court for abuse of discretion.

(c) Suspension of Rules. In the interest of expediting decision, or for other good cause shown, the Supreme Court or the Court of Appeals may suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction. The time for taking an appeal under Rules 4 or 5 may be extended in criminal and post-conviction cases, but not in civil cases.

[Amended effective January 1, 1999; June 29, 2017.]

Advisory Committee Historical Note

Effective January 1, 1999, Rule 2(a)(2) was amended to provide that motions for additional time will not be entertained after notice of deficiency has issued. 717-722 So.2d XXVII (West Miss.Cases 1998).

Effective January 1, 1999, Rule 2(b) was amended to effect a technical change. 717-722 So.2d XXVII (West Miss.Cases 1998).

Effective July 1, 1997, the Comment to Rule 2 was amended to reflect the promulgation of new Rule 4(h). 689-692 So.2d LXVI (West Miss. Cases 1997).

Effective January 1, 1995, Miss.R.App.P. 2 replaced Miss.Sup.Ct.R. 2, embracing proceedings in the Court of Appeals. 644-647 So.2d XXIV-XXVI (West Miss.Cases 1994).

Effective March 17, 1994, Miss.Sup.Ct.R. 2(a)(2) was amended to provide that if the party in default fails to correct the deficiency within 14 days after notification, the appeal shall be dismissed by the clerk. 632-635 So.2d XLII-XLIII (West Miss.Cases 1994).

Comment

Perpetuating the spirit underlying the former rules of the Mississippi Supreme Court, the present rules will be construed to facilitate the just and efficient disposition of causes brought before the Supreme Court and the Court of Appeals. Accordingly, compliance with even the most technical requirements of the rules is encouraged.

Under Rule 2(a)(1), if an appeal is not taken within the time specified in Rules 4 or 5, either court, on its own motion or on motion of party, shall dismiss it. Rule 4(g) states when an extension of time may be granted by the trial court. Rule 2(c) provides for the suspension of Rule 2(a)(1) in criminal and post-conviction cases.

Where dismissal appears warranted for any other reason, the rule provides for the clerk to give written notice of the deficiency to counsel for the defaulting party. Specifically, the clerk will notify counsel that the party is in default in some manner and has 14 days to correct the noted deficiency. If the deficiency is not corrected within 14 days after notification, the appeal shall be dismissed by the clerk. In *pro se* proceedings, notification of deficiency shall be sent to the party. The rule recognizes that deficiencies may result from actions of third parties, such as court officials. The primary responsibility, however, for assuring correction of the deficiency remains with the defaulting party.

Rule 2(b) states the inherent disciplinary authority of either appellate court over

parties and officers of the court. Because Rules 3, 10, and 11 involve actions to be taken in the trial court to prepare the appellate record, the rule recognizes the concurrent jurisdiction of the trial court to impose sanctions for noncompliance with those rules. *See Wilson v. State*, 461 So. 2d 728, 729 (Miss. 1984).

Rule 2(c) provides for suspension of the rules for reasons of expedition or good cause shown. It is important to note that in civil cases, under Rule 2(c), the Court may not extend the time for taking an appeal except as provided by Rule 4 (g) or (h). This is a departure from prior law. *See Clark v. City of Pascagoula*, 473 So.2d 477 (Miss.1985); *but see Roberts v. Grafe Auto Co., Inc.*, 653 So.2d 250, 250-251 (Miss. 1994) (The Court held that several verdict forms signed by the trial court were not "final judgments" triggering the 30-day time for appeal. The Court further stated that "[e]ven assuming arguendo that the forms could be construed to be final judgments, [appellant] was never notified of their existence, and her right to due process would protect her from losing her right to appeal since she was not aware of the jury verdict forms and was not notified of their existence.") Where a party has filed an otherwise timely notice of appeal which is ineffective under Rule 4(d) or 4(e), the Court may, however, suspend the operation of 4(d) or 4(e) to prevent manifest injustice. This is not an extension of the "time for taking" the appeal. Also, because procedures for criminal appeals apply to post-conviction relief proceedings, Miss. Code Ann. § 99-39-25(1), the Supreme Court may suspend the rules and extend the time for taking an appeal in those proceedings. Rules 2(c) and 4(g) thus supplant the procedure described in *Jones v. State*, 355 So.2d 89, 90 (Miss.1978).

[Amended effective July 1, 1997; June 29, 2017.]

APPEALS FROM TRIAL COURTS

RULE 3. APPEAL AS OF RIGHT - HOW TAKEN

(a) Filing the Notice of Appeal. In all cases, both civil and criminal, in which an appeal is permitted by law as of right to the Supreme Court, there shall be one procedure for perfecting such appeal. That procedure is prescribed in these rules. All statutes, other sets of rules, decisions or orders in conflict with these rules shall be of no further force or effect. An appeal permitted by law as of right from a trial court to the Supreme Court shall be taken by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the perfection of the appeal, but is ground only for such action as the Supreme Court deems appropriate, which may include dismissal of the appeal. Interlocutory appeals by permission shall be taken in the manner prescribed by Rule 5.

(b) Joint or Consolidated Appeals. If two or more persons are entitled to appeal from a judgment or order of a trial court and their interests are such as to make joinder practicable, they may file a joint notice of appeal, or may join in appeal after filing separate timely notices of appeal, and they may thereafter proceed on appeal as a single appellant. Appeals may be consolidated by order of the Supreme Court (or of the Court of Appeals in cases assigned to the Court of Appeals) upon its own motion or upon motion of a party, or by stipulation of the parties to the several appeals.

(c) Content of the Notice of Appeal. The notice of appeal shall specify the party or parties taking the appeal and the party or parties against whom the appeal is taken, and shall designate as a whole or in part the judgment or order appealed from. An appeal shall not be dismissed for informality of form or title of the notice of appeal.

(d) Service of the Notice of Appeal. The clerk of the trial court shall serve notice of the filing of a notice of appeal by mailing a copy of the notice to counsel of record for each party other than the appellant, or, if a party is not represented by counsel, to the last known address of that party, and to the court reporter; and the clerk shall transmit to the clerk of the Supreme Court forthwith a copy of the notice of appeal, together with the docket fee as provided in Rule 3(e), and, with cost to the appellant, a certified copy of the trial court docket as of the date of the filing of the notice of appeal, a certified copy of the opinion, if any, and a certified copy of the judgment from which the appeal is being taken and a certified copy of the Civil Case Filing Form in civil cases or the Notice of Criminal Disposition Form in criminal cases. When an appeal is taken by a defendant in a criminal case, the clerk shall also serve a copy of the notice of appeal upon the defendant, either by personal service or by mail addressed to the defendant. The clerk shall note on each copy served the date on which the notice of appeal was filed. Failure of the clerk to serve notice shall not affect the perfection of the appeal. Service shall be sufficient notwithstanding the death of a party or

the party's counsel. The clerk shall note in the docket the names of the parties to whom the clerk mails copies with the date of mailing.

(e) Payment of Fees. Upon the filing of any separate or joint notice of appeal from the trial court, the appellant shall pay to the clerk of the trial court the docket fee to be received by the clerk of the trial court on behalf of the Supreme Court.

[Adopted to govern matters filed on or after January 1, 1995; amended June 21, 1996.]

Advisory Committee Historical Note

Effective June 21, 1996, Rule 3(d) was amended to require the clerk of the trial court to transmit the Civil Case Filing Form or the Notice of Criminal Disposition Form to the clerk of the Supreme Court. 673-678 So.2d XXXVII (West Miss. Cases 1996).

Effective January 1, 1995, Miss.R.App.P. 3 replaced Miss.Sup.Ct.R. 3, embracing proceedings in the Court of Appeals. Rule 3(d) was further amended to require the clerk of the trial court to transmit additional documents to the clerk of the Supreme Court. 644-647 So.2d XXVI-XXVII (West Miss.Cases 1994).

Effective July 1, 1994, the Comment to Miss.Sup.Ct.R. 3 was amended to note that the fee to be paid under Rule 3(e) is provided by statute. 632-635 So.2d V (West Miss.Cases 1994).

[Adopted August 21, 1996; amended effective July 1, 1997; July 1, 1998.]

Comment

Rule 3 and Rule 4 combine to set forth the procedures and time frame for perfecting an appeal. The same procedures are to be used for appeals in civil and criminal cases. Rules 10 and 11 state how the content of the record on appeal is determined and how the record is completed and transmitted to the Court.

Subdivision 3(a) departs from prior practice and provides that the only absolutely necessary step in the process is the timely filing of the notice of appeal. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal. If the notice of appeal is not filed within the time specified in Rule 4, either the Supreme Court or the Court of Appeals, on its own motion or on motion of a party, will dismiss it. Failure to take any step, other than the timely filing of a notice of appeal, is ground for such action as either appellate court deems appropriate, which may include dismissal of the appeal. Steps which must be taken within seven days after filing the notice of appeal include the designation of the record under Rule 10(b)(1) and deposit of cost estimate under Rule 11(b)(1).

The appellant is required by M.R.C.P. 5(a) to serve on all parties a copy of the notice of appeal as submitted to the trial court clerk. Rule 3(d) requires the clerk to transmit to all parties and to the Supreme Court clerk copies of the notice of appeal indicating the date on which the notice of appeal was filed. Ordinarily, the appellant should supply the trial court clerk with a sufficient number of copies of the notice of appeal to accomplish this. The clerk may alternatively prepare the copies at the appellant's expense. The failure of the appellant or the trial court clerk to serve copies of the notice does not affect the perfection of the appeal.

The fee to be paid under Rule 3(e) is set by statute. *See* Miss. Code Ann. § 25-7-3 (1994).

RULE 4. APPEAL AS OF RIGHT - WHEN TAKEN

(a) Appeal and Cross-Appeals in Civil and Criminal Cases. Except as provided in Rules 4(d) and 4(e), in a civil or criminal case in which an appeal or cross-appeal is permitted by law as of right from a trial court to the Supreme Court, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from. If a notice of appeal is mistakenly filed in the Supreme Court, the clerk of the Supreme Court shall note on it the date on which it was received and transmit it to the clerk of the trial court and it shall be deemed filed in the trial court on the date so noted.

(b) Notice Before Entry of Judgment. A notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day of the entry.

(c) Notice by Another Party. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this rule, whichever period last expires.

(d) Post-trial Motions in Civil Cases. If any party files a timely motion of a type specified immediately below the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion under the Mississippi Rules of Civil Procedure (1) for judgment under Rule 50(b); (2) under Rule 52(b) to amend or make additional findings of facts, whether or not granting the motion would alter the judgment; (3) under Rule 59 to alter or amend the judgment; (4) under Rule 59 for a new trial; or (5) for relief under Rule 60 if the motion is filed no later than 10 days after the entry of judgment. A notice of appeal filed after announcement or entry of the judgment but before disposition of any of the above motions is ineffective to appeal from the judgment or order, or part thereof, specified in the notice of appeal, until the entry of the order disposing of the last such motion outstanding. Notwithstanding the provisions of Appellate Rule 3(c), a valid notice of appeal is effective to appeal from an order disposing of any of the above motions.

(e) Post-trial Motions in Criminal Cases. If a defendant makes a timely motion (1) for judgment of acquittal notwithstanding the verdict of the jury, or (2) for a new trial under MRCrP 25.1, the time for appeal for all parties shall run from the entry of the order denying such motion. Notwithstanding anything in this rule to the contrary, in criminal cases the 30 day period shall run from the date of the denial of any motion contemplated by this subparagraph, or from the date of imposition of sentence, whichever occurs later. A notice of appeal filed after the court announces a decision, sentence, or order but before it disposes of any of the above motions, is ineffective until the date of the entry of the order disposing

of the last such motion outstanding, or until the date of the entry of the judgment of conviction, whichever is later. Notwithstanding the provisions of Appellate Rule 3(c), a valid notice of appeal is effective to appeal from an order disposing of any of the above motions.

(f) Parties Under Disability. In the case of parties under a disability of infancy or unsoundness of mind, the various periods of time for which provision is made in this rule and within which periods of time action must be taken shall not begin to run until the date on which the disability of any such party shall have been removed. However, in cases where the appellant infant or person of unsound mind was a plaintiff or complainant, and in cases where such a person was a party defendant and there had been appointed for him or her a guardian *ad litem*, appeals to the Supreme Court shall be taken in the manner prescribed in this rule within two years of the entry of the judgment or order which would cause to commence the running of the 30 day time period for all other appellants as provided in this rule.

(g) Extensions. The trial court may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time otherwise prescribed by this rule. Any such motion which is filed before expiration of the prescribed time may be granted for good cause and may be *ex parte* unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to other parties, and the motion shall be granted only upon a showing of excusable neglect. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

(h) Reopening Time for Appeal. The trial court, if it finds (a) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry and (b) that no party would be prejudiced, may, upon motion filed within 180 days of entry of the judgment or order or within 7 days of receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

(i) Taxpayer Appeals. If the board of supervisors of any county, or the mayor and board of aldermen of any city, town or village, or any other board, commission or other officer of any county, or municipality, or district, sued in an official capacity, fails to file a notice of appeal under Rule 4(a) within 20 days after the date of entry of an adverse judgment or order, or within 7 days after filing of a notice by another party pursuant to Rule 4(c), any taxpayer of the county, municipality or district shall have the right at the taxpayer's own expense to employ private counsel to prosecute the appeal in compliance with these rules. If the governmental entity files a notice of appeal, the appeal shall not be dismissed if any such taxpayer objects and prosecutes the appeal at the taxpayer's own expense.

[Amended effective July 1, 1997; July 1, 1998.]

Advisory Committee Historical Note

Effective April 29, 1998, Rules 4(d) and (e) were amended to provide that a notice of appeal filed before disposition of specified post trial motions becomes effective on disposition thereof and is effective to appeal said disposition. In addition, the list of specified motions was enlarged to include M.R.C.P. 60 motions filed within 10 days. 706-708 So.2d XLIV (West Miss.Cases 1998).

Effective July 1, 1997, a new Rule 4(h) was added to provide for reopening of time for appeal in the event that a notice of entry of judgment is not received. The former Rule 4(h) was redesignated 4(i). 689-692 So. 2d LXII (West Miss. Cases 1997).

Effective January 1, 1995, Miss.R.App.P. 4 replaced Miss.Sup.Ct.R. 4, embracing proceedings in the Court of Appeals. 644-647 So.2d XXVII-XXX (West Miss.Cases 1994).

Effective July 1, 1994, the Comment to Miss.Sup.Ct.R. 4 was amended to delete references to repealed statutes and material concerning the transition from statutory procedures to Rule practice. 632-635 So. 2d V (West Miss.Cases 1994).

Effective July 1, 1994, the Comment to Miss.Sup.Ct.R. 4 was amended to provide that the date of the entry of the judgment is the date the judgment is entered in the general docket of the clerk of court, and to delete an outdated case citation. 632-635 So.2d XLIV-XLV (West Miss.Cases 1994).

[Adopted August 21, 1996; amended effective July 1, 1997; July 1, 1998.]

Comment

Rule 4 applies to appeals and cross-appeals in all civil and criminal cases. The date of entry of judgment is the date the judgment is entered in the general docket of the clerk of the court. M.R.C.P. 58.

The notice of appeal requirement applies to all forms of appeal, including cross-appeals. Rule 4(c) requires that a notice of appeal for a cross-appeal be filed within 14 days after the date on which the first notice of appeal was filed, unless a longer period is prescribed by another provision of Rule 4.

Previously, Rule 4(d) specified certain post-trial motions that had to await disposition

before a valid notice of appeal could be filed. Any notice of appeal filed before such disposition had no force or effect. Rule 4(e) had the same provisions for specified post-trial motions in criminal cases. Those provisions of Rules 4(d) and 4(e), however, created a trap for an unsuspecting litigant who filed a notice of appeal before a post trial motion, or while a post trial motion was pending. Because the Rules required a party to file a new notice of appeal after the motion's disposition, unless a new notice was filed the Supreme Court lacked jurisdiction to hear the appeal. *See In re Kimbrough*, 680 So.2d 799 (Miss.1996). Many litigants, especially *pro se* litigants, failed to file the second notice of appeal, and the Court expressed dissatisfaction with the rule. *See id.* (Banks, J., dissenting) and (McRae, J., dissenting).

Rules 4(d) and 4(e) now provide that a notice of appeal filed before the disposition of a specified post trial motion will become effective upon disposition of the motion. A notice filed before the filing of one of the specified motions or after the filing of a motion but before its disposition is, in effect, suspended until the motions disposition, whereupon the previously filed notice effectively places jurisdiction in the Supreme Court. Still, ordinarily, the filing of a notice of appeal should come after the disposition of these motions. An appeal should not be noticed and docketed in the Supreme Court while it is still possible that the appealing party may obtain relief in the trial court.

Because a notice of appeal will ripen into an effective appeal upon disposition of a post trial motion, in some instances there will be an appeal from a judgment that has been altered substantially because the motion was granted in whole or in part. Many such appeals will be dismissed for want of prosecution when the appellant fails to meet the briefing schedule. But, the appellee may also move to strike the appeal. When responding to such a motion, the appellant would have an opportunity to state that, even though some relief sought in a post trial motion was granted, the appellant still plans to pursue the appeal. Because the appellant's response would provide the appellee with sufficient notice of the appellant's intentions, an additional notice of appeal is unnecessary.

While Rule 4 is patterned after its Federal counterpart, Rule 4(d) departs from Federal practice by providing that a valid notice of appeal is effective to appeal from an order disposing of a post trial tolling motion. Under FED. R. APP. P. 4(a)(4), if a party wishes to appeal from the disposition of a post trial tolling motion, the party must amend the notice to so indicate. However, requiring amendment of the notice of appeal would create a new, albeit less severe, trap for unsuspecting litigants, without serving a substantial purpose.

Rule 4(d) is also amended to include, among motions that extend the time for filing a notice of appeal, a Rule 60 motion that is filed within 10 days after entry of judgment. This eliminates the difficulty of determining whether a post trial motion made within 10 days after entry of a judgment is a Rule 59 motion, which tolls the time for filing an appeal, or a Rule 60 motion, which historically has not tolled the time. *See Michael v. Michael,* 650 So.2d 469

(Miss. 1995).

Rule 4(f) continues to recognize an extension for parties under a legal disability. *See Parks v. Knight*, 491 So. 2d 217 (Miss. 1986).

Rule 4(g) is based on Fed. R. App. P. 4(a)(5). A motion filed before expiration of the 30 day period may be *ex parte* and may be granted for any "good cause." This standard is identical to that found in Rule 26. The extension may not go beyond 30 days after the time prescribed in Rule 4(a).

If the motion is not filed until the extension period has begun to run, the burden rests on the appellant to show the failure to file a timely notice was a result of "excusable neglect." Mere failure to learn of entry of the judgment is generally not a ground for showing excusable neglect. Counsel in a case taken under advisement has a duty to check the docket regularly. *But see City of Gulfport v. Saxon*, 437 So. 2d 1215, 1217 (Miss. 1983) (when trial court sits as an appellate court, parties may reasonably expect notification from the court or clerk when a ruling is made). Filing a notice is a simple act, and a party must do all it could reasonably be expected to do to perfect the appeal in a timely fashion. Counsel's failure to read published rules of court and counsel's reliance on mistaken legal advice from a trial court clerk will not show excusable neglect. *Campbell v. Bowlin*, 724 F. 2d 484, 488 (5th Cir. 1984); *Reed v. Kroger Co.*, 478 F. 2d 1268 (T.E.C.A. 1973). Excusable neglect will not be shown by counsel's busy trial schedule. *Pinero Schroeder v. Fed. Nat'l Mtg. Ass'n*, 574 F. 2d 1117 (1st Cir. 1978).

On the other hand, a party misled by actions of the court can establish excusable neglect. *See Chipser v. Kohlmeyer & Co.*, 600 F. 2d 1061, 1063 (5th Cir. 1979); *In re Morrow*, 502 F. 2d 520, 522 (5th Cir. 1974) (dictum). Excusable neglect may be shown where a timely mailed notice was late because of unanticipated and uncontrollable delays in the mail. *Fallen v. United States*, 378 U.S. 139, 84 S. Ct. 1689, 12 L. Ed. 2d 760 (1964). See generally, 20 W. Moore, Federal Practice§ 304-13.

An excusable neglect motion must be filed within the 30 day extension period. The extension will be limited to that period, or to a period ending 10 days after the entry of an order granting the motion, whichever occurs later.

In criminal cases, the Court may suspend Rule 4 to permit out of time appeals. Post-conviction relief proceedings are governed by the rules controlling criminal appeals. Miss. Code Ann. § 99-39-25(1). No such suspension, however, is permitted in a civil case. *See* Rules 2(c); 26(b).

Rule 4(h) is patterned after FED. R. APP. P. 4(a)(6), which was added to the Federal

Rules in 1991. Rule 4(h) provides a limited opportunity for relief, independent of and in addition to that available under Rule 4(g), 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 Rule 77(d) of the Mississippi Rules of Civil Procedure, is either not received by a party or is received so late as to impair the opportunity to file a timely notice of appeal. Rule 4(h) allows a trial court to reopen for a brief period the time for appeal upon a finding that notice of entry of a judgment or order was not received from the clerk or a party within 21 days of its entry and that no party would be prejudiced. While the party seeking relief under Rule 4(h) bears the burden of persuading the trial court of lack of timely notice, a specific factual denial of receipt of notice rebuts and terminates the presumption that mailed notice was received. *See Nunley v. City of Los Angeles*, 52 F.3d 792, 798 (9th Cir. 1995). "Prejudice" means some adverse consequence other than the cost of having to oppose the appeal and encounter the risk of reversal, consequences that are present in every appeal. Prejudice might arise, for example, if the appellee had taken some action in reliance on the expiration of the normal time period for filing a notice of appeal.

While the trial court retains some discretion to refuse to reopen the time for appeal even when the requirements of Rule (4)(h) are met, the concept of excusable neglect embodied in Rule 4(g) simply has no place in the application of Rule 4(h). *See Avolio v. Suffolk,* 29 F.3d 50, 53 (2d Cir. 1994). "To hold otherwise would negate the addition of Rule 4[h], which provides an avenue of relief separate and apart from Rule 4[g]." *Nunley v. City of Los Angeles*, 52 F.3d 792, 797 (9th Cir. 1995). Thus, "where non-receipt has been proven and no other party would be prejudiced, the denial of relief cannot rest on [a lack of excusable neglect, such as] a party's failure to learn independently of the entry of judgment during the thirty-day period for filing notices of appeal." *Id.* at 798.

Reopening may be ordered only upon a motion filed within 180 days of the entry of a judgment or order or within 7 days of receipt of notice of such entry, whichever is earlier. This provision establishes an outer time limit of 180 days for a party who fails to receive timely notice of entry of a judgment or order to seek additional time to appeal and enables any winning party to shorten the 180-day period by sending (and establishing proof of receipt of) its own notice of entry of a judgment or order, as authorized by Miss. R. Civ. P. 77(d). Winning parties are encouraged to send their own notice in order to lessen the chance that a judge will accept a claim of non-receipt in the face of evidence that notices were sent by both the clerk and the winning party. Receipt of a winning party's notice will shorten only the time for reopening the time for appeal under this subdivision, leaving the normal time periods for appeal unaffected.

If the motion is granted, the trial court may reopen the time for filing a notice of appeal only for a period of 14 days from the date of entry of the order reopening the time for appeal.

The taxpayer who prosecutes an appeal under Rule 4(i) must comply with these rules and file a timely notice of appeal under 4(a), or 4(c), if applicable.

[Amended effective July 1, 1997; July 1, 1998; June 29, 2017.]

RULE 5. INTERLOCUTORY APPEAL BY PERMISSION

(a) Petition for Permission to Appeal. An appeal from an interlocutory order may be sought if a substantial basis exists for a difference of opinion on a question of law as to which appellate resolution may:

(1) Materially advance the termination of the litigation and avoid exceptional expense to the parties; or

(2) Protect a party from substantial and irreparable injury; or

(3) Resolve an issue of general importance in the administration of justice.

Appeal from such an order may be sought by filing a petition for permission to appeal with the clerk of the Supreme Court within 21 days after the entry of such order in the trial court with proof of service on the trial judge and all other parties to the action in the trial court.

(b) Content of Petition; Answer. The petition shall contain a statement of the facts necessary to an understanding of the question of law determined by the order of the trial court; a statement of the question itself; a statement of the current status of the case; and a statement as to why the petition for interlocutory appeal is timely. The petition shall further identify all other cases or petitions for interlocutory appeal pending before the appellate court and known to the petitioner which are related to the matter for which interlocutory review is sought. The petition shall include or have annexed a copy of the order from which appeal is sought and of any related findings of fact, conclusions of law or opinion. Within 14 days after service of the petition, the trial judge may file a statement informing the appellate court of any reasons why that judge believes that the petition should or should not be granted, and any adverse party may file an answer in opposition with the clerk of the Supreme Court, with proof of service on the trial judge and all other parties to the action in the trial court. The petition with any statement by the trial judge and answers of all parties responding shall be submitted without oral argument unless otherwise ordered.

(c) Form of Papers; Number of Copies. Four (4) copies of the petition and answer, if any, shall be filed with the original, but the Court may require that additional copies be furnished. The provisions of Rule 27 concerning motions shall govern the filing and consideration of the petition and answer, except that no petition or answer, including its supporting brief, shall exceed 15 pages in length.

(d) Grant of Permission; Prepayment of Costs; Filing of Record. If permission to appeal is granted by the Supreme Court, the appellant shall pay the docket fee as required

by Rule 3(e) within 14 days after entry of the order granting permission to appeal, and the record on appeal shall be transmitted and filed and the appeal docketed in accordance with Rules 10, 11, and 13. The time fixed by those rules for transmitting the record and docketing the appeal shall run from the date of entry of the order granting permission to appeal. A notice of appeal need not be filed.

(e) Expedited Proceedings. The Court may in its discretion expedite the appeal and give it preference over ordinary civil cases. If the Court determines that the issues presented can be fairly decided on the petition, response and exhibits presented, the Court may decide those issues simultaneously with the granting of the petition, without awaiting preparation of a record or further briefing.

(f) Effect on Trial Court Proceedings. The petition for appeal shall not stay proceedings in the trial court unless the trial judge or the Supreme Court shall so order.

[Amended effective July 29, 2004 to add paragraph (e) regarding expedited proceedings when the petition is granted. Effective December 9, 2004, as to trial court orders entered from and after March 1, 2005, paragraph (a) and (b) are amended to eliminate provision for seeking certification of the issue by the trial judge and provide the trial judge an opportunity to file a statement regarding the issue.]

Advisory Committee Historical Note

Effective April 15, 2004, the Comment was amended to note that Rule 5 does not alter the applicability of Miss. Code Ann. § 99-35-103 (Rev. 2000) regarding appeals by the government in criminal cases.

Effective January 1, 1995, Miss.R.App.P. 5 replaced Miss.Sup.Ct.R. 5, 644-647 So.2d XXX-XXXIII (West Miss.Cases 1994).

Effective July 1, 1994, the Comment to Miss.Sup.Ct.R. 5 was amended to delete a reference to a repealed statute. 632-635 So.2d LI (West Miss.Cases 1994).

Comment

This rule is a composite of Fed. R. App. P. 5, 28 U.S.C. § 1292(b) and American Bar Ass'n. *Standards Relating to Appellate Courts* § 3.12 (1977). *See also*, Ala. R. App. P. 5; Comment, 88 Harv. L. Rev. 607 (1975). It provides for interlocutory appeal from Circuit, Chancery and County Courts. *See Sonford Products Corp. v. Freels*, 495 So. 2d 468, 471 (Miss. 1986); *Kilgore v. Barnes*, 490 So. 2d 895, 896 (Miss. 1986); *Southern Farm Bureau Cas. Ins. v. Holland*, 469 So. 2d 55, 62-64 (Miss. 1985) (Anderson, J., concurring). It applies

to both civil and criminal cases. *Cf. State v. Caldwell*, 492 So. 2d 575, 576-577 (Miss. 1986) (remedial writ granted where constitutional rights violated prior to criminal trial).

Prior to March 1, 2005, Rule 5(a) required the petitioner to seek certification for an interlocutory appeal first from the trial court. Denial of certification did not limit the right of the petitioner to seek interlocutory review, but submitting the matter to the trial judge was a prerequisite to proceeding in the Supreme Court. This requirement has been eliminated by the amendment as to trial court orders entered from and after March 1, 2005. Under the rule prior to the amendment, the 14 day time limit ran from the time of entry of the judge's order ruling on a motion to amend the order which was the subject of the petition. With the elimination of the requirement of trial court certification or denial of certification as to orders entered after March 1, 2005, the petition must be filed within 21 days following the entry of the order which the petitioner submits for interlocutory review. While an interlocutory appeal may be sought at any time, the timeliness of the petition decreases as trial approaches. The practice of seeking belated reconsideration of the trial court's ruling for the purpose of renewing the time allowed for seeking interlocutory review is condemned. The rule is unlike federal practice in which both courts must agree before an interlocutory appeal will be heard under 28 U.S.C. § 1292(b).

The March 1, 2005 amendment recognizes that the trial court's views as to whether interlocutory review should be granted are often helpful. The amendment requires that the petition be served on the trial judge and invites that judge's statement as to the reasons why the petition should or should not be granted.

The standards for granting interlocutory appeal are based on existing law. Appeal will not be permitted except to resolve a question of law, and this includes the application of law to fact. There must be a substantial basis for a difference of opinion with the trial court. *See* Fed. R. App. P. 5(b); 28 U.S.C. § 1292(b). A question of law need not control the entire case, but must be sufficiently important to the litigation to merit interlocutory appeal. In this latter respect, the rule departs from the standards set forth in § 1292(b) and adopts the language followed by other state courts. *See, e.g.*, Ill. Sup. Ct. R. 308. Rule 5 does not alter the applicability of Miss. Code Ann. § 99-35-103 (Rev. 2000) regarding appeals by the government in criminal cases. *State v. Hicks*, 806 So. 2d 261 (Miss. 2002).

Rule 5(a)(1) begins with the federal requirement that interlocutory review will be permitted when such review will "materially advance the termination of the litigation." *See* Fed. R. App. P. 5(b); 28 U.S.C. § 1292(b). It adds the requirement of the now-repealed Miss. Code Ann. § 11-51-7 (Supp. 1986) that the appellant must show that the appeal may avoid expense as well as delay.

Rule 5(a)(2) permits interlocutory appeal where review will protect a party from substantial and irreparable injury. This category would permit interlocutory review of rulings

on injunctions and receivership matters allowed as of right under 28 U.S.C. § 1292(a)(1). It would continue present state practice of interlocutory review of chancery orders requiring money to be paid or the possession of property changed, but only if compliance with such an order threatened the opposite party with irreparable injury.

Rule 5(a)(3) provides the Court with flexible authority to grant interlocutory review in situations in which the pertinent interest is the administration of justice. The interest "is that of the proper administration of justice generally--for example, when an order involves a question of procedure that would likely become moot by the time final judgment was entered but should be authoritatively resolved for the purposes of future guidance of courts below." American Bar Ass'n, *Standards Relating to Appellate Courts* § 3.12, at 29. *See also* Wisc. Stat. Ann. § 809.50(c) (1986). By permitting review to resolve conflicts among trial courts in such cases, the rule promotes uniformity and fairness to litigants.

Rule 5(b) provides only for the petition and the answer. A reply to the answer is not permitted and will not be considered.

Rule 5(c) contemplates that the petition and answer will be treated as motions and so must be supported by a brief. In order to expedite judicial consideration, however, the total length of a petition and brief are limited to 15 pages, and a similar restriction applies to the answer and its supporting brief. This limitation does not include pages in exhibits required to be annexed to the petition.

Rule 5 review is separate from the interlocutory review available by certification under M.R.C.P. 54(b) when a final judgment is entered as to fewer than all parties or claims, and that available under Rule 9 governing release in criminal cases.

Rule 5(e) was added by amendment effective July29, 2004 in recognition of the need for expedited disposition of interlocutory appeals. On occasions when the Court is presented in the petition with a pure question of law or otherwise has before it sufficient information to do so, the Court may in its discretion address and dispose of the issue presented simultaneously with the grant of permission to file the interlocutory appeal and without further record preparation or briefing.

[Comment amended effective April 15, 2004; amended effective July 29, 2004; amended effective December 9, 2004; Comment amended effective January 11, 2007; Comment amended effective July 1, 2008.]

RULE 6. COUNSEL ON APPEAL IN CRIMINAL CASES AND PROCEEDINGS *IN FORMA PAUPERIS* IN CRIMINAL CASES

(a) Leave to Proceed *In Forma Pauperis* From the Trial Court to the Supreme Court in Criminal Cases.

(1) *Post-trial Motion in Trial Court.* A defendant in a criminal case in a trial court who desires to proceed on appeal *in forma pauperis* shall file in the trial court a motion for leave so to proceed, together with an affidavit showing the defendant's inability to pay fees and costs. If the motion is granted, the defendant may so proceed without further application to the Supreme Court and without prepayment of fees or costs in either court. If the motion is denied, the trial court shall state in writing the reasons for the denial.

(2) *When In Forma Pauperis Status Previously Granted by Trial Court.* Notwithstanding the provisions of Rule 6(a)(1), a party who has been permitted to proceed *in forma pauperis* in the trial court may proceed on appeal *in forma pauperis* without further authorization unless, before or after the notice of appeal is filed, the trial court shall certify that the party is no longer indigent and is not otherwise entitled to proceed *in forma pauperis*. The court shall state in writing the reasons for such certification or finding. Where an appeal is taken to the Supreme Court *in forma pauperis*, the certification of compliance required by Rule 11(b)(1) shall indicate that the appeal is taken *in forma pauperis*.

(3) *Motion in the Supreme Court.* If a motion for leave to proceed on appeal *in forma pauperis* is denied by the trial court, the trial court clerk shall forthwith serve notice of such action. A motion for leave so to proceed may be filed in the Supreme Court within 30 days after service of notice of the action of the trial court. The motion shall be accompanied by a copy of the affidavit filed in the trial court, or by the affidavit prescribed by Rule 6(a)(1) if no affidavit has been filed in the trial court, and by a copy of the statement of reasons given by the trial court for its action.

(b) Appointment of Counsel on Appeal in Criminal Cases. Appointed trial counsel shall continue as defendant's counsel on appeal unless relieved by order of the trial court, or, if the appeal has been perfected, by order of the Supreme Court or the Court of Appeals. Any motion for such relief filed with the Supreme Court shall be accompanied by a certified copy of a trial court order appointing substitute counsel pending action by the Supreme Court or the Court of Appeals.

Appointed trial counsel may file a motion to substitute the Indigent Appeals Division of the Office of the State Public Defender, in accordance with Section 99-40-1 of the Mississippi Code. Trial counsel shall remain as the defendant’s counsel until relieved by order of the Supreme Court and shall have a continuing duty to cooperate with appellate

counsel after relieved by order of the Supreme Court.

(c) Waiver of Counsel in Criminal Appeal.

(1) *When Appellant Has No Counsel.* Where an appeal is taken to the Supreme Court and the appellant is not represented by an attorney, and the existing record does not disclose whether appellant intelligently and competently waived the right to counsel in the State appellate courts, the Supreme Court or the Court of Appeals shall request the trial court to determine:

i. whether the appellant is indigent and unable to employ counsel;

ii. if indigent, whether the appellant desires counsel to be appointed; and

iii. if the appellant does not desire counsel, whether the appellant intelligently and competently waives the appointment of counsel on appeal.

A transcript shall be made by the court reporter of the hearing on these issues before the trial court, and such transcript and the order of the trial court shall be certified to the Supreme Court or the Court of Appeals and shall be made a part of the record on appeal.

If the trial judge or the appellate court determines that appellant is indigent and is entitled to the appointment of counsel on appeal, and that the appellant has not intelligently and competently waived the same, the trial court shall, except for good cause shown, appoint the Indigent Appeals Division of the Office of the State Public Defender to represent the appellant on appeal in accordance with the provisions of Section 99-40-1 of the Mississippi Code.

If the trial judge or the appellate court determines that appellant is not indigent and that the appellant has not intelligently and competently waived the right to counsel on appeal, the appellate court shall stay the appeal for thirty (30) days so that appellant may hire counsel.

(2) *When Appellant Moves to Dismiss Counsel and Proceed Pro Se on Appeal.* When a criminal appellant moves to dismiss counsel on appeal and proceed pro se, the appellant shall serve a copy of the motion upon current counsel. The appellate court shall request the trial court to determine:

i. whether the appellant is indigent and unable to employ counsel;

ii. if indigent, whether the appellant desires counsel to be appointed; and

iii. if the appellant does not desire counsel, whether the appellant intelligently and competently waives the right to counsel on appeal.

A transcript shall be made by the court reporter of the hearing on these issues before the trial court, and such transcript and the order of the trial court shall be certified to the Supreme Court or the Court of Appeals and shall be made a part of the record on appeal.

If it is determined that appellant has not intelligently and competently waived the right to counsel on appeal, then the motion to dismiss counsel shall be denied. If it is determined that appellant has intelligently and competently waived the right to counsel on appeal, then the motion to dismiss counsel shall be granted.

[Amended August 9, 2007, to provide for appointment of the Mississippi Office of Indigent Appeals; Adopted to govern matters filed on or after January 1, 1995; amended effective August 2, 2012 to include procedural safeguards regarding the waiver of counsel in a criminal appeal.]

Advisory Committee Historical Note

Effective January 1, 1995, M.R.A.P. 6 replaced Miss. Sup. Ct. R. 6, embracing proceedings in the Court of Appeals. 644-647 So. 2d XXXIII-XXXIV (West Miss. Cases 1994).

[Adopted August 21, 1996.]

Comment

Rule 6(a) and (b) provide for appeals *in forma pauperis* in criminal appeals. The rule reflects the salient features of Fed. R. App. P. 24 and Ala. R. App. P. 24. *See* Form 4 for a suggested affidavit to accompany a motion for application to proceed *in forma pauperis*. Rule 6(b) provides that appointed counsel in a criminal case may not be relieved of the responsibility for an appeal absent leave of Court. *Allison v. State*, 436 So. 2d 792 (Miss. 1983).

An accused entitled to counsel at trial is also entitled to counsel in an appeal as of right to the Supreme Court. *Evitts v. Lucey*, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985); *Neal v. State*, 422 So. 2d 747, 748 (Miss. 1982). Under federal law, a defendant is entitled to counsel if a sentence of imprisonment is imposed. *Scott v. Illinois*, 440 U.S. 367, 99 S. Ct. 1158, 59 L. Ed. 2d 383 (1979). *See also* Miss. Const. of 1890, art. 3, § 26.

The county prepays costs when an indigent criminal defendant appeals *in forma pauperis*. Miss. Code Ann. § 99-35-105 (Rev. 2000). The Clerk of the Supreme Court charges no fees or costs when a defendant incarcerated at the Mississippi State Penitentiary appeals on pauper's oath. Miss. Code Ann. § 25-7-3 (Rev. 2006).

Rule 6(b) provides for the appointment of the Indigent Appeals Division of the Office of the State Public Defender in accordance with Section 99-40-1 of the Mississippi Code. An indigent appellant shall be represented by the Indigent Appeals Division of the Office of the State Public Defender absent good cause shown.

Rule 6(c) is regarding the waiver of counsel on appeal in criminal cases. The subsection applies regardless of appellant's ability to pay for counsel. The waiver of counsel must be knowingly and intelligently made. The hearing in the trial court mirrors the hearing provided for in MRCrP 7.1(c). If appellant's motion to dismiss counsel is denied, appellant may file a pro se supplemental brief pursuant to Rule 28(b).

[Amended effective August 2, 2012.]

RULE 7. [SECURITY FOR COSTS ON APPEAL IN CIVIL CASES] [OMITTED]

Advisory Committee Historical Note

Effective January 1, 1995, Miss.R.App.P. 7 replaced Miss.Sup.Ct.R. 7, 644-647 So.2d XXXIV (West Miss.Cases 1994).

Effective July 1, 1994, the Comment to Miss.Sup.Ct.R. 7 was amended to delete material concerning the transition from statutory procedures to Rule practice. 632-635 So.2d LI (West Miss.Cases 1994).

[Adopted August 21, 1996.]

Comment

Rule 7 is omitted from these rules because provisions for costs on appeal are found in Rule 11. This is consistent with prior statutory practice.

RULE 8. STAY OR INJUNCTION PENDING APPEAL

(a) Stay by Clerk's Approval of Supersedeas Bond. The appellant shall be entitled to a stay of execution of a money judgment pending appeal if the appellant gives a supersedeas bond, payable to the opposite party, with two or more sufficient resident sureties, or one or more guaranty or surety companies authorized to do business in this state, in a penalty of 125 percent of the amount of the judgment appealed from, conditioned that the appellant will satisfy the judgment complained of and also such final judgment as may be made in the case. The clerk of the trial court shall approve any such bond and the approval of the supersedeas bond by the clerk shall constitute a stay of the judgment. In the event the clerk declines to approve the bond, or the clerk's approval is contested, or the appellant seeks a stay on any basis other than compliance with this subdivision, the requirements of Rule 8(b) apply.

(b) Other Stays Must Ordinarily Be Sought in the First Instance From the Trial Court.

(1) Application for a stay of the judgment or the order of a trial court pending appeal or for approval or disapproval of a contested supersedeas bond or for an order suspending, modifying, restoring, or granting an injunction during the pendency of an appeal must ordinarily be made in the first instance to the trial court. The court shall require the giving of security by the appellant in such form and in such sum as the court deems proper, and for good cause shown may set a supersedeas bond in an amount less than the 125 percent required in cases under Rule 8(a).

(2) However, a bond or equivalent security required on any money judgment entered in whole or in part on account of punitive damages shall, as to the punitive damages portion of the judgment only, be the lower of:

(a) 125 percent of the total amount of punitive damages, or

(b) ten percent of the net worth of the defendant seeking appeal as determined by applying generally accepted accounting principles to the defendant's financial status as of December 31, of the year prior to the entry of the judgment for punitive damages.

(c) Absent unusual circumstances, the total amount of the required bond or equivalent security for any case as to punitive damages shall not exceed $100,000,000.

(3) To qualify for reduction of bond or equivalent security under subpart (b)(2)(b), there must be a good and sufficient showing that the imposition of a supersedeas bond of 125% of the full judgment appealed from would place that appellant in a condition of

insolvency or would otherwise substantially threaten its future financial viability.

(4) When the appellant is allowed the benefit of a reduction in bond or equivalent security under subpart (b)(2)(b) or (c), the court may require submission of such reports or evidence to the court and to opposing parties as will allow them to be properly informed of the financial condition of the appellant during the period of supersedeas. If at any time after notice and hearing, the court finds that an appellant who has posted a bond or equivalent security for less than 125 percent of the full amount of the judgment has taken actions that affect the financial ability of the appellant to respond to the judgment, or has taken other actions with the intent to avoid the judgment, the court shall increase the bond or equivalent security to the full 125 percent of the judgment. If the appellant does not post the additional bond required by the court, the stay shall be revoked.

(5) If a hearing is necessary for issues arising under subpart (b), the judgment shall be stayed during such hearing and for ten days following the trial court's ruling. The ruling of the trial court on motions filed under this subpart (b) shall be reviewable by the Supreme Court or the Court of Appeals.

(c) Motion to Stay or Vacate Stay in Supreme Court. A motion for such relief may be made to the Supreme Court (or to the Court of Appeals in cases assigned by the Supreme Court to the Court of Appeals) but the motion shall show that the application to the trial court for relief sought is not practicable, or that the trial court has denied an application or has failed to afford the relief which the applicant has requested, with the reasons given by the trial court for its action. The motion shall also show the reasons for the relief requested and the facts relied upon and, if the facts are subject to dispute, the motion shall be supported by affidavits or other sworn statements. The applicant shall file an original and four (4) copies of the motion for stay and, if the motion is opposed, shall attach legible copies of the documents listed below. If the applicant asserts that time does not permit the filing of a written motion, applicant shall deliver to the clerk five (5) legible copies of each of the listed documents as soon as possible. If any listed document cannot be attached or delivered, a statement of the reason for the omission shall be substituted.
The documents required are:

(1) the application to the trial court for a stay;

(2) each brief or memorandum of authorities filed by a party to the application in the trial court;

(3) the opinion giving the reasons advanced by the trial court for denying relief;

(4) the trial court order or judgment denying relief.

Reasonable notice of the motion shall be given to all parties. The motion shall be filed with the clerk of the Supreme Court and will be considered by a panel of the Supreme Court or the Court of Appeals. In emergency cases the application may be considered by a single justice or judge of the appropriate appellate court, and the applicant shall file the motion with the clerk of the Supreme Court in writing as promptly as possible.

(d) Stay May Be Conditioned Upon the Giving of a Bond; Proceedings Against Sureties. Relief available in the Supreme Court or the Court of Appeals under this rule may be conditioned upon the filing of a bond or other appropriate security in the trial court. If the security is given in the form of a bond or stipulation or undertaking with one or more sureties, each surety submits itself to the jurisdiction of the trial court and irrevocably appoints the clerk of the trial court as its agent upon whom any papers affecting its liability on the bond or undertaking may be served. The surety's liability may be enforced on motion in the trial court without the necessity of an independent action. The motion and notice of the motion may be served upon the clerk of the trial court, who shall forthwith mail copies to the sureties if their addresses are known.

[Adopted to govern matters filed on or after January 1, 1995; amended April 26, 2001]

Advisory Committee Historical Note

Effective April 24, 2001, Rule 8 was amended to add (b)(2)-(5). 783-785 So.2d XIX (West Miss.Cases 2001).

Effective January 1, 1995, Miss.R.App.P. 8 replaced Miss.Sup.Ct.R. 8, embracing proceedings in the Court of Appeals. 644-647 So.2d XXXV-XXXVII (West Miss.Cases 1994).

Comment

Rule 8(a) is based on Miss. Code Ann. § 11-51-31 (Supp. 1994) and Ala. R. App. P. 8(a). It provides for a stay of a money judgment pending appeal upon approval of a supersedeas bond by the clerk of the trial court. In a case involving only a money judgment, the appellant can obtain a stay by posting a bond approved by the clerk. A form for a supersedeas bond is found in Form 5 in the Appendix of Forms.

All matters concerning stays are to be resolved in the first instance by the trial court, if possible.

If the trial court clerk declines to approve the bond, the appellant must apply to the trial court for approval under Rule 8(b). If the clerk approves the bond and the appellee contests

it for any reason, the appellee must file a motion with the trial court for disapproval of the bond and to vacate the stay. If the appellant seeks a stay on any basis other than by posting a 125 percent bond to supersede a money judgment, the appellant must apply to the trial court for a stay. In determining whether to grant a stay, the trial court should endeavor to protect the prevailing party. The purpose of a supersedeas bond is to preserve the status quo while protecting the judgment creditor's rights pending appeal.

The trial court may grant or deny a stay upon such terms as to bond or otherwise as it considers proper for the security of the adverse party. It may approve security in the form of a cash or property bond. *See* M.R.C.P. 62.

While the trial court may not require a bond greater than 125 percent to supersede a money judgment, the court may, in appropriate cases, approve a supersedeas bond of less than 125 percent of the money judgment. *See Henry v. First National Bank*, 424 F. Supp. 633, 639 (N.D. Miss.), aff'd 595 F. 2d 291, 305 (5th Cir. 1979). If an appellant seeks relief from the full bond requirement, the trial court must, upon notice and hearing find that good cause justifies a departure from the usual bond requirements. At the hearing, the burden to provide a secure alternative to the required bond rests on the judgment debtor. Before the trial court can grant a reduced bond, there must be an objective demonstration that the appellant's financial strength and ability to respond will remain undiluted during the pendency of the appeal. A record sufficient to allow review should be made. The maximum bond in a contempt case is set by statute, Miss. Code Ann. § 11-51-11 (Supp. 1994). When the judgment is not a money judgment, the court may, but is not required to, follow the practice of statutes supplanted by this rule, e.g., now-repealed Miss. Code Ann. § 11-51-35 (Supp. 1986) (double one year's rent to stay execution of a writ of possession in ejectment); § 11-51-39 (Supp. 1986) (double value of real estate to be surrendered); now-repealed § 11-51-41 (1972) (double value of real estate or charges on real estate).

Under Miss. Code Ann. § 11-51-101 (Supp. 1994), certain parties, including the state, counties, municipalities, public officers, state educational or charitable institutions, and federally-owned corporations are entitled to an automatic stay without posting bond or any action by the clerk of the trial court under this rule. Similarly, no additional action by the clerk of the trial court is required when the appellant has already posted a sufficient bond prior to judgment under statutes governing appeals by executors, administrators, and guardians, Miss. Code Ann. § 11-51-99 (Supp. 1994), or appeals in estate tax cases, Miss Code Ann. § 27-9-47 (1994), or appeals from the State Tax Commission, Miss. Code Ann. § 27-35-163 (Supp. 1994).

Rule 8(c) and 8(d) are based on Fed. R. App. P. 8 and 5th Cir. R. 8.1.1. They set forth the procedure to be followed when an appellant or appellee contests the trial court's action on a stay.

[Amended, April 26, 2001.]

RULE 9. RELEASE IN CRIMINAL CASES

(a) Release Prior to a Judgment of Conviction. A petition challenging an order refusing or imposing conditions of release shall be heard promptly by the Supreme Court or the Court of Appeals if the case has been assigned to the Court of Appeals. Upon entry of an order refusing or imposing conditions of release, the trial court shall state in writing the reasons for the action taken. Where the petition challenges an order denying bail or setting bail which the challenging party contends is excessive, the challenging party shall file contemporaneously with the petition such papers, affidavits, and portions of the record as will show:

(1) the nature and circumstances of the offense charged;

(2) the weight of the evidence;

(3) family ties of the defendant;

(4) defendant's employment status;

(5) defendant's financial resources;

(6) defendant's character and mental condition;

(7) defendant's length of residence in the community;

(8) defendant's record of prior convictions;

(9) defendant's record of appearances or flight;

(10) a copy of the trial court's order regarding bail;

(11) where available, a transcript of the trial court proceedings regarding bail. If the party is unable to obtain such a transcript, the party shall state in an affidavit the reasons the party cannot obtain it;

(12) such other matters as may be deemed pertinent.

An original and four (4) copies of the petition and accompanying documents shall be filed with the clerk of the Supreme Court. The Supreme Court or the Court of Appeals may require that additional copies be furnished.

(b) Release Pending Appeal From a Judgment of Conviction. Release after

judgment of conviction of a felony and pending direct appeal shall be governed by statute and uniform rule. A party seeking release shall file with the party's motion for release the same papers, affidavits, and portions of the record as are required by Rule 9(a).

Advisory Committee Historical Note

Effective January 1, 1995, Miss.R.App.P. 9 replaced Miss.Sup.Ct.R. 9, embracing proceedings in the Court of Appeals. 644-647 So.2d XXXVII-XXXVIII (West Miss.Cases 1994).

Comment

Rule 9(a) is substantially patterned after Fed. R. App. P. 9(a). Subdivision (b) continues Mississippi practice for release after judgment of conviction provided in MRCrP 8.3, Miss. Code Ann. §§ 99-35-105, -107, -109 (1994), Miss. Code Ann. § 99-35-115 (1994), Miss. Code Ann. § 99-35-117 (1994). Both 9(a) and (b) require the party seeking release to provide the appellate court with certain information relevant to release. *See* former 5th Cir. R. 9.1, 9.2. Normally these facts will be part of the record in the trial court. Both petitions under 9(a) and motions under 9(b) will be handled by the appropriate appellate court as motions under Rule 27.

RULE 10. CONTENT OF THE RECORD ON APPEAL

(a) Content of the Record. The parties shall designate the content of the record pursuant to this rule, and the record shall consist of designated papers and exhibits filed in the trial court, the transcript of proceedings, if any, and in all cases a certified copy of the docket entries prepared by the clerk of the trial court.

(b) Determining the Content of the Record.

(1) *Designation of Record.* Within seven (7) days after filing the notice of appeal, the appellant shall file with the clerk of the trial court and serve both on the court reporter or reporters and on the appellee a written designation describing those parts of the record necessary for the appeal.

(2) *Inclusion of Relevant Evidence.* In cases where the defendant has received the death sentence, the entire record shall be designated. In any other case, if the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion.

(3) *Matters Excluded Absent Designation.* In any case other than a case where the defendant has received a death sentence, the record shall not include, unless specifically designated,

i. subpoenas or summonses for any witness or defendant when there is an appearance for such person:

ii. papers relating to discovery, including depositions, interrogatories, requests for admission, and all related notices, motions or orders;

iii. any motion and order of continuance or extension of time;

iv. documents concerning the organization of the grand jury or any list from which grand or petit jurors are selected;

v. pleadings subsequently replaced by amended pleadings;

vi. jury *voir dire*.

(4) *Statement of Issues.* Unless the entire record, except for those matters identified in (b)(3) of this Rule, is to be included, the appellant shall, within the seven (7) days time

provided in (b)(1) of this Rule, file a statement of the issues the appellant intends to present on the appeal and shall serve on the appellee a copy of the designation and of the statement. Each issue in the statement shall be separately numbered. If the appellee deems inclusion of other parts of the proceedings to be necessary, the appellee shall, within 14 days after the service of the designation and the statement of the appellant, file with the clerk and serve on the appellant and the court reporter a designation of additional parts to be included. The clerk and reporter shall prepare the additional parts at the expense of the appellant unless the appellant obtains from the trial court an order requiring the appellee to pay the expense.

(5) *Attorney's Examination and Proposed Corrections.* For fourteen (14) days after service of the clerk's notice of completion under Rule 11(d)(2), the appellant shall have the use of the record for examination. On or before the expiration of that period, appellant shall return the record to the trial court clerk, and shall append to the record (i) a written statement of any proposed corrections to the record, (ii) a certificate that the appellant or the appellant's attorney has carefully examined the record and that with the proposed corrections, if any, it is correct and complete, and (iii) a certificate of service indicating that the record has been returned to the clerk. For fourteen (14) days after receipt of the certificate of service from appellant, appellee shall have the use of the record for examination. On or before the expiration of that period, appellee shall return the record to the trial court clerk, and shall append to the record (i) a written statement of any proposed corrections to the record, (ii) a certificate that the appellee or the appellee's attorney has carefully examined the record and that with the proposed corrections, if any, it is correct and complete, and (iii) a certificate of service, indicating that the record has been returned to the clerk. Corrections as to which all parties agree in writing shall be deemed made by stipulation. If the parties propose corrections to the record but do not agree on the corrections, the trial court clerk shall forthwith deliver the record with proposed corrections to the trial judge. The trial judge shall promptly determine which corrections, if any, are proper and enter an order under Rule 10(e). Within five days, the trial court clerk shall serve all parties and their attorneys with a copy of the order. If a party does not agree with the court's order, that party shall, within five days of service of the order, request a hearing. Such a request shall be assigned priority status on the trial judge's docket, and after a hearing, the trial judge shall promptly enter an order directing the court reporter and/or the trial court clerk to make the appropriate correction(s), if any, and to finalize completion of the record for transmission to this Court. Once the order is entered, or if no hearing request is made, the record shall be returned to the court reporter and/or the trial court clerk who shall within seven days make corrections directed by the order. The trial court clerk shall verify that any approved changes have been made and that the required certifications are appended to the record before sending it to the Supreme Court.

(c) Statement of the Evidence When No Report, Recital, or Transcript Is Available. If no stenographic report or transcript of all or part of the evidence or proceedings is available, the appellant may prepare a statement of the evidence or proceedings from the best

available means, including recollection. The statement should convey a fair, accurate, and complete account of what transpired with respect to those issues that are the bases of appeal. The statement, certified by the appellant or his counsel as an accurate account of the proceedings, shall be filed with the clerk of the trial court within 60 days after filing the notice of appeal. Upon filing the statement, the appellant shall simultaneously serve notice of the filing on the appellee, accompanied by a short and plain declaration of the issues the appellant intends to present on appeal. If the appellee objects to the statement as filed, the appellee shall file objections with the clerk of the trial court within 14 days after service of the notice of the filing of the statement. Any differences regarding the statement shall be settled as set forth in subdivision (e) of this Rule.

(d) Agreed Statement as the Record on Appeal. In lieu of a record on appeal designated pursuant to subdivisions (b) or (c) of this Rule, the parties may prepare and sign a statement of the case showing how the issues presented by the appeal arose and were decided in the trial court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented. If the statement conforms to the truth, it, together with such additions as the court may consider necessary fully to present the issues raised by the appeal, shall be approved by the trial court and shall then be certified to the Supreme Court as the record on appeal.

(e) Correction or Modification of the Record. If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated in the record, the parties by stipulation, or the trial court, either before or after the record is transmitted to the Supreme Court or the Court of Appeals, or either appellate court on proper motion or of its own initiative, may order that the omission or misstatement be corrected, and, if necessary, that a supplemental record be filed. Such order shall state the date by which the correction or supplemental record must be filed and shall designate the party or parties who shall pay the cost thereof. Any document submitted to either appellate court for inclusion in the record must be certified by the clerk of the trial court. All other questions as to the form and content of the record shall be presented to the appropriate appellate court.

(f) Limit on Authority to Add to or Subtract From the Record. Nothing in this rule shall be construed as empowering the parties or any court to add to or subtract from the record except insofar as may be necessary to convey a fair, accurate, and complete account of what transpired in the trial court with respect to those issues that are the bases of appeal.

[Amended effective January 1, 1999; amended July 1, 1999; amended effective July 1, 2011 to revise the procedure for attorney's examination and proposed corrections.]

Advisory Committee Historical Note

Effective June 24, 1999, Rule 10(b)(5) was amended to effect editorial changes. 735 So.2d XIX (West Miss.Cases 1999).

Effective January 1, 1999, Rule 10(b)(5) was amended to require counsel to make certifications regarding the record and to extend the examination period to 14 days. 717-722 So.2d XXVII (West Miss.Cases 1998).

Effective January 1, 1995, Miss.R.App.P. 10 replaced Miss.Sup.Ct.R. 10, embracing proceedings in the Court of Appeals. 644-647 So.2d XXXVIII-XLI (West Miss.Cases 1994).

Effective July 1, 1994, the Comment to Miss.Sup.Ct.R. 10 was amended to delete references to repealed statutes and material concerning the transition from statutory procedures to Rule practice. 632-635 So.2d LI (West Miss.Cases 1994).

Comment

Rule 10 is based on Fed. R. App. P. 10, taking into account modifications suggested by the more recent Ala. R. App. P. 10 and Tenn. R. App. P. 24.

The purpose of the Rule is to permit and encourage parties to include in the record on appeal only those matters material to the issues on appeal. While subdivision (b) will govern most appeals, subdivisions (c) and (d) provide alternate methods of preparing the record, either when no transcript is available, or when the parties can agree on a "statement of the case" that will adequately present the issues on appeal.

Subdivision (b) eliminates the confusion that followed *City of Mound Bayou v. Roy Collins Const. Co.*, 457 So. 2d 337 (Miss. 1984). That case directed court reporters to record everything transpiring at trial, including *voir dire* and bench and chambers conferences. It also, however, ended the jurisdictional requirement of designating the record pursuant to Miss. Code Ann. § 9-13-33(1) to (4) (Supp. 1986). In doing so, it inadvertently encouraged use of the entire record, a practice the Court then condemned in *Byrd v. F-S Prestress, Inc.*, 464 So. 2d 63, 69 (Miss. 1985). This rule reinstates the express requirement that the appellant designate those parts of the record to be included on appeal. Form 2 in the Appendix of Forms is a form for designation of the record. This requirement is no longer jurisdictional, but a failure to comply with it could lead to dismissal pursuant to Rule 2(a)(2). This is consistent with federal practice.

Pursuant to subdivision (b)(3), a general designation will not be construed to include certain papers normally irrelevant to the issues on appeal. The rule thus encourages the omission of these nonessential matters. Because counsel customarily do not file trial court briefs with the clerk, briefs are not included in the (b)(3) list. Briefs do not normally belong

in a record on appeal, unless necessary to show that an issue was presented to the trial court.

A designation of certain issues under subdivision (b)(4) does not preclude a party from stating other issues in its brief under Rule 28(a)(3). However, a party asserting other issues in its brief will bear responsibility for the cost of preparing any additional portions of the record subsequently designated by any other party in response to the statement of additional issues. As a result, accurate designation under (b)(4) is advisable.

Subdivision (f) clearly states that the flexible procedures of this rule are not intended to permit a party to augment the record with matters entered *ex parte*.

RULE 11. COMPLETION AND TRANSMISSION OF THE RECORD

(a) Duty of Appellant. After filing the notice of appeal the appellant or, in the event that more than one appeal is taken, each appellant shall comply with the provisions of Rule 10 and shall take any other action necessary to enable the clerk to assemble and transmit the record. A single record shall be transmitted.

(b) Estimation and Payment of Fees.

(1) *Record Preparation Estimate and Deposit.* Within seven (7) days after filing the notice of appeal, the appellant shall estimate the cost of preparation of the record on appeal, including, but not limited to, the cost of the preparation of the transcript, and shall deposit that sum with the clerk of the court whose judgment or order has been appealed. The appellant shall simultaneously file with the clerk of the trial court a certificate setting forth the fact of compliance with this subparagraph and shall serve a copy of the certificate upon all other parties, upon the court reporter, and upon the Supreme Court Clerk. The estimate shall be calculated pursuant to estimates from the clerk(s) and court reporter(s). If the appellant is unable to obtain an estimate from a clerk within the seven (7) days, the appellant shall calculate the estimate at the statutory rate per page for the approximate number of pages of clerk's papers. If the appellant is unable to obtain an estimate from a court reporter within the seven (7) days, the appellant shall calculate the estimate at the rate of $300.00 per day of proceedings to be transcribed.

(2) *Application to Increase Deposit.* If dissatisfied with the amount tendered, either the clerk of the trial court or the court reporter may apply for an increase to the trial court which, after reasonable advance notice and opportunity to be heard having been afforded all parties, and for good cause shown, may order the amount of the deposit increased. The party taking the appeal shall comply with any such order within 14 days of the date of entry. The deposit and any such order shall be provisional, subject to adjustment after the transcript has been completed and its actual cost ascertained.

(c) Duty of Reporter to Prepare and File Transcript. Upon the appellant's compliance with subparagraph (b)(1) and service of the designation required by Rule 10(b)(1), the reporter shall commence preparation of the transcript. The reporter's transcript shall conform to the Guidelines for Court Reporters adopted by the Supreme Court, attached as Appendix III to these rules and incorporated herein by reference, and shall contain a title page setting out the style, number, and counsel appearances; a table of contents; and a certificate of completion. It shall not contain any exhibits. The transcript table of contents shall, however, indicate for each exhibit whether or not it was admitted into evidence.

If the transcript cannot be completed within 60 days of service of the designation, one 30 day extension may be granted by the trial court by order served on all parties and the clerk of the Supreme Court. Any subsequent extension shall be sought from the clerk of the Supreme Court. Any such request may be made orally or in writing and shall specify in detail:

(1) the amount of work that has been accomplished on the transcript,

(2) all outstanding transcripts due to this and other courts, including the due dates of filing, and

(3) verification that the request has been brought to the attention of, and approved by, the trial judge who tried the case.

The action of the clerk of the Supreme Court shall be entered and the court reporter shall confirm the action in writing within seven (7) days to the clerk with a copy to the trial judge and to the parties. When an extension is granted on oral request, the confirmation shall include the information required to be specified in the request. In the event of the failure of the reporter to file the transcript within the time allowed, the clerk of the Supreme Court shall notify the trial judge and take such other steps as may be directed by the Supreme Court.

Upon completion of the transcript the reporter shall certify the transcript as an accurate account of the proceedings and file the original and one copy of the transcript with the clerk of the trial court. The reporter shall simultaneously certify and serve notice of the filing on the parties and on the clerk of the Supreme Court. Additionally, the reporter shall prepare an electronically formatted medium (such as USB Flash Drive or CD-ROM) of the transcript filed and shall file the electronic medium with the trial court clerk for inclusion in the appellate record. All electronic media and electronic files stored thereon must be in an industrial standardized format with the electronic transcript stored in the Adobe Portable Document Format (PDF). All electronic media shall be labeled to include the following information:

(1) style of the case; and,

(2) number of CD-ROMs, i.e., 1 of 2, 2 of 2, etc.

After such filing and service of notice, the trial court clerk may disburse actual fees earned to the court reporter from estimated fees deposited pursuant to Rule 11(b).

(d) Duty of Trial Court Clerk to Prepare and Transmit Record.

(1) *Clerk's Preparation of Record.* Upon the appellant's compliance with subparagraph (b)(1) and service of the designation required by Rule 10(b)(1), the trial court clerk shall assemble the record as follows:

i. Clerk's Papers.

(a) *Conventional*. A certified copy of the docket entries prepared by the clerk of the trial court shall be followed by a legible photocopy of any papers filed with the clerk and designated by the parties and a cost bill for the preparation of the record indicating costs for the trial court clerk and court reporter and the Supreme Court filing fee. Within 30 days, the clerk shall assemble the papers in the order of filing, number each page consecutively at the bottom, and transmit a list of the papers correspondingly numbered and identified with reasonable definiteness. All jury instructions shall be placed in the record with court instructions first, instructions given to plaintiff second, instructions refused plaintiff third, instructions given to defendant fourth, and instructions refused defendant fifth.

The trial court clerk shall separate the clerk's papers into volumes of no more than 150 pages for fastening. The clerk shall fasten the clerk's papers on the top and provide suitable covers for each volume. Each volume of clerk's papers shall be bound in a brown binder and the outside of each binder shall designate the page numbers of the pages contained in that volume.

(b) *Electronic*. Within 30 days, the clerk shall use the Mississippi Electronic Court (MEC) system to assemble the record as follows. The docket shall be followed by the papers designated by the parties and a cost bill for the preparation of the record indicating costs for the trial court clerk and court reporter. The clerk shall assemble the papers in the order of filing, except that jury instructions shall be assembled with court instructions first, instructions given to plaintiff second, instructions refused plaintiff third, instructions given to defendant fourth, and instructions refused defendant fifth.

The Supreme Court filing fee shall be mailed to the Supreme Court.

ii. Transcript.

(a) *Conventional*. The original transcript is prepared by the court reporter pursuant to Rule 11(c). The clerk of the trial court shall not renumber

the pages of the original transcript, nor make copies of the original transcript, nor handle the original transcript in any way other than to include in the table of contents of the Clerk's Papers the number of volumes contained in the original transcript and include the original transcript as part of the record to be transmitted to the Supreme Court. The court reporter is responsible for preparing, certifying, and binding the transcript and is responsible for furnishing the transcript fully ready for transmission to the Supreme Court.

(b) *Electronic*. The original transcript is prepared by the court reporter pursuant to Rule 11(c). The court reporter shall either file the transcript electronically or deliver the transcript on an electronic disk to the clerk so that the clerk can then file the transcript electronically. The court reporter is responsible for preparing and certifying the transcript and for furnishing the transcript fully ready for transmission to the Supreme Court.

iii. Exhibits.

(a) *Conventional.* Within 30 days, a copy of exhibits designated by the parties shall be assembled in a flat file envelope or a box. If an exhibit is a photograph, the original shall be included and a photocopy retained by the trial court clerk. Video and audio tapes shall be included and a duplicate shall be retained by the trial court clerk. The clerk shall include with the exhibits forwarded to the Supreme Court a list of all exhibits designated by the parties, indicating thereon those retained by the trial court clerk and those submitted to the Supreme Court. Documents of unusual bulk or weight and physical exhibits other than documents, shall not be transmitted by the trial court clerk unless the clerk is directed to do so by a party or by the clerk of the Supreme Court. A party must make advance arrangements with the clerks for the transportation and receipt of exhibits of unusual bulk or weight.

(b) *Electronic.* Within 30 days, exhibits designated by the parties shall be assembled as follows. If the document or photograph can be scanned, the trial court clerk shall scan the exhibit, convert the file to Adobe Portable Document Format (PDF), and retain the original unless a party or the clerk of the Supreme Court directs otherwise. If the document, photograph, or physical exhibit cannot be scanned, the trial court clerk should, if possible, photograph the exhibit; scan or convert the photograph to PDF; and retain the original unless a party or the clerk of the Supreme Court directs otherwise.

The trial court clerk shall comply with subsection (d)(1)(iii)(a) if

- the exhibit can neither be scanned nor photographed;
- the PDF image is deficient so that the original is necessary; or
- the exhibit is a video or audio recording.

Following the time for attorney's examination and proposed correction under Rule 10(b)(5), the trial court clerk shall send all PDF exhibits to the Supreme Court using the Mississippi Electronic Court (MEC) system. When forwarding exhibits to the Supreme Court, the trial court clerk shall include a list of all designated exhibits, indicating those scanned, those photographed, those submitted conventionally, and those retained by the trial court clerk.

(2) *Transmission of Record*. When the clerk's papers and exhibits are assembled and the transcript is received, the clerk shall then execute a certificate of compliance with this Rule and serve notice of completion on the parties and on the clerk of the Supreme Court. At the end of the time prescribed by Rule 10(b)(5), the clerk shall immediately deliver the record to the Supreme Court.

(e) Retention of Duplicate Record in Trial Court for Use in Preparing Appellate Papers. The trial court shall retain, pending further order of the Supreme Court, its original docket entries, the original papers held with the clerk, a copy of the list of papers required by Rule 11(d)(1)(I), the original exhibits, other than photographs, a photocopy of photographic exhibits, a copy of video and audio tape exhibits, a duplicate of the reporter's transcript, and table of contents. Attorneys preparing appellate papers may use these retained documents. In cases where the circuit or chancery court has functioned as an appellate court for review of an on-the-record adjudication by an administrative agency or inferior tribunal and the circuit or chancery court clerk determines that a copy of the proceedings of such adjudication is retained in the administrative agency or inferior tribunal, the circuit or chancery court clerk need not copy the record of such proceedings, but must retain the original of the papers and documents attendant to the proceedings in that court while transmitting to the Supreme Court the original of the agency or inferior tribunal record (including transcript, papers, documents, and exhibits), along with a copy of the record of the circuit or chancery court proceedings.

(f) Record for Preliminary Hearing in the Supreme Court. If, prior to the time the record is transmitted, a party desires to make in the Supreme Court a motion for dismissal, for release, for a stay pending appeal, for additional security on the bond on appeal or on a supersedeas bond, or for any intermediate order, the clerk of the trial court at the request of any party shall transmit to the Supreme Court copies of such parts of the original record as any party shall designate, or shall certify them for transmission by the party.

[Adopted to govern matters filed on or after January 1, 1995; amended effective May 23, 2002; amended effective June 27, 2002; amended March 23, 2006 to provide that the trial court clerk shall assemble the record at the same time as the court reporter prepares the transcript; amended effective July 1, 2009; amended effective July 1, 2011 to revise the time for preparation of the clerk's papers and exhibits; amended effective January 12, 2017 to accommodate electronic transmission of the appellate record.]

Advisory Committee Historical Note

Effective June 27, 2002, Rule 11(c) and the Comment were amended to delete requirements that the reporter prepare and serve an acknowledgment of receipt of the certificate of compliance. 819-821 So.2d XV (West Miss.Cases 2002).

Effective May 23, 2002, Rule 11(b)(1) and the Comment were amended to provide alternative methods for estimating costs. 813-815 So.2d XXVIII (West Miss.Cases 2002).

Effective January 1, 1995, Miss.R.App.P. 11 replaced Miss.Sup.Ct.R. 11. 644-647 So.2d XLI-XLVI (West Miss.Cases 1994).

Effective July 1, 1994, Miss.Sup.Ct.R. 11(d)(2) and Appendix III, section II(1), were amended to provide further detail concerning the binding and labeling of the clerk's papers and the transcript. 632-635 So.2d XLVI-XLVIII (West Miss.Cases 1994).

Comment

Rule 11(b) provides the appellant shall estimate costs based on estimates received from the clerk(s) and court reporter(s) if available within 7 days after filing the notice of appeal. If either the clerk(s) or court reporters(s) do not provide estimates, Rule 11(b)(1) provides for alternative methods. Even though Rule 3(a) no longer makes prepayment of costs an absolute criterion for perfecting an appeal, the Supreme Court can respond under Rule 2(a)(2) to such failure with an appropriate sanction, including dismissal. Appellants who claim exemption from payment or prepayment of costs, see, e.g., Rule 6 (in forma pauperis appeals); Miss. Code Ann. § 11-53-13 (1972); *City of Mound Bayou v. Roy Collins Const. Co*., 457 So.2d 337 (Miss.1984) (exemption for state, county, city, town or village), should estimate the cost of preparation of the record but claim the exemption in the certificate of compliance required by Rule 11(b)(1). If the exemption is denied, the appellant should then prepay as required by the rule. Form 3 in the Appendix of Forms is a form for the certificate required by this rule.

Rule 11(c) gives to the Supreme Court the authority to rule on certain requests for

extension. The Court may empower its clerk to rule on such requests and to grant extensions up to a specified time, e.g., 30 days. The rule prescribes the content of the reporter's request. The rule also provides that the transcript is to conform to the Guidelines for Court Reporters and exhibits are not to be physically incorporated in the transcript, thereby ensuring that all transcripts will be uniform and eliminating the awkward folding and separation of documentary exhibits by page.

Rule 11(c) also requires the court reporter to prepare and file with the original transcript a copy of the transcript in an electronically formatted medium. This procedure provides the Supreme Court a copy of the transcript via electronic format for future reference by the Court, if required.

The transcript table of contents required by Rule 11(c) should comply with Miss. Code Ann. § 9-13-25 (1972).

Rule 11(d) requires that the trial court clerk prepare the record on appeal. It eliminates the binding of records in book form and so avoids an unnecessary expense to the parties. Under Rule 11(d), the record as transmitted will consist of (1) the certified copy of docket entries, a photocopy of filed papers designated by the parties, and a cost bill; (2) the original transcript; and (3) an envelope or box containing a copy of designated exhibits accompanied by the list identifying which exhibits are retained by the clerk and which are submitted to the Supreme Court required by Rule 11(d)(1)(iii). The clerk may mark the certified copy of docket entries with the page numbers corresponding to each entry and so provide the list of documents required by Rule 11(d)(1)(I). Form 6 in the Appendix of Forms is a form for a list of clerk's papers. The form can be used if the docket sheet is illegible or for any other reason a satisfactory list cannot be produced by adding record page numbers to the docket sheet. The rule does not follow the federal practice of appeals entirely on the original record, but retains the requirement of copying original papers and exhibits for use by the Supreme Court. This requirement reduces the bulk of documents to be reviewed by the Court and provides for a duplicate copy of essential records.

The requirement that the clerk duplicate exhibits may, in some cases, impose an unnecessary expense on the parties. For this reason, Rule 11(d) provides that the clerk shall not duplicate documents of unusual bulk or weight and Rule 12 provides for the transmission of original items to the Supreme Court. The retention of designated records in the trial court would not preclude the parties from including parts of those records in their record excerpts submitted pursuant to Rule 30. Rules 11(d)(1)(iii) and 11(e) provide that the trial court clerk is to retain a photocopy of exhibits which are photographs and a copy of video and audio tapes, and is to send the original photographic exhibits and original audio or video tapes to the Supreme Court without a special request.

Rules 11(e) and (f) follow Fed.R.App.P. 11(c) and (g).

[Comment amended May 23, 2002; amended effective June 27, 2002; amended effective July 1, 2009.]

RULE 12. TRANSMISSION OF ORIGINAL ITEM FROM THE TRIAL COURT

Any party to an appeal or any justice of the Supreme Court or judge of the Court of Appeals may request that an original of any writing, document or exhibit in the record on appeal be delivered to the appropriate appellate court. The request shall be made to the clerk of the Supreme Court. Upon receipt of such request, the clerk of the Supreme Court shall request the original from the trial court clerk. The clerk of the trial court shall photocopy the original and forward the original to the clerk of the Supreme Court, retaining the photocopy in the clerk's office. Following disposition in the Supreme Court or the Court of Appeals, the clerk of the Supreme Court shall return the original to the clerk of the trial court.

Advisory Committee Historical Note

Effective January 1, 1995, Miss.R.App.P. 12 replaced Miss.Sup.Ct.R. 12, embracing proceedings in the Court of Appeals. 644-647 So.2d XLVI (West Miss.Cases 1994).

Comment

Rule 12 is based on Ala.R.App.P. 13 and former Mississippi practice. This Rule applies only to matters designated as a part of the record and is not a substitute for a motion to supplement the record pursuant to Rule 10(e).

RULE 13. DOCKETING THE APPEAL AND FILING THE RECORD

(a) Docketing the Appeal. Upon receipt of the copy of the notice of appeal transmitted by the clerk of the trial court pursuant to Rule 3(d), the clerk of the Supreme Court shall enter the appeal upon the docket and assign it a docket number which includes the designation TS to serve as a tracking number. The docket number shall remain the same throughout the appellate process regardless of whether the case is assigned to the Court of Appeals or is retained by the Supreme Court. An appeal shall be docketed under the title "____, Appellant(s) v. _____, Appellee(s)," identifying appellant(s) and appellee(s).

(b) Filing the Record, Partial Record, or Certificate. Upon receipt of the record transmitted pursuant to Rule 11(d), or the partial record transmitted pursuant to Rule 11(f), the clerk of the Supreme Court shall file it, replace the TS designation with a designation to indicate the kind of case it is (e.g., KA for criminal appeal, CA for civil appeal, etc.) and immediately give notice to all parties of the date on which it was filed.

Advisory Committee Historical Note

Effective January 1, 1995, Miss.R.App.P. 13 replaced Miss.Sup.Ct.R. 13, embracing proceedings in the Court of Appeals. Rule 13 was further amended to effect technical changes concerning docketing and tracking appeals. 644-647 So.2d XLVI-XLVII (West Miss.Cases 1994).

Comment

Rule 13 follows Fed.R.App.P. 12. Rule 45 sets forth other duties of the clerk. Docketing the appeal at the time the notice of appeal is filed gives the Supreme Court greater control over the appellate process. It also recognizes the principle that perfection of the appeal by filing the notice vests jurisdiction over the case in the Supreme Court, except as otherwise provided by statute or rule.

RULE 14. FINDINGS OF FACT AND CALCULATIONS DURING THE COURSE OF AN APPEAL

(a) Finding of Fact by the Supreme Court. The Supreme Court (and the Court of Appeals on those cases assigned to it by the Supreme Court) may try and determine all issues of fact which may arise out of any appeal before it and which are necessary to the disposition of the appeal, and, to this end, may, by order in each case, prescribe in what way evidence may be produced before it on the issue.

(b) Finding of Fact by the Trial Court. In the event the Supreme Court or the Court of Appeals so directs, the trial court may determine all issues of fact which may arise out of any appeal submitted to the trial court for a determination, and which may be necessary for the disposition of cases on appeal.

(c) Calculations. When a party relies on an error in the calculation of interest or damages as a reason for altering a judgment, a true calculation shall be presented to the appellate court, in writing and figures, with a certificate by a certified public accountant not interested in the cause, that the calculation is correct; and no such error will be noticed unless so presented to the Supreme Court or the Court of Appeals.

Advisory Committee Historical Note

Effective January 1, 1995, Miss.R.App.P. 14 replaced Miss.Sup.Ct.R. 14, embracing proceedings in the Court of Appeals. 644-647 So.2d XLVII-XLVIII (West Miss.Cases 1994).

Comment

Rule 14(a) is a restatement of the authority to determine facts arising out of the appeal itself vested in the Court by Miss. Code Ann. § 9-3-37 (1972).

Subdivisions (b) and (c) carry forward procedures, previously followed by the Court, except that (c) now requires that a certified public accountant prepare the certificate.

RULE 15. MANDAMUS TO REQUIRE TRIAL COURT DECISION

(a) When a trial judge in a civil case takes under advisement a motion or request for relief which would be dispositive of any substantive issues and has held such motion or request under advisement for sixty (60) days, the plaintiffs and the defendants shall each within fourteen (14) days thereafter submit a proposed order or judgment to the trial judge and shall forward to the Administrative Office of Courts, the trial court clerk and the opposing parties true copies thereof with a statement setting forth the style and number of the case, the names and addresses of the judge and of all parties and the date on which such motion or request was taken under advisement. On receipt of such proposed orders and notices, the Administrative Office of Courts shall calendar them and notify the trial judge and the trial court clerk of the filing. At any time thereafter that an order or judgment is entered on the motion or request for relief, the plaintiffs and the defendants shall, in writing, promptly notify the Administrative Office of Courts and the opposing parties of the date of entry of the decision; copies of such notification shall be sent to the judge and the trial court clerk. If no written notice of a decision is received by the Administrative Office of Courts within six(6) months from the date the case was taken under advisement, the Administrative Office of Courts shall confirm with the trial court clerk that no order or judgment has been entered and notify the Supreme Court. The Administrative Office of Courts will forward copies of its notification to the trial judge and parties and shall advise the judge and counsel that they are to respond to the notice within a specified period. The Supreme Court shall treat such notification as the filing of an application for a writ of mandamus by all the parties to the action and shall proceed accordingly. The notice of the Administrative Office of Courts of the time within which to respond shall satisfy the requirements of M.R.A.P. 21(d).

(b) The trial judge, not later than thirty (30) days prior to the expiration of the six (6) months from the date the case was taken under advisement, for just cause shown, may apply in writing to the Supreme Court for additional time beyond said six (6) months in which to enter a decision. Concurrently, the judge shall provide a copy of such application to each of the parties.

[Amended effective October 10, 2002.]

Advisory Committee Historical Note

Effective October 17, 2002, Rule 15 and the Comment were entirely rewritten. 827-829 So.2d XVII (West Miss.Cases 2002).

Effective June 14, 1996, Rules 15(a) and (c) were amended to provide that failure to timely file an application for a writ of mandamus will not result in dismissal when the failure is caused by excusable neglect and dismissal will result in manifest injustice. 673-678 So.2d

XXXV (West Miss. Cases 1996).

Effective January 1, 1995, Miss.R.App.P. 15 replaced Miss.Sup.Ct.R. 15. 644-647 So.2d XLVIII-XLIX (West Miss.Cases 1994).

Comment

This rule recognizes the importance of prompt disposition of matters submitted to the courts for decision and is in accord with M.R.C.P. 1 in its dictate that the rules be construed to secure just, speedy and inexpensive determination of actions, and with Section 3A(5) of the Code of Judicial Conduct which requires that judges promptly dispose of the business of the courts.

In its former version, Rule 15 applied where a judge failed to render a decision "on a motion or request for relief which would be dispositive of all the claims or the rights and liabilities of all the parties." As revised, the rule is now applicable to instances wherein no decision has issued on motions or requests for relief "which would be dispositive of any substantive issues."

The rule requires the Administrative Office of Courts to invite the trial judge and parties to respond to its notification of a matter having been held under advisement and to set a specified time during which such responses shall be filed with the Supreme Court. This satisfies the requirement of M.R.A.P. 21(d) requiring an opportunity for the judge and parties to respond to a petition for writ of mandamus.

The notification to the Administrative Office of Courts of matters taken under advisement is mandatory and the parties are not at liberty to disregard the duty. This rule provides a mechanism to facilitate disposition of matters as promptly as fair consideration of the issues allows. The judge may and is expected to seek additional time where just cause is found for further deliberation.

[Amended effective October 10, 2002.]

RULE 16. JURISDICTION OF THE SUPREME COURT AND THE COURT OF APPEALS; ASSIGNMENT OF CASES TO THE COURT OF APPEALS

(a) Jurisdiction of the Supreme Court. The Supreme Court shall have such jurisdiction as is provided by Constitution and statute. All appeals from final orders of trial courts shall be filed in the Supreme Court and the Supreme Court shall assign cases, as appropriate, to the Court of Appeals.

(b) Jurisdiction of the Court of Appeals. Pursuant to Miss. Code Ann. § 9-4-3 (Supp. 1994), the Court of Appeals shall have only such jurisdiction as is conferred upon it by assignment of appeals and other proceedings by the Supreme Court. The Supreme Court may, by statute, assign any appeal to the Court of Appeals except appeals in cases involving:

(1) the imposition of the death penalty;

(2) utility rates;

(3) annexations;

(4) bond issues;

(5) election contests; or

(6) a trial court's holding a statute unconstitutional.

(c) Transfer of Case or Matter to Court of Appeals. In matters which could be properly handled in either court but which are originally retained by the Supreme Court, that Court may, at any time prior to the issuance of an opinion or ruling disposing of a case or matter before it, transfer the case to the Court of Appeals if the Court determines that expeditious disposition requires the case be decided by the Court of Appeals.

(d) Initial Assignment to the Court of Appeals. The clerk of the Supreme Court, subject to the directions of the Court, will designate those cases retained by that Court for disposition and those assigned to the Court of Appeals.

Although any case, other than those which the Supreme Court is statutorily required to retain, may be assigned to the Court of Appeals, the Supreme Court will retain all cases involving attorney discipline, judicial performance, and certified questions from a federal court. The Court will also ordinarily retain cases involving:

(1) a major question of first impression;

(2) fundamental and urgent issues of broad public importance requiring prompt or ultimate determination by the Supreme Court;

(3) substantial constitutional questions as to the validity of a statute, ordinance, court rule, or administrative rule or regulation;

(4) issues upon which there is an inconsistency in the decisions of the Court of Appeals or of the Supreme Court or conflict between the decisions of the two courts.

In assigning matters to the Court of Appeals, the Supreme Court may take into account the relative workloads of the Supreme Court and the Court of Appeals. The Supreme Court may also, by order, provide that cases falling within identified categories, defined by subject matter or other general criteria, shall be designated for immediate transfer to the Court of Appeals or retention by the Supreme Court. Except for those cases which the Supreme Court is required by statute to retain, a party has no right to have his or her case heard by the Supreme Court.

(e) Assignment Decision Final and Not Subject to Reconsideration on Petition of Party or Court of Appeals. After entry of an order assigning a case to the Court of Appeals, neither the Court of Appeals nor any party may file any pleading or certification seeking reassignment. Any reassignment may take place only on the motion of the Supreme Court.

[Amended effective October 15, 1998].

Advisory Committee Historical Note

Effective October 15, 1998, Rule 16(d) was amended to provide that the clerk will designate those cases retained by the Supreme Court and those assigned to the Court of Appeals. 717-722 So.2d XXVII (West Miss.Cases 1998).

Effective January 1, 1995, the Supreme Court promulgated Miss.R.App.P. 16, entitled "Jurisdiction of the Supreme Court and the Court of Appeals; Assignment of Cases to the Court of Appeals." Miss.Sup.Ct.R. 16 had been designated reserved. 644-647 So.2d XLIX-XLI (West Miss.Cases 1994).

Comment

M.R.A.P. 16, dealing with the jurisdiction of the Supreme Court and the Court of

Appeals, has no counterpart in the former Supreme Court Rules. The rule specifies the cases which must, pursuant to Miss. Code Ann. § 9-4-3-(1) (Supp. 1994), be decided by the Supreme Court. The rule further provides that all matters involving bar discipline and judicial performance will be decided by the Supreme Court, as will certified questions from federal courts. The rule makes it clear that any other case may, in the discretion of the Supreme Court, be assigned to the Court of Appeals. The rule sets forth criteria for retention of other cases in the Supreme Court, but the rule suggests that the Supreme Court will not ordinarily exercise its discretion to retain a case unless it is apparent that the case presents an issue which is of such broad and fundamental public importance that the Supreme Court must ultimately be involved in its disposition or unless the issue presented is such that its resolution is highly likely to result in significant development of the law. The rule does not preclude the assignment of cases involving law development to the Court of Appeals but provides that such assignments will not be routinely made.

Section (d) provides that a party has no right to have his case heard by the Supreme Court, and section (a) provides that the Court will not entertain any pleading which seeks to have a case reassigned to the Supreme Court from the Court of Appeals.

RULE 17. REVIEW IN THE SUPREME COURT FOLLOWING DECISION BY THE COURT OF APPEALS

(a) Decisions of Court of Appeals Reviewable by Writ of *Certiorari*. A decision of the Court of Appeals is a final decision which is not reviewable by the Supreme Court except on writ of *certiorari*. Review on writ of *certiorari* is not a matter of right, but a matter of judicial discretion. The Supreme Court may grant a petition for writ of *certiorari* on the affirmative vote of four of its members and may, by granting such writ, review any decision of the Court of Appeals. Successive review of a decision of the Court of Appeals by the Supreme Court will ordinarily be granted only for the purpose of resolving substantial questions of law of general significance. Review will ordinarily be limited to:

(1) cases in which it appears that the Court of Appeals has rendered a decision which is in conflict with a prior decision of the Court of Appeals or published Supreme Court decision;

(2) cases in which it appears that the Court of Appeals has not considered a controlling constitutional provision;

(3) cases which should have been decided by the Supreme Court because:

(i) the statute or these rules require decision by the Supreme Court, or

(ii) they involve fundamental issues of broad public importance requiring determination by the Supreme Court.

Notwithstanding the presence of one or more of these factors, the Supreme Court may decline to grant a petition for *certiorari* for review of the decision of the Court of Appeals. The Court may, in the absence of these factors, grant a writ of *certiorari*.

(b) Time for Filing Petition for Writ of *Certiorari*; Content and Length of Petition. A party seeking review of a judgment of the Court of Appeals must first seek review of that court's decision by filing a motion for rehearing in the Court of Appeals. If a party seeks review in the Supreme Court, a petition for a writ of *certiorari* for review of the decision of the Court of Appeals must be filed in the Supreme Court and served on other parties within fourteen (14) days from the date of entry of judgment by the Court of Appeals on the motion for rehearing, unless extended upon motion filed within such time. An untimely petition may be summarily dismissed by a single justice of the Supreme Court. The petition for writ of *certiorari* may not exceed ten (10) pages in length and must briefly and succinctly state the precise basis on which the party seeks review by the Supreme Court, and may include citation of authority in support of that contention. No citation to authority or argument may be incorporated into the petition by reference to another document. The petitioner must file an

original and ten (10) copies of the petition. The petitioner must attach, as appendices to the petition, a copy of the opinion and judgment of the Court of Appeals, and a copy of the motion for rehearing filed in the Court of Appeals.

(c) Briefs and Oral Argument Not Permitted. Neither briefs nor oral argument shall be allowed in support of a petition for a writ of *certiorari*, unless requested by the Supreme Court.

(d) Response to Petition for Writ of *Certiorari*. Within seven (7) days after the filing of a petition for a writ of *certiorari*, any other party to the case may, but need not, file and serve an original and 10 copies of a written response in opposition to the petition. The response may not exceed ten (10) pages in length. No citation to authority or argument may be incorporated into the response by reference to another document. The respondent may attach, as an appendix, his or her response to the motion for rehearing filed in the Court of Appeals.

(e) Decision by the Supreme Court. The Supreme Court shall act upon a petition for a writ of *certiorari* within ninety (90) days of the filing of the response provided for in subsection (d) above, or, should no response be filed, the final date upon which such response could be filed. The failure of the Court to issue such a writ within that period shall constitute a rejection of the petition and the petition shall be deemed denied.

(f) Reconsideration Not Permitted. Neither an acceptance nor a rejection of a petition for *certiorari* shall be subject to further pleading by a party for rehearing or reconsideration. Prior to final disposition, the Supreme Court may, on its own motion, find there is no need for further review and may dismiss the *certiorari* proceeding.

(g) Notification of Grant of Petition for *Certiorari*. Upon the Supreme Court's disposition of a petition for a writ of certiorari, the clerk of the Supreme Court shall immediately notify the parties.

(h) Supplemental Briefs; Record on Review. Upon notice of a grant of *certiorari*, any party may, whether requested by the Court or not, within 10 days, file an original and 10 copies of a supplemental brief not to exceed 10 pages. No additional time or pages shall be allowed for supplemental briefs. The Supreme Court may require supplemental briefs on the merits of all or some of the issues for review. The Supreme Court's review on the grant of *certiorari* shall be conducted on the record and briefs previously filed in the Court of Appeals and on any supplemental briefs filed. The Supreme Court may limit the question on review.

(i) Oral Argument. Oral argument shall not be allowed, unless requested by the Supreme Court. The Court may require oral argument.

(j) Mandate. The timely filing of a petition for a writ of *certiorari* shall stay the issuance of the mandate of the Court of Appeals. Upon the issuance of an order of denial of a petition for a writ of *certiorari* or upon the expiration of the period allowed for the Supreme Court's consideration of such a petition, the clerk of the Supreme Court shall issue the mandate, pursuant to M.R.A.P. 41.

[Amended February 10, 1995; amended effective September 28, 1995; amended June 21, 1996; amended effective January 1, 1999; amended July 1, 1999.]

(k) Motions to dismiss or withdraw opinion filed after petition for writ of certiorari. Where motions to dismiss an appeal or motions to withdraw or alter an opinion of the Court of Appeals are filed after petitions for writ of certiorari have been filed in the Supreme Court, the proceedings on the petitions for writ of certiorari will be suspended and the cases will be remanded to the Court of Appeals to address the motions. After the Court of Appeals has addressed the motions, the matter shall proceed in the Supreme Court, and, if the motion to dismiss the case has been granted, the petition may be dismissed as moot.

[Adopted to govern matters filed on or after January 1, 1995; amended February 10, 1995; amended effective September 28, 1995; amended June 21, 1996; amended October 15, 1998, effective from and after January 1, 1999; amended June 24, 1999; amended effective January 3, 2002; amended effective July 1, 2012 to revise subsection (f).]

Advisory Committee Historical Note

Effective January 3, 2002, a new Rule 17(k) was adopted. 803-804 So.2d XIX (West Miss.Cases 2002).

Effective June 24, 1999, Rule 17(b) was amended to effect editorial changes. 735 So.2d XIX (West Miss.Cases 1999).

Effective January 1, 1999, Rule 17(b) was amended to provide that untimely certiorari petitions may be summarily dismissed by a single justice and to provide that motions to extend the time to file a certiorari petition must be made within the original 14 days. 717-722 So.2d XXVII (West Miss.Cases 1998).

Effective January 1, 1999, Rule 17(e) was amended to effect a technical change. So.2d 717-722 XXVII (West Miss.Cases 1998).

Effective June 21, 1996, Rule 17 (e) was amended to enlarge the period for acting on certiorari petitions from sixty to ninety days. In addition, Rule 17(b) was amended to redesignate rehearing “petitions” as “motions,” and Rule 17 (d) was amended to

consistently designate certiorari “petitions” as “petitions” and effect another technical change. 673-678 So.2d XXXIX-XL (West Miss. Cases 1996).

Effective September 25, 1995, Rule 17(b) was amended to make clear that the time for filing a petition a writ of certiorari begins to run with the entry of the judgment of the Court of Appeals on the required petition for rehearing, and to effect unrelated technical changes. 660 So.2d LXXXIII-LXXXIV (West Miss.Cases 1995).

Effective February 10, 1995, Rule 17(j) was amended to state that the clerk shall issue the mandate in accordance with Miss.R.App.P. 41. 648 So.2d XXXII (West Miss.Cases 1995).

Effective January 1, 1995, the Supreme Court promulgated Miss.R.App.P. 17, entitled “Review in the Supreme Court Following Decision by the Court of Appeals.” Miss.Sup.Ct.R. 17 had been designated reserved. 644-647 So.2d LI-LIII (West Miss.Cases 1994).

Comment

Rule 17 provides a procedure by which parties may seek Supreme Court review of a judgment of the Court of Appeals. Section (a) follows Miss. Code Ann. § 9-4-3(2)(Supp. 1994) which provides that "[d]ecisions of the Court of Appeals are final and are not subject to review by the Supreme Court, except by [grant of] writ of *certiorari* . . . by the affirmative vote of four (4) of [the Supreme Court's] members."

RULE 18. [OMITTED]

APPEALS FROM AGENCY RESPONSIBLE FOR UTILITY RATES

RULE 19. APPEALS FROM THE PUBLIC SERVICE COMMISSION

Appeals from an administrative agency charged by law with the responsibility for approval or disapproval of rates sought to be charged the public by any public utility are governed by statutes enacted pursuant to the Mississippi Constitution of 1890, art. 6, § 146.

Advisory Committee Historical Note

Effective January 1, 1995, Miss.R.App.P. 19 replaced Miss.Sup.Ct.R. 19. 644-647 So.2d LIII-LIV (West Miss.Cases 1994).

Effective July 1, 1994, the Comment to Miss.Sup.Ct.R. 19 was amended to delete references to repealed statutes and material concerning the transition from statutory procedures to Rule practice, and to effect attendant technical changes. 632-635 So.2d LI-LII (West Miss.Cases 1994).

Comment

Legislative authority to provide for direct appeals to the Supreme Court from certain decisions of the Mississippi Public Service Commission was established by amendment to § 146 of the Mississippi Constitution of 1890. That amendment was ratified by the electorate on November 8, 1983, and was inserted as a part of the Constitution on January 3, 1984. Pursuant to the authority granted by § 146, the legislature enacted Miss. Code Ann. § 77-3-72 (1991) which establishes procedures for such direct appeals.

Under § 77-3-72, final orders in any utility rate proceeding involving a filing for a rate change are appealed by filing an "appeal" comparable to the Rule 3 notice of appeal. The "appeal," however, is filed with the clerk of the Supreme Court, not with the Commission, and it must "state briefly the nature of the proceedings before the commission, and shall specify the order complained of." Miss. Code Ann. § 77-3-72(1) (1991). The appeal is on the entire record unless the parties stipulate to the contrary. Miss. Code Ann. § 77-3-72(2) (1991). The statutes do not require a cost estimate or prepayment of costs. The appealing party must, however, pay the fees required by the clerk of the Supreme Court under Miss. Code Ann. § 25-7-3 (1991). The statutes provide for collection of rates under bond in certain cases. Miss. Code Ann. § 77-3-72(3), (4) (1991).

Where the statute is silent, these rules govern the appeal. Applicable rules in rate appeals include rules concerning dismissal for failure to prosecute and other sanctions, Rule 2; designation, correction, and preparation of the record, Rule 10 and Rule 11; writs of

mandamus and other extraordinary writs, Rule 21(c); filing and service, Rule 25; computation and extension of time, Rule 26; motions, Rule 27; brief and record excerpts, Rules 28-32; and other rules generally applicable to civil cases, Rules 33-38, 40-47.

Appeals from Commission decisions in other cases are to the chancery court of the judicial district in which the principal place of business of the utility in the State of Mississippi is located, Miss. Code Ann. § 77-3-67(1) (1991), or to the circuit court of the first judicial district of Hinds County, Miss. Code Ann. § 77-1-45 (1991). Appeals from the chancery court to the Supreme Court are governed by these rules and the bond provisions of Miss. Code Ann. § 77-3-71 (1991). Appeals from the circuit court to the Supreme Court are governed by these rules and the bond provisions of Miss. Code Ann. § 77-1-47 (1991).

CERTIFIED QUESTIONS FROM FEDERAL COURTS

RULE 20. CERTIFIED QUESTIONS FROM FEDERAL COURTS

(a) When Certified. When it shall appear to the Supreme Court of the United States or to any United States Court of Appeals that there may be involved in any proceeding before it questions or propositions of law of this state which are determinative of all or part of that cause and there are no clear controlling precedents in the decisions of the Mississippi Supreme Court, the federal court may certify such questions or propositions of law of this state to the Mississippi Supreme Court for rendition of a written opinion concerning such questions or propositions of Mississippi law. The Supreme Court may, in its discretion, decline to answer the questions certified to it.

(b) Method of Invoking Rule. The provision of this rule may be invoked by the federal court upon its own motion or the suggestion or motion of any interested party when approved by the federal court.

(c) Contents of Certificate. The certificate shall contain the style of the case, a statement of facts showing the nature of the cause and the circumstances out of which the questions or propositions of law arise, and the question of law to be answered.

(d) Preparation of Certificate. The certificate shall be certified to the Supreme Court by the clerk of the federal court and under its official seal. The Supreme Court may, in its discretion, require the original or copies of all or any portion of the record before the federal court to be filed with said certificate where, in its opinion, such record may be necessary in the determination of the certified question.

(e) Costs. The costs of the proceedings shall be equally divided between the parties unless otherwise ordered by the Supreme Court.

(f) Briefs and Argument. The appellant or petitioner in the federal court shall submit the initial brief on the question certified. All briefs, arguments, and other proceedings shall be conducted according to these Rules. For the purposes of Rule 28, additional briefing will be upon directive of the Supreme Court.

[Adopted governing matters filed on or after January 1, 1995; amended effective June 27, 2002.]

Advisory Committee Historical Note

Effective June 27, 2002, Rule 20(f) was amended to provide that briefing in addition to the initial brief will be on the directive of the Supreme Court. 819-822 So.2d XVIII (West Miss.Cases 2002).

Effective January 1, 1995, Miss.R.App.P. 20 replaced Miss.Sup.Ct.R. 20. 644-647 So.2d LIV-LV (West Miss.Cases 1994).

Comment

Rule 20 continues the practice of accepting certified questions from federal courts. Acceptance of a question so certified is discretionary with the Court. The Court reserves the right to rephrase certified questions, *Government Employees Ins. Co. v. Brown*, 446 So. 2d 1002, 1006 (Miss. 1984), and has said it will restrict its review under this rule "to the performance when properly requested of the function of declaring in general terms the controlling rules" of state law, and not the application of law to fact. *Boardman v. United Services Auto Ass'n*, 470 So. 2d 1024, 1031 (Miss. 1985). The practice of the United States Court of Appeals for the Fifth Circuit in certifying questions is discussed in *In Re McClintock*, 558 F. 2d 732, 733 nn. 2-5 (5th Cir. 1977), and J. Brown, *Certification-Federalism in Action*, 7 Cumb. L. Rev. 455 (1977) (tracing development of certification doctrine).

EXTRAORDINARY WRITS AND COLLATERAL RELIEF

RULE 21. WRITS OF MANDAMUS AND PROHIBITION DIRECTED TO A JUDGE OR JUDGES AND OTHER EXTRAORDINARY WRITS

(a) Writs and Process, Supreme Court. The Supreme Court shall issue all writs and process necessary for the exercise and enforcement of its appellate jurisdiction and may enforce its mandates by fine and other appropriate sanctions.

(b) Writs and Process, Court of Appeals. The Court of Appeals shall issue writs and other process necessary for the exercise and enforcement of its jurisdiction, but a writ, order, or other process in any appeal not transferred to the Court of Appeals by the Supreme Court shall be of no effect.

(c) Mandamus or Prohibition To a Judge or Judges; Petition for Writ; Service and Filing. Application for a writ of mandamus or of prohibition directed to a judge or judges shall be made by filing a petition with the clerk of the Supreme Court with proof of service on the judge or judges and on all parties to the action in the trial court.

A petition for writ of mandamus, writ of prohibition, or other extraordinary writ shall not bear the name of the judge or judges, but shall be entitled, *In re*:_____, Petitioner. To the extent that relief is requested of a particular judge, unless otherwise ordered, the judge shall be represented *pro forma* by counsel for the party opposing the relief, who shall appear in the name of the party and not that of the judge, except that where the petition relates to a criminal case, the judge shall not be represented by the District Attorney's office but shall either represent himself/herself or be represented by the office of the Attorney General and/or private counsel retained by the judge. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application and why it was denied by the trial court; a statement of the issues presented and of the relief sought; a statement of the reasons why the writ should issue; and certified copies of any order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. Upon receipt of the prescribed docket fee, the clerk of the Supreme Court shall docket the petition and submit it to the appellate court to which the case has been assigned.

(d) Denial; Notice Directing Answer. If the appellate court is of the opinion that the writ should not be granted, it will deny the petition without requesting an answer. Otherwise, the clerk of the Supreme Court will issue notice that an answer to the petition be filed by the respondents within the time fixed by the notice. The notice shall be served by the clerk on the judge or judges and on all other parties to the action in the trial court. All parties below,

other than the petitioner, shall also be deemed respondents for all purposes. Two or more respondents may answer jointly. The clerk shall advise the parties of the dates on which briefs are to be filed, if briefs are required, and of the date of oral argument. The proceeding shall be given preference over ordinary civil cases. The Supreme Court also may, in its discretion, treat the petition as a petition for permission to appeal under Rule 5 and order such further proceedings as the Court deems appropriate.

(e) Other Extraordinary Writs. Application for extraordinary writs other than those provided for in subdivisions (c) and (d) of this rule shall be made by petition filed with the clerk of the Supreme Court with proof of service on the parties named as respondents. Proceedings on such application shall conform, so far as is practicable, to the procedure prescribed in subdivisions (c) and (d) of this rule.

(f) Form of Papers; Number of Copies. All papers shall be typewritten or printed. Four (4) copies shall be filed with the original, but the court may direct that additional copies be furnished.

[Amended effective January 1, 1999]

Advisory Committee Historical Note

Effective January 1, 1999, Rule 21(d) was amended to effect technical changes. 717-722 So.2d XXVII (West Miss.Cases 1998).

Effective January 1, 1995, Miss.R.App.P. 21 replaced Miss.Sup.Ct.R. 21 and added new subsections (a) and (b), embracing proceedings in the Court of Appeals. 644-647 So.2d LV-LVII (West Miss.Cases 1994).

Comment

Rule 21 applies to all requests for remedial writs under Miss. Code Ann. § 9-1-19 (Supp. 1994). The rule was originally modeled on Fed. R. App. P. 21 as modified by 5th Cir. R. 21. With the exception of the writ of mandamus required by Rule 15, a party must seek relief in the trial court before obtaining the extraordinary relief of a remedial writ from the Supreme Court. The rule preserves the Mississippi requirement that papers attached to a petition must be certified. It does not require, however, that the petition be under oath. Petitions will be considered by a panel of the appropriate court rather than by a single justice or judge. In emergency circumstances in which panel consideration would be impractical due to requirements of time, however, a single justice or judge may hear the petition and issue a temporary stay pursuant to Rule 8. A single justice's or judge's decision not to grant a stay may be reviewed by the appropriate court.

The Supreme Court, under Rule 21(b), retains the discretion to treat the petition as a petition for permission to appeal under Rule 5 and to instruct the parties to proceed under that rule. *See In re Brown*, 478 So. 2d 1033 (Miss. 1985) (application for writ treated as emergency appeal).

RULE 22. APPLICATION FOR POST-CONVICTION COLLATERAL RELIEF IN CRIMINAL CASES

(a) Filing of Applications. Applications for post-conviction collateral relief in criminal cases are governed by Miss. Code Ann. § 99-39-1, et seq. (Suppl. 1994) and this Rule 22. If any application fails to comply substantially with the statute, the clerk of the Supreme Court shall give written notice of the default, apprising the party of the nature of the deficiency. If the deficiencies are not corrected within thirty days, the application may be dismissed. Successive applications for post-conviction relief which do not clearly demonstrate an exception to the successive writ bar of Miss. Code Ann. § 99-39-27(9) may subject the filer to sanctions.

(b) Post-conviction issues raised on direct appeal. Issues which may be raised in post-conviction proceedings may also be raised on direct appeal if such issues are based on facts fully apparent from the record. Where the appellant is represented by counsel who did not represent the appellant at trial, the failure to raise such issues on direct appeal shall constitute a waiver barring consideration of the issues in post-conviction proceedings.

(c) Post-conviction Proceedings Filed by Persons Under Sentence of Death. Proceedings on post-conviction applications and motions filed by persons under sentence of death shall be governed by this rule. This sub-part (c) shall apply only to such proceedings filed by persons under sentence of death.

(1) Representation by counsel.

> (i) The petitioner shall be represented by qualified counsel unless the petitioner has elected to proceed pro se, and the convicting court finds, after a hearing on the record, that the petitioner's election is informed and voluntary.
>
> (ii) Where a petitioner is sentenced to death the Supreme Court shall, immediately after the announcement of the decision on direct appeal, order that the convicting court determine whether the petitioner is indigent and, if so, whether the petitioner desires appointment of counsel for the purpose of post-conviction proceedings. Such order shall be forwarded to the convicting court and the Office of Capital Post-Conviction Counsel upon entry. The Office of Capital Post-Conviction Counsel shall advise the convicting court of the attorney selected to represent the petitioner pursuant to Section 99-39-23 and these rules.

(iii) Should it be determined upon hearing in the convicting court that the petitioner has retained qualified private counsel, the attorney selected by the Office of Capital Post-Conviction Counsel shall take no further action and shall be discharged. Should it be determined that the petitioner elects to proceed pro se, the attorney selected by the Office of Post Conviction Counsel shall continue to serve, but only as counselor and advisor to the petitioner.

(2) Proceedings pro se.

(i) The petitioner shall be allowed to proceed pro se only upon findings of the convicting court that the petitioner has made an informed and voluntary election to so proceed under the provisions of subpart (1)(i) above. Such an election shall be deemed informed and voluntary only when the petitioner has been advised of the complexity of post-conviction proceedings and the limitations upon issues which may be raised. The court shall advise the petitioner that:

the stringent filing and other deadlines attendant to post-conviction proceedings will not be relaxed for pro se litigants,

ignorance of the law or procedures will not be accepted as an excuse for failure to proceed in accordance with law,

grounds for post-conviction relief, including intervening decisions, are often technical and require knowledge of and skill in the law,

investigation, including discovery and the gathering of evidence can be best pursued by counsel, and incarceration of the petitioner will not be accepted as an excuse for failure to conduct such investigation and gather such evidence,

the court will not relax or disregard the rules of evidence, procedure, or courtroom protocol for the pro se petitioner, and without legal counsel the petitioner's ability to proceed effectively will be hampered, and

a decision to proceed pro se in post-conviction matters usually increases the likelihood of an outcome unfavorable to the petitioner.

(ii)In the event that expenses for litigation are allowed a post-conviction petitioner, they shall be disbursed through the attorney serving as advisor and counselor.

(iii) When the petitioner is proceeding pro se, access to trial and appellate files, prosecution and law enforcement files and the delivery of discovery materials shall be upon such conditions and subject to such restrictions as the conviction court may deem necessary to preserve the integrity and security of the files and materials.

(iv) When the petitioner is proceeding pro se, and the application for leave to file a motion for post-conviction relief is denied, or if the application is granted, relief is denied in the convicting court and such denial is affirmed in the Supreme Court, the attorney appointed as advisor and counselor shall seek appointment of federal habeas corpus counsel in accordance with the provisions of subpart (9) below.

(3) Compensation of appointed counsel and expenses of litigation.

Compensation for attorneys appointed under this section and expenses of litigation shall be governed by Miss. Code Ann. § 99-15-18. Prior to the approval of expenses for litigation, the petitioner shall present to the convicting court, with notice to the Attorney General and an opportunity for the Attorney General to be heard, a request estimating the amount of such expenses as will be necessary and appropriate in the matter, and the court will determine and allow such expenses as are justified upon hearing of the request for expenses. In requesting such expenses, the petitioner shall make a preliminary showing that such expenses are necessary to the presentation of his case and that they relate to positions which may reasonably be expected to be beneficial. To the extent that the court may find that the disclosure of identity of experts or other factual matters may hinder a fair preparation of the petitioner's case, the disclosure thereof may be presented in camera without disclosure to the State. All orders initially allowing litigation expenses shall be subject to review and reconsideration from time to time as the court may find necessary, and payment under such order will be approved only upon the submission of specific detailed invoices and review by the court. Should the court find that such invoices contain information which if disclosed to the State would unfairly disclose

information detrimental to the petitioner's fair presentation of his case, the court shall consider those portions in camera without disclosure to the State.

(4) Further matters preliminary to proceedings in the Supreme Court

(i) An application for post-conviction relief shall not be filed until proceedings on rehearing of the affirmance of the conviction and sentence are final. However, not later than sixty (60) days following the appointment of post-conviction counsel, or the determination that the petitioner is represented by qualified private counsel, or elects to proceed pro se, counsel or the pro se petitioner shall examine the record and preliminarily investigate the case and shall file with this Court a statement that having done so, counsel or the pro se petitioner either finds no issues with potential post-conviction merit or finds that there are issues which are believed to be meritorious. In the event that counsel or the pro se petitioner files a statement indicating that post-conviction review is deemed to be meritorious and that counsel or the pro se petitioner intends to file an application for post-conviction review, execution of the sentence shall be stayed until disposition of post-conviction proceedings.

(ii) Upon appointment of counsel, or the determination that the petitioner is represented by private counsel the petitioner's prior trial and appellate counsel shall make available to the petitioner's post-conviction counsel their complete files relating to the conviction and sentence. The State, to the extent allowed by law, shall make available to post-conviction counsel the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed and the prosecution of the petitioner. If the State has a reasonable belief that allowing inspection of any portion of the files by post-conviction counsel for the petitioner would not be in the interest of justice, the State may submit for inspection by the convicting court those portions of the files so identified. If upon examination of the files, the court finds that such portions of the files could not assist the capital petitioner in investigating, preparing, or presenting a motion for post-conviction relief, the court in its discretion may allow the State to withhold that portion of the files. Discovery and compulsory process may be allowed the petitioner from and after the appointment of post-conviction counsel or the determination that the petitioner is represented by private counselor or is proceeding pro se, but only upon motion indicating the purpose

of such discovery and that such discovery is not frivolous and is likely to be helpful in the investigation, preparation or presentation of specific issues which the petitioner in good faith believes to be in question and proper for post-conviction relief, and order entered in the sound discretion of the court. Upon determination that the petitioner has elected to proceed pro se, such files and discovery shall be made available as provided in subsection (2)(iii) above.

(5) Proceedings in the Supreme Court on Application for Leave to Seek Relief in the Convicting Court.

(i) An application for leave to file a motion for post-conviction relief shall be filed in the Supreme Court not later than one hundred eighty (180) days after counsel is appointed or sixty (60) days following denial of rehearing on the direct appeal of the conviction and sentence, whichever is later. An application which is filed after such date is presumed untimely unless the petitioner establishes good cause by showing particularized justifying circumstances. Absent extraordinary circumstances, a petitioner may not establish good cause for untimely filing of an application filed later than ninety-one (91) days after the filing due date hereunder. The failure to file an application within the time allowed hereunder constitutes a waiver of all grounds for relief, excepting from such waiver only those matters which are excepting from res judicata or successive writ bar identified in section 99-39-27(9).

(ii) The State shall file a response to the application for leave to file a motion for post-conviction relief not later than thirty (30) days following the date the State receives notice of filing of the application. The State may request additional time upon particularized justifying circumstances. The petitioner may file a rebuttal to the State's response within fifteen (15) days following the date the petitioner receives notice of filing of the response. The petitioner may request additional time for rebuttal upon particularized justifying circumstances.

(6) Proceedings in the Convicting Court

In the event that the application is granted, the Supreme Court shall issue such scheduling orders as it deems appropriate and shall during proceedings in the convicting court monitor such proceedings in order to assure compliance with filing and decision periods established in this section or by order. Such

scheduling orders shall require (1) the filing of the motion for post-conviction relief within thirty (30) days following the entry of the order, and, if an evidentiary hearing is to be granted, such hearing to be conducted not more than one hundred eighty (180) days following the filing of the motion for post-conviction relief. The scheduling order shall, in any event, require disposition of all proceedings in the convicting court within two hundred seventy (270) days following the filing of the motion for post-conviction relief. The preparation of the transcript and record of proceedings shall take precedence over all other duties of the court reporter assigned to the post-conviction proceedings in the convicting court, and in any event, such record shall be transcribed within thirty (30) days following the conclusion of such proceedings unless additional time shall be allowed by the Supreme Court.

(7) To the extent that the procedures set out in this rule may conflict with any other rule of procedure or practice, the procedures set out herein shall control in post-conviction proceedings on behalf of petitioners under a sentence of death.

(8) Appeals from the judgments entered under this rule shall proceed as in other appeals from post-conviction decisions of the convicting courts and in accordance with rules established by the Supreme Court.

(9) If after an application for leave to file a motion for post-conviction relief is filed, the petitioner is denied post-conviction relief in this Court, or is denied such relief in the convicting court after grant of an application for leave to file for post-conviction relief in the convicting court and the Supreme Court affirms such denial by the trial court, an attorney, whether appointed under this section or privately retained, shall not later than fifteen (15) days after such denial becomes final in the Supreme Court, move to be appointed as counsel in federal habeas review under 21 U.S.C. Section 848(q) or equivalent provision or, if necessary, move for the appointment of other counsel under 21 U.S.C. Section 848(q) or equivalent provision.

(d) Standards and Qualifications for Attorneys Appointed to Represent Those Under Sentence of Death in Post-conviction Proceedings. At least one (1) attorney representing those under a sentence of death seeking post-conviction relief shall have primary responsibility for and personally appear at proceedings, and shall,

(1) Be admitted to practice law in Mississippi, being a member in good standing of the Bar for at least five years immediately preceding the appointment, or admitted pro hac vice pursuant to order entered under M.R.A.P. 46 and being a member in good standing of that attorney's home jurisdiction for a like period immediately preceding the appointment,

(2) Be admitted to practice in the federal courts of Mississippi and before the United States Court of Appeals for the Fifth Circuit, or, in the case of attorneys appearing pro hac vice, admitted to the federal district courts and the circuit court of appeals having jurisdiction in their home areas,

(3) Have practiced for three years, in federal or state court, in at least one of the following areas:

(a) criminal trials or direct appeals before a court of record, and/or
(b) post-conviction or habeas proceedings.

(4) Have not previously represented the capital petitioner in the case either in the trial court or in the direct appeal, unless the petitioner and counsel expressly request continued representation and waive all potential issues that are foreclosed by continued representation,

(5) Have substantial knowledge and understanding of the relevant state and federal law, both procedural and substantive, governing capital cases, including completion of the requisite educational training enumerated in subsection (e), and

(6) Have otherwise demonstrated the necessary proficiency and commitment to zealous advocacy which exemplify the quality of representation appropriate to capital cases.

Provided, however, that with the approval of the trial court, an attorney may be appointed who does not meet the stated qualifications in (1) - (3) upon a showing that the attorney's experience, stature and record in a different type of practice (e.g., civil litigation, academic work, or work for a court or prosecutor) enable the trial court to conclude that the attorney has extensive experience in complex cases substantially equivalent to that of a qualified attorney.

(e) Education and training of attorneys appointed or retained to represent those under sentence of death in post-conviction proceedings. Effective July 31, 2000, an attorney serving as post-conviction counsel in a case wherein the petitioner is under a sentence of death shall have within one year prior to his appointment or employment successfully completed twelve hours training or educational programs in the area of capital defense through a program accredited by the Mississippi Commission on Continuing Legal Education or by the American Bar Association.

[Adopted August 21, 1996; amended June 24, 1999 by order entered that date; amended effective July 27,2000; amended effective February 10, 2005 to specify that post-conviction

issues are to be raised on direct appeal only when they are apparent on the record; amended effective May 31, 2007, to provide for sanctions.]

Advisory Committee Historical Note

Effective July 27, 2000, new Rules 22(b) and (c) were adopted with a related reference in 22(a) and a third paragraph added to the Comment. 761-763 So.2d XVII (West Miss.Cases 2000).

Effective June 24, 1999, Rule 22(a) was revised regarding deficient applications and Rules 22(c) and (d) were adopted. 735 So.2d XXIII (West Miss.Cases 1999).

Effective January 1, 1999, Rule 22(a) was amended to provide thirty days after notice from the clerk to remedy failure to comply substantially with statutory requirements. 717-722 So.2d XXVII (West Miss.Cases 1998).

Effective January 1, 1995, Miss.R.App.P. 22 replaced Miss.Sup.Ct.R. 22. 644-647 So.2d LVII (West Miss.Cases 1994).

Comment

Rule 22 incorporates the comprehensive procedure reflected in the Mississippi Uniform Post-Conviction Collateral Relief Act, codified at Section 99-39-1, *et seq.* of the Mississippi Code. Passed in 1984, the Act requires that when a prisoner's conviction and sentence have been appealed to the Supreme Court, and the appeal is either affirmed or dismissed, the prisoner is to seek leave from that Court before filing a motion for post-conviction collateral relief in the trial court, Section 99-39-7. The motion for leave is governed by Section 99-39-27, and the provisions of these rules that are consistent with that statute. *See, e.g.,* Rules 25, filing and service; 26, computation and extension of time; 27, motions; 28(h), length of briefs; 31(c), number of briefs.

Rule 22(b) allows the appellant to raise post-conviction issues on direct appeal where the issues are fully apparent from the record of the trial, and failure to raise such issues constitutes a waiver. Under this provision, issues such as claims of ineffective assistance of counsel for failure to object to evidence offered by the state or to argument by the state must be raised on direct appeal. Other post-conviction issues which cannot be raised at the time of appeal because they involve actions or inaction outside the record are not waived since they cannot practically be raised without further development or investigation.

If leave to proceed in the trial court is granted, and proceedings take place there pursuant to §§ 99-39-9 to 99-39-23, an appeal from the trial court's decision is governed by

these rules except as otherwise stated in § 99-39-25, which makes specific provision for stays or bail pending such an appeal. Statutory provisions are subject to the requirements of Miss. Const. of 1890, art. 3, § 21.

Following the adoption of new legislation in 2000, the rule was further amended to adopt special procedures governing proceedings on applications for leave to file in the trial court and motions for post-conviction relief in the cases of parties under sentence of death. These amendments are designed to implement the legislation, adopted as H.B. 1228 and signed by the Governor on May 22, 2000, effective on July 1, 2000.

[Adopted to govern matters filed on or after January 1, 1995; amended effective January 1, 1999; June 24, 1999; amended effective July 27, 2000; amended effective February 10, 2005; amended effective August 2, 2012.]

GENERAL PROVISIONS

RULE 23. CALL AND ORDER OF DOCKET

(a) Civil Cases. Except as may be provided by special order, all civil cases will be submitted in the order in which they stand on the docket.

(b) Criminal Cases. Criminal cases may be set for call on any day when the Supreme Court or the Court of Appeals is sitting, and in such numbers as it may designate.

(c) Oral Argument. All cases, civil and criminal, where oral argument is not granted, will be submitted when they are reached on the docket, without the necessity of the cases being called and without notice to the lawyers or litigants.

(d) Decisions. The minutes of the Supreme Court shall be signed and announcement of decisions shall be made on each Thursday when the Court is sitting. The minutes of the Court of Appeals shall be signed and announcement of decisions shall be made monthly or more often as the Court of Appeals deems necessary.

Advisory Committee Historical Note

Effective January 1, 1995, Miss.R.App.P. 23 replaced Miss.Sup.Ct.R. 23, embracing proceedings in the Court of Appeals. 644-647 So.2d LVII-LVIII (West Miss.Cases 1994).

Comment

Rule 23 follows the longstanding practices of the Supreme Court as to the order and call of the docket. A civil case may be expedited only by special order, while expedition in hearing a criminal case requires no such order. Normally, upon motion, the Supreme Court will enter an order expediting a case where preference is granted by statute. The statutes grant preference in certain civil cases, including *quo warranto* actions, actions of mandamus where the public interest is concerned, and cases involving taxes claimed by the state, county or municipality, Miss. Code Ann. § 11-3-3 (1972); in challenges to removal elections, Miss. Code Ann. § 25-5-35 (1991); and in appeals from Youth Court, Miss. Code Ann. § 43-21-651 (1972). Also by statute, cases in which the defendant has received a death sentence are preference cases. Miss. Code Ann. § 9-3-21 (1991). Rule 5(d) authorizes the Supreme Court to grant a preference in hearing interlocutory appeals and Rule 21 grants a preference in handling petitions for extraordinary writs. Rule 34 governs practice in granting and holding oral argument.

RULE 24. [OMITTED]

RULE 25. FILING AND SERVICE

(a) Filing. Papers required or permitted to be filed shall be filed with the clerk of the Supreme Court and no motion, brief, motion for rehearing or other document, or any copy shall be sent by an attorney directly to any individual justice except as provided in Rule 8(c). Filing may be accomplished by mail addressed to the clerk or by electronic means in conformity with procedures established by the Court, but filing shall not be timely unless the papers are received by the clerk within the time fixed for filing, except that briefs and record excerpts shall be deemed filed on the day of mailing by first class mail with postage prepaid, or any more expeditious form of delivery. For briefs and record excerpts to be deemed filed on the day of mailing, they must be accompanied by a certificate signed by the person who will actually mail the brief or record excerpt. The certificate shall specify the document filed, the number of copies filed, and the date the paper will be deposited in the United States mail addressed to the clerk. Papers received by the clerk of the Supreme Court without a certificate of filing shall be deemed filed when received by that clerk.

Filing of unopposed procedural and emergency relief motions may be accomplished by facsimile (fax) transmission. A document longer than five pages shall not be filed without prior leave of the clerk.

Each facsimile transmission shall be accompanied by a facsimile cover page which states the date of the transmission, the name and telephone number of the person transmitting the document, the name and facsimile telephone number of the person to whom the document is being transmitted, the docket number and style of the case in which the document is to be filed, the style of the document being filed, and the number of pages being transmitted, excluding the cover page.

A facsimile fee shall be required for filing a document by facsimile transmission.

Only one copy of the document shall be transmitted; the clerk will provide any additional copies required by these rules or an order of the appropriate appellate court, and the cost of copying shall be assessed against the filing party. Papers filed by facsimile transmission shall be deemed filed when the official date and time stamp of the clerk is affixed to the transmission. The facsimile signature shall be deemed an original signature. The filing party shall retain possession of the original executed document for submission to the Court if there is a dispute over authenticity.

A paper may be filed by facsimile transmission only if it can be served on opposing counsel by facsimile transmission. Service of a paper by facsimile transmission is complete when the person transmitting the paper receives confirmation of receipt of the transmission by the facsimile machine of the person served.

The proof of service for a paper served by facsimile transmission shall state the facsimile telephone number of the person to whom the paper was transmitted. A copy of the transmission report to opposing counsel shall be attached to the transmitted document. The person transmitting the document shall further certify that the facsimile fee and any required filing fee have been mailed to the clerk contemporaneously with the facsimile transmission.

Failure to comply with the facsimile requirements of this rule may result in the imposition of sanctions; the document transmitted may be stricken or deemed not filed, or other appropriate action may be taken.

Except as provided above, when these rules or an order of an appellate court requires multiple copies of a document to be filed, filing shall not be deemed complete until all required copies are filed. If a motion is filed with a single justice as permitted by Rule 8, the justice may permit the motion to be filed with that justice, in which event the justice shall note on the motion the date of filing and shall forward the motion to the clerk of the Supreme Court.

(b) Service of All Papers Required. Copies of all papers filed by any party and not required by these rules to be served by the clerk shall, at or before the time of filing, be served by a party or person acting for that party on all other parties to the appeal. Service on a party represented by counsel shall be made on counsel. In all cases a copy of any brief on the merits shall be served on the judge who presided at the trial and, in criminal cases, with the office of the District Attorney.

(c) Manner of Service. Service may be personal, by mail, by electronic means in conformity with procedures established by the Court, or, in limited instances, by facsimile transmission. Personal service includes delivery of the copy to a clerk or other responsible person at the office of counsel. Service by mail is complete on mailing. A paper may be served by facsimile transmission only if it can be filed by facsimile transmission and only if the person to be served is an attorney who has consented to receive facsimile transmissions. An attorney may consent by including the attorney's facsimile telephone number in the letterhead or signature/address block of a paper the attorney files in the case. Consent may be rescinded by serving and filing notice to the other parties to the appeal or review and to the clerk of the Supreme Court. Service of a paper by facsimile transmission is complete when the person transmitting the paper receives confirmation of receipt of the transmission by the facsimile machine of the person served.

(d) Proof of Service. Papers presented for filing shall contain an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. Proof of service may appear on or be affixed to the papers filed. The clerk may permit papers to be filed without acknowledgment or proof of service but shall require such

to be filed promptly. The proof of service for a paper served by facsimile transmission shall state the facsimile telephone number of the person to whom the paper was transmitted.

[Amended June 21, 1996; amended effective June 27, 2002; amended June 6, 2013.]

Advisory Committee Historical Note

Effective June 27, 2002, Rule 25(b) was amended to delete a reference to the District Attorney "who prosecuted the case." 822-823 So.2d XVII (West Miss.Cases 2002).

Effective June 21, 1996, Rule 25(a) was amended to redesignate rehearing "petitions" as "motions." 673-678 So.2d XL (West Miss. Cases 1996).

Effective January 1, 1995, Miss.R.App.P. 25 replaced Miss.Sup.Ct.R. 25, embracing proceedings in the Court of Appeals. Rule 25 was further amended to provide for filing by facsimile transmission. 644-647 So.2d LIX-LXI (West Miss.Cases 1994).

Comment

Rule 25 is substantially patterned after Fed.R.App.P. 25. It enlarges upon former practice to provide that service by mail is complete on mailing. Filing of briefs and record excerpts is deemed to take place on the day of mailing if they are sent by first class mail with postage prepaid or any more expeditious form of delivery. Other papers are deemed filed when filed with the clerk.

Unlike the federal rule, this rule does not permit papers to be filed with a single justice as a matter of course. It restricts such filings to requests for emergency stay relief under Rule 8(c).

RULE 26. COMPUTATION AND EXTENSION OF TIME

(a) Computation. In computing any period of time prescribed or allowed by these rules, by order of the Supreme Court or the Court of Appeals, 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 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 clerk's office is closed. When the period of time prescribed or allowed is less than seven (7) 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. The Supreme Court or the Court of Appeals for good cause shown may, upon motion, enlarge the time prescribed by the rules or by its order for doing any act, or may permit an act to be done after the expiration of such time, but the Supreme Court will not enlarge the time for filing notice of appeal or a petition for permission to appeal.

(c) Additional Time After Service by Mail. Whenever a party is required or permitted to do an act within a prescribed period after service of a paper upon that party and the paper is served by mail, three (3) days shall be added to that prescribed period.

(d) 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 either the Supreme Court or the Court of Appeals to do any act consistent with these rules.

Advisory Committee Historical Note

Effective January 1, 1995, Miss.R.App.P. 26 replaced Miss.Sup.Ct.R. 26, embracing proceedings in the Court of Appeals. 644-647 So.2d LXI-LXII (West Miss.Cases 1994).

Comment

Rule 26 is patterned after Fed.R.App.P. 26 and M.R.C.P. 6. The purpose of this rule is to provide reasonably flexible, general guidelines for the measurement of time periods under these rules. Under Rule 26(b), the court is given wide discretion to enlarge the various time periods both before and after the actual termination of the allotted time, with the exception of enlarging the time for filing a notice of appeal under Rule 4, or a petition for permission to appeal under Rule 5.

Rule 26(a) incorporates legal holidays as defined by statute. *See* Miss. Code Ann. § 3-3-7 (1991).

RULE 27. MOTIONS

(a) Content of Motions; Response. Unless another form is elsewhere prescribed by these rules, an application for an order or other relief shall be made by filing a motion for such order or relief with proof of service on all other parties. The motion shall contain or be accompanied by any matter required by a specific provision of these rules governing such a motion, shall state with particularity the grounds on which it is based, and shall set forth the order or relief sought. If a motion is supported by briefs, affidavits, or other papers, they shall be served and filed with the motion. Any party may file a response in opposition to a motion other than one for a procedural order within seven (7) days after service of the motion, but motions authorized by Rules 8, 9, and 41 may be acted upon after reasonable notice, and the court may shorten or extend the time for responding to any motion.

(b) Determination of Motions for Procedural Relief. Notwithstanding the provisions of Rule 27(a) as to motions generally, motions for procedural relief may be acted upon at any time without awaiting a response. When unopposed, motions for specified types of procedural orders may be disposed of by the clerk of the Supreme Court. The clerk may rule on motions:

(1) for enlargement of time permitted by these rules for periods not to exceed a total of 60 days,

(2) to make corrections in briefs or pleadings filed at the request of counsel filing the brief or pleading,

(3) to withdraw as counsel and/or substitute appearance of counsel, except in appeals from the imposition of a sentence of death,

(4) to voluntarily dismiss appeals where sought by the appellant or the cross-appellant, unless the case has been submitted to the Court for decision,

(5) to increase the page limit for briefs up to 75 pages, or up to 125 pages in appeals from the imposition of a sentence of death,

(6) to supplement the record where documents which were included in the designation of, yet omitted from, the record are certified according to Rule 11 and attached to the motion,

(7) to appear *pro hac vice*,

(8) to suspend record preparation or briefing, and

(9) such other motions as the Court may from time to time direct.

Any party adversely affected by such action may by motion to the appropriate appellate court request reconsideration, vacation or modification of such action by the clerk.

(c) Power of a Single Justice to Entertain Motions. In addition to the authority expressly conferred by these rules or by law, a single justice of the Supreme Court or a single judge of the Court of Appeals may entertain and may grant or deny any request for relief which, under these rules, may properly be sought by motion, except that when a motion is contested a single justice or judge may not dismiss or otherwise determine an appeal or other proceedings. A single justice or judge may rule on opposed motions otherwise subject to action by the clerk under Rule 27(b).

(d) Form of Papers; Number of Copies. All papers relating to motions shall be typewritten or printed and all exhibits and other attachments shall be securely bound. An original and four (4) copies shall be filed with the clerk of the Supreme Court. The Supreme Court or the Court of Appeals may require that additional copies be furnished.

(e) Oral Argument Not Permitted. Unless otherwise ordered by the court to which the case is assigned, no motion shall be orally argued. If the appropriate court requests oral argument, the matter will be heard at such time as the court may designate with reasonable notice to the parties.

(f) Motions Proposing Adoption, Repeal, or Amendment of Rules of Court and Rules Governing the Practice of Law. All applications concerning the adoption, repeal, or amendment of the Mississippi Rules of Civil Procedure, Rules of Evidence, Rules of Appellate Procedure, Rules of Criminal Procedure, Uniform Civil Circuit and County Court Rules, Uniform Chancery Court Rules, Uniform Rules of Procedure for Justice Court, Code of Judicial Conduct, Rules of the Commission on Judicial Performance, Rules and Regulations for Mandatory Continuing Judicial Education, Rules of Professional Conduct, Rules of Discipline for the Mississippi Bar, Rules and Regulations for Mandatory Continuing Legal Education, Rules Governing Admission to the Mississippi Bar, and all other rules affecting the practice of law and the administration of the courts in Mississippi shall be filed in the Supreme Court. Such motions shall comply with all other requirements of the Mississippi Rules of Appellate Procedure; specifically, four (4) copies shall be filed with the original, but the Supreme Court may require that additional copies be furnished. Such motions should include the text of the proposed new rule or of the rule to be amended with deletions indicated by strikeouts and additions shown underlined. The motions shall also be accompanied by a copy of the motion and of the proposed rule or rule amendment in an electronically formatted medium (such as USB Flash Drive or CD-ROM). No notice or response to such motion shall be required, except as may be required by the Court, but the Court may in its discretion submit any rules motion to the Supreme Court Rules Advisory

Committee, or any other source, for review and comment. Upon receipt of requests or petitions for adoption or amendment of rules the Court may publish the proposal or request on the Supreme Court's Internet site, and invite comment thereon. No action shall be taken by the Supreme Court on such proposal or request for a period of thirty(30) days following the commencement of such publication, and all comments received shall be considered; however, the Court may dispense with such publication and comment in the event that the Court deems the urgency of the proposal or request prohibitive to the delay needed for publication and comment.

(g) Motions Regarding the Setting of Term and Assigning of Causes in the Trial Courts. Orders entered and other actions in the chancery and circuit courts setting terms of court and assigning causes and dockets under Miss. Code Ann. § 9-5-3 and § 9-7-3 are subject to review by the Supreme Court on petition of any judge of the district wherein such orders have been entered or such action has been taken. The setting of terms and assigning of causes and dockets in the chancery and circuit courts shall be done fairly considering the relative work loads of the judges and the right of litigants within the district to fair and reasonable access to all of the judicial officers as well as reasonable accommodation of the requests and needs of all judges within the district. Further, the assignment of cases and dockets shall be done through a systematic plan recognizing the criteria set out herein.

(h) Reconsideration on Motions. Motions for reconsideration, vacation or modification of rulings of the Supreme Court and the Court of Appeals on motions are generally not allowed. However motions for reconsideration of rulings on motions and petitions may be filed within 14 days after a decision is handed down on the motion to be reconsidered as to:

(1) non-voluntary dismissal of pending appeals under rule 2(a);

(2) procedural dispositions by the Clerk of the Court under Rule 27(b);

(3) petitions for interlocutory appeal under Rule 5;

(4) motions for stay and supersedeas under Rule 8;

(5) petitions for writ of mandamus, prohibition or extraordinary writs under Rule 21;

(6) motions to amend, correct or clarify orders, opinions, and mandates;

(7) motions for recusal of justices or judges or review of ruling of trial judges on recusal under M.R.A.P. 48B or 48C; and

(8) in extraordinary cases, by suspension of the rules for good cause shown under Rule 2(c).

[Adopted to govern matters filed on or after January 1, 1995; amended October 15, 1998, effective from and after January 1, 1999; amended July 1, 1999; amended effective August, 1999; amended effective November 2, 2000; amended effective May 29, 2003 to provide for reconsideration of certain specific types of motions and petitions, if filed within 14 days following the ruling for which reconsideration is sought; amended effective September 30, 2004 to recognize that the Court may from time to time allow the clerk to rule on specified motions; amended March 20, 2008, to expand the provision under which the Court may post proposals for public comment; amended effective July 1, 2010.]

Advisory Committee Historical Note

Effective June 27, 2002, Rule 27(b) was amended to delete motions "to stay issuance of mandate pursuant to Rule 41" from the list of motions on which the clerk may rule. 819-821 So.2d XX (West Miss.Cases 2002).

Effective November 2, 2000, a new Rule 27(g) was adopted. 770-772 So.2d XVII (West Miss.Cases 2000).

Effective August 26, 1999, Rule 27(f) and the Comment were amended to provide for publication of proposals on the Supreme Court's Internet site and an attendant comment period. 736-737 So.2d XXI (West Miss.Cases 1999).

Effective June 24, 1999, Rules 27(b) and (g) were amended to effect editorial changes. 735 So.2d XIX (West Miss.Cases 1999).

Effective January 1, 1999, Rule 27(b) was amended to provide that the clerk may rule on motions to withdraw as counsel in non-capital cases, to voluntarily dismiss appeals, to obtain additional pages, to supplement the record, to appear *pro hac vice,* and to suspend the briefing schedule. 717-722 So.2d XXVII (West Miss.Cases 1998).

Effective January 1, 1999, Rule 27(g) was adopted and corresponding changes were made to Rule 27(c) and the Comment. 717-722 So.2d XXVII (West Miss.Cases 1998).

Effective June 21, 1996, following the redesignation of rehearing "petitions" as "motions," the Comment to Rule 27 was amended to provide that motions for rehearing cannot be considered by a single justice. 673-678 So.2d XLI (West Miss. Cases 1996).

Effective January 1, 1995, Miss.R.App.P. 27 replaced Miss.Sup.Ct.R. 27, embracing proceedings in the Court of Appeals. Rule 27 was further amended by adding subsection (f) concerning motions pertaining to Rules of Court. 644-647 So.2d LXII-LXIV (West Miss.Cases 1994).

Comment

Rule 27 is based on Fed.R.App.P. 27 as modified by 5th Cir.R. 27.

Many motions seek relief of a sort which is ordinarily unopposed, or which is granted as of course. The provision of subdivision (a), which permits any party to file a response in opposition to a motion within seven days after its service, assumes that the motion is one of substance which ought not be acted upon without affording affected parties an opportunity to reply. A motion to dismiss or otherwise determine an appeal is clearly such a motion. Motions authorized by Rules 8, 9, and 41 are likewise motions of substance, but, in the nature of the relief sought, to afford an adversary an automatic delay of at least seven days is undesirable; thus, such motions may be acted upon after notice which is reasonable under the circumstances.

The term "motions for procedural orders" is used in subdivision (b) to describe motions which do not substantially affect the rights of the parties or the ultimate disposition of the appeal (other than motions for voluntary dismissal). To prevent delay in the disposition of such motions, subdivision (b) provides that they may be acted upon immediately without awaiting a response. The rule also gives the clerk authority to dispose of certain procedural motions. An enlargement of time for filing a notice of appeal is not

permitted by these rules and may not be granted by the clerk.

Subdivision (c) empowers a single justice to act upon virtually all requests for intermediate relief which may be made during the course of an appeal or other proceeding. By its terms, the justice may entertain and act upon any motion, other than a contested motion to dismiss or a contested motion that will otherwise determine an appeal or other proceeding.

Examples of the power conferred on a single justice by Rule 27(c) are: to determine any matter which, if unopposed, may be decided by the clerk under subdivision (b); to grant enlargements of time for any period beyond the 60 days granted by the clerk, except that the time period for filing a notice of appeal may not be extended, *see* Rules 2(c), 26(b); to permit an appeal *in forma pauperis* and to appoint counsel under Rule 6; to consider release in criminal cases under Rule 9; to expedite or to consolidate appeals under Rule 23; to permit the filing of further reply or supplemental briefs under Rule 28(d) or briefs of extraordinary length under Rule 28(h); to grant leave to file an *amicus* brief under Rule 29; to postpone oral argument under Rule 34(a) or grant additional time for oral argument under Rule 34(b); or to substitute parties under Rule 43.

Under Rule 27(c), a single justice may not act upon requests for permission to appeal under Rule 5, or for mandamus or other extraordinary writs under Rule 21, other than for stays or injunctions pending appeal, authority to grant which is "expressly conferred by these rules" on a single justice under certain circumstances under Rule 8.

Subdivision (f) sets out procedures to be followed in the adoption and amendment of rules governing practice and procedures in the courts and those specific to the practice of law. The provision of the subdivision providing for publication on the Internet and comment supercedes Misc. Order 2056 which formerly required Bar related petitions to be published in the *Mississippi Lawyer* with a ninety day comment period. Misc. Order 2056 was vacated by the order adoption of this provision for subdivision (f).

Rule 27(h) motions for reconsideration of the court's ruling on motions or petitions are to be distinguished from Rule 40 motions for rehearing on opinions. Motions for clarification and correction of opinions and mandates which address issues other than specific errors of law or fact which would be determinative of the decision announced in the opinion should also be filed in accordance with the procedures set out in Rule 27, not those of Rule 40.

Rule 27(h) motions for reconsideration of the court's rulings on motions are governed

by and subject to the procedures set out in Rule 27. Generally, motions are decided by orders of the appellate courts.

Motions for rehearing are filed under Rule 40 and are appropriate only where an opinion has issued which the movant believes to contain specific errors of law or fact.

Reconsideration of the court's ruling on a motion or petition is allowed only as to motions and petitions specified in Rule 27(h).

A brief may be filed in support of a motion and such a brief should be filed unless the motion seeks a routine procedural order. The rule does not, however, require the filing of a brief with every motion.

Rule 27(h) motions for reconsideration of the court's ruling on motions or petitions shall, whenever possible, state with particularity specific reasons, in the opinion of the movant, the court's action should be reconsidered. The motion for reconsideration is not intended to afford an opportunity for a mere repetition of the argument already considered by the court, but may contain such argument in support of the motion as movant desires to present. *See M.R.A.P. 40(a)*.

[Comment amended June 21, 1996; October 15, 1998, effective January 1, 1999; August 26, 1999; amended effective May 29, 2003; amended May 18, 2006; amended effective August 2, 2012.]

RULE 28. BRIEFS

(a) Brief of the Appellant. The brief of the appellant shall contain under appropriate headings and in the order here indicated:

(1) *Certificate of Interested Persons.* This certificate shall list all persons, associations of persons, firms, partnerships, or corporations which have an interest in the outcome of the particular case.

If a large group of persons or firms can be specified by a generic description, individual listing is not necessary.

The certificate shall be in the following form:

Number and Style of Case.

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

(Here list names of all such persons and identify their connection and interest.)

_____

Attorney of record for

_____

Governmental parties need not supply this certificate.

(2) *Tables*. There shall follow a table of contents, with page references, and a table of cases (alphabetically arranged), statutes, and other authorities cited, with references to the pages of the brief where they are cited.

(3) *Statement of Issues*. A statement shall identify the issues presented for review. No separate assignment of errors shall be filed. Each issue presented for review shall be separately numbered in the statement. No issue not distinctly identified shall be argued by counsel, except upon request of the court, but the court may, at its option, notice a plain error not identified or distinctly specified.

(4) *Statement of Assignment*. Unless the case has already been assigned by the Court, the appellant must succinctly give the reasons, if any, that the Supreme Court either must or should retain the case for the reasons stated under Rule 16(b) or (d). The statement should include citations to any cases sought to be overruled or perceived to be in conflict.

(5) *Statement of the Case*. This statement shall first indicate briefly the nature of the case, the course of the proceedings, and its disposition in the court below. There shall follow the statement of facts relevant to the issues presented for review, with appropriate references to the record.

(6) *Summary of the Argument*. The summary, suitably paragraphed, should be a succinct, but accurate and clear, condensation of the argument actually made in the body of the brief. It should not be a mere repetition of the headings under which the argument is arranged. It should seldom exceed two (2) and never five (5) pages.

(7) *Argument*. The argument shall contain the contentions of appellant with respect to the issues presented, and the reasons for those contentions, with citations to the authorities, statutes, and parts of the record relied on.

(8) *Conclusion*. There shall be a short conclusion stating the precise relief sought.

(b) Pro Se Supplemental Brief in Criminal Appeal. An appellant in a criminal appeal may file a pro se supplemental Brief of the Appellant. This pro se brief may address issues not raised by counsel, but such issues must be based on the record. This pro se brief shall conform to the requirements of Rule 28(a), (e), (f), (h) and (l).

(c) Brief of the Appellee. The brief of the appellee shall conform to the requirements of Rule 28(a) except that a statement of issues, of assignment, or of the case need not be made unless the appellee is dissatisfied with the statement of the appellant.

(d) Reply Brief. The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross-appeal. No further briefs may be filed except with leave of the Court. All reply briefs shall contain a table of contents, with page references, and a table of cases (alphabetically arranged), statutes, and other authorities cited, with references to the pages of the reply brief where they are cited.

(e) References in Briefs to Parties. Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee." It promotes clarity to use the designations used in the lower court or in the agency proceedings, or the actual names of the parties, or descriptive terms such as "the employee," "the injured person," "the taxpayer," or "plaintiff."

(f) References in Briefs to the Record and Citations. All briefs shall be keyed by reference to page numbers (1) to the record excerpts filed pursuant to Rule 30 of these Rules, and (2) to the record itself.

(1) The Supreme Court and the Court of Appeals shall assign paragraph numbers to the paragraphs in all published opinions. The paragraph numbers shall begin at the first paragraph of the text of the majority opinion and shall continue sequentially throughout the majority opinion and any concurring or dissenting opinions in the order that the opinions are arranged by the Court.

(2) All Mississippi cases shall be cited to either:

(i) the *Southern Reporter* and, in cases decided prior to 1967, the official Mississippi Reports (e.g., *Smith v. Jones*, 699 So. 2d 100 (Miss. 1997); *Thompson v. Clark*, 251 Miss. 555, 170 So. 2d 225 (1965)); or

(ii) for cases decided from and after July 1, 1997, the case numbers as assigned by the Clerk's Office (e.g., *Smith v. Jones*, 95-KA-01234-SCT (Miss. 1997)).

(3) Quotations from cases and authorities appearing in the text of the brief shall be cited in one of the following ways:

(i) preceded or followed by a reference to the book and page in the *Southern*

Reporter and/or the Mississippi Reports where the quotation appears (e.g., *Smith v. Jones*, 699 So. 2d 100, 102 (Miss. 1997)); or

(ii) in cases decided from and after July 1, 1997, preceded or followed by a reference to the case number assigned by the Clerk's Office and paragraph number where the quotation appears (e.g., *Smith v. Jones*, 95-KA-01234-SCT (¶1) (Miss. 1997)); or

(iii) in cases decided from and after July 1, 1997, preceded or followed by a reference to the book and paragraph number in the *Southern Reporter* where the quotation appears (e.g., *Smith v. Jones*, 699 So. 2d 100 (¶1) (Miss. 1997)); or

(iv) in cases decided prior to July 1, 1997, preceded or followed by a reference to the case number assigned by the Clerk's Office and paragraph number where the quotation appears when the case is added to the Court's Internet web site in the new format, i.e., with paragraph numbers (e.g., *Smith v. Jones*, 93-CA-05678-SCT (¶1) (Miss. 1995)); or

(v) preceded or followed by a parallel citation using both the book citation and the case number citation.

(g) Reproduction of Statutes, Rules, Regulations, etc. If determination of the issues presented requires the study of statutes, rules, or regulations, etc., they shall be reproduced in the brief or in an addendum at the end and they may be supplied to the court in pamphlet form.

(h) Length of Briefs. Except by permission of the court, principal briefs shall not exceed 50 pages, and reply briefs shall not exceed 25 pages, exclusive of pages containing the statement with respect to oral argument, any certificates of counsel, table of contents, tables of citations, and any addendum containing statutes, rules, or regulations.

(i) Briefs in Cases Involving Cross-Appeals. If a cross-appeal is filed, the party first filing a notice of appeal shall be deemed the appellant for the purposes of this rule and Rules 30 and 31, unless the parties otherwise agree or the court otherwise orders. The brief for appellee shall contain the issues involved in the appellee's appeal as well as the answer to the brief for appellant.

(j) Briefs in Cases Involving Multiple Appellants or Appellees. In cases involving

more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

(k) Citation of Supplemental Authorities. When pertinent and significant authorities come to the attention of counsel after the party's brief has been filed, or after oral argument or decision, the party may promptly advise the clerk of the Supreme Court, by letter with a copy to all counsel, setting forth the citations. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall, without argument, state the reasons for the supplemental citations. Any response shall be made promptly and shall be similarly limited.

(l) Disrespectful Language Stricken. Any brief containing language showing disrespect or contempt for the trial court will be stricken from the files, and the appropriate appellate court will take such further action as it may deem proper.

(m) Other Briefs. Any brief submitted other than those listed in Rule 28(a), (b), (c), and (d) shall conform to Rules 28 (e), (f), (h), and (l). Any brief filed prior to the filing of the brief of the appellant shall contain a certificate of interested persons as required by Rule 28(a)(1). Any brief exceeding 10 pages in length shall contain tables of contents and authorities in compliance with Rule 28(a)(2).

(n) Filing of Briefs on Electronic Media. All parties filing a brief on the merits of any case with the Clerk of the Supreme Court shall file with that brief a copy thereof in an electronically formatted medium (such as USB Flash Drive or CD-ROM) , and the Clerk shall receive and file such with the papers of that case. All electronic media and electronic files stored thereon must be in an industrial standardized format with the electronic brief stored in the Adobe Portable Document Format (PDF). All electronic media shall be labeled to include the following information:

(1) the style of the case, and,

(2) the number of CD-ROMs, i.e., “1 of 2, 2 of 2, etc.,”

[Amended December 28, 1995; December 22, 1997; amended effective May 27, 2004 to make filing of briefs on electronic disks mandatory; amended effective July 1, 2009; amended effective August 2, 2012 to allow pro se supplemental briefs in criminal appeals; amended effective June 1, 2016 to require Statement of Assignment.]

Advisory Committee Historical Note

Effective December 11, 1997, Rule 28(e) and the Comment were amended to provide a vendor and media neutral citation standard in the public domain. 702-705 So. 2d XLI (West Miss. Cases 1997).

Effective December 28, 1995, Rule 28(m) and a new final paragraph to the Comment were added to encourage the filing of disk copies of briefs. 663-667 So. 2d XXVII (West Miss. Cases 1995).

Effective January 1, 1995, M.R.A.P. 28 replaced Miss. Sup. Ct. R. 28, embracing proceedings in the Court of Appeals. 644-647 So. 2d LXIV-LXVII (West Miss. Cases 1994).

Effective July 1, 1994, the Comment to Miss. Sup. Ct. R. 28 was amended to delete material concerning the transition from statutory procedures to Rule practice. 632-635 So. 2d LII (West Miss. Cases 1994).

Comment

Rule 28 is based upon Fed. R. App. P. 28 and 5th Cir. R. 28.2.1, 28.2.2. If a party states issues under Rule 28(a)(3) not included in a statement required by Rule 10(b)(4), that party will bear responsibility for the cost of preparing any additional portions of the record subsequently designated by any other party in response to the statement of additional issues.

Article 3, section 26 of the Mississippi Constitution states that "[i]n all criminal prosecutions the accused shall have a right to be heard by himself or counsel, or both. . . ." Accordingly, pro se supplemental briefs are permitted under Rule 28(b). *See also Lindsey v. State*, 939 So. 2d 743 (Miss. 2005).

In cross-appeals, the response of the appellant to the cross-appeal is to be combined with the appellant's reply. The combined brief is treated as a principal brief under Rule 28(h) which governs page lengths.

Rule 28(f) requires parallel citations prior to 1967 because the *Southern Reporter* is the official reporter only for decisions published since 1966. Any party filing a brief citing

an unreported decision from another court should also file a copy of the decision with the clerk of the Supreme Court.

Rule 28(f) adopts a citation standard which is in the public domain. The new citation standard is both vendor neutral and media neutral. A vendor neutral citation is one which does not contain vendor-specific information, and a media neutral citation is one which is not tied to a particular format. The citation *Smith v. Jones*, 699 So. 2d 100 (Miss. 1997), for example, is neither vendor neutral nor media neutral. However, the citation *Smith v. Jones*, 95-KA-01234-SCT (Miss. 1997) is both vendor neutral and media neutral. The basis for the adoption of a new citation standard is to allow citation of cases which appear in electronic format in addition to citation of cases which appear in print.

An original Rule 28(k) letter should be submitted with three copies. Rule 28(m) governs briefs other than briefs on the merits controlled by Rules 28(a), (b), (c), and (d).

The provisions of Rule 28(n) apply only to briefs on the merits of an appeal and not to memoranda and briefs filed in support of or in opposition to motions and petitions seeking less than relief on the merits of appeals.

[Amended December 28, 1995; December 22, 1997; amended effective May 27,2004; amended effective July 1, 2009; amended effective August 2, 2012.]

RULE 29. BRIEF OF AN *AMICUS CURIAE*

(a) Grounds for Filing. A brief of an *amicus curiae* may be filed only by leave of the appropriate appellate court, except that leave shall not be required when the brief is presented by the state and sponsored by the Attorney General or by a guardian *ad litem* who is not otherwise a party to the appeal. A motion for leave shall demonstrate that (1) *amicus* has an interest in some other case involving a similar question; or (2) counsel for a party is inadequate or the brief insufficient; or (3) there are matters of fact or law that may otherwise escape the court's attention; or (4) the *amicus* has substantial legitimate interests that will likely be affected by the outcome of the case and which interests will not be adequately protected by those already parties to the case.

(b) How and When Filed. A motion for leave to file an *amicus* brief shall be filed no later than seven (7) days after filing of the initial brief of the party whose position the *amicus* brief will support. The motion must be accompanied by the proposed brief of *amicus curiae* which shall be a concise statement not to exceed 15 pages. The party filing the motion shall also file with the motion a brief stating why the motion satisfies the requirements of Rule 29(a).

(c) Response to Motion. An opposing party who does not object to the motion for leave may respond to the *amicus* brief in the opposing party's response or reply brief pursuant to Rule 28(c) or 28(d). An opposing party who objects to the motion for leave shall file a response in opposition within seven (7) days pursuant to Rule 27 stating why the requirements of Rule 29(a) have not been met. For the purpose of Rule 31(a), the time for filing the next brief will run from the date the appropriate court enters an order on the motion for leave.

(d) Oral Argument. A motion of *amicus curiae* to participate in oral argument will be granted only for extraordinary reasons.

[Adopted to govern matters filed on or after January 1, 1995; amended effective June 27, 2002; amended effective August 2, 2012.]

Advisory Committee Historical Note

Effective June 27, 2002, Rule 29(c) was amended to provide that a party has 7 days to file a response in opposition to a motion to file an *amicus curiae* brief. 822-823 So.2d XIX (West Miss.Cases 2002).

Effective January 1, 1995, Miss.R.App.P. 29 replaced Miss.Sup.Ct.R. 29, embracing proceedings in the Court of Appeals. 644-647 So.2d LXVII-LXIX (West Miss.Cases 1994).

Effective July 1, 1994, the Comment to Miss.Sup.Ct.R. 29 was amended to effect technical changes. 632-635 So.2d LII (West Miss.Cases 1994).

[Adopted August 21, 1996.]

Comment

Rule 29 is patterned on Fed.R.App.P. 29, 5th Cir.R. 31.2, Ala.R.App.P. 29, U.S.Sup.Ct.R. 36, and the former rules of the Mississippi Supreme Court.

Briefs of an *amicus curiae* are allowed under this rule consistent with the accepted view that such briefs, in appropriate cases, are of genuine assistance to the court and facilitate a more thorough understanding of the facts and law. *Taylor v. Roberts*, 475 So. 2d 150 (Miss. 1985). Under this rule, any person may move for leave to file an *amicus* brief. The appropriate court will consider motions filed under this rule pursuant to the considerations set out in subdivision (a). The State of Mississippi, through the Attorney General, however, need not obtain permission of the Court to appear as an *amicus curiae*. The court may also invite *amicus* briefs from persons the Court perceives may be affected by the outcome of the case. *See Warren County v. Culkin*, 497 So. 2d 433, 435-36 (Miss. 1986).

The rule follows federal practice by integrating *amicus curiae* briefs into the schedule for filing briefs on the merits. The motion with attached *amicus* brief need not be filed, however, until seven days after the initial brief of the party whose position the *amicus* brief will support. This delay permits the *amicus* to take advantage of Rule 28(j) and adopt by reference portions of the brief of that party. It also ensures the *amicus* will know what the party's brief contains. It is designed to discourage the filing of repetitive briefs that cannot satisfy Rule 29(a).

The opposing party may choose not to oppose the motion and may respond to the *amicus* brief in the party's next brief. If the opposing party files a response in opposition within seven days as required by Rule 27, the time for filing the next brief is rescheduled and does not begin to run until the date the court enters an order on the motion for leave. The response in opposition is to address only whether leave should be granted under Rule 29(a). The party opposing the motion will respond to the merits of the *amicus* brief in that party's

next brief only if the motion for leave is granted. The former practice of a separate brief in response to the *amicus* brief is abolished. If the court grants leave to file, however, it may condition leave by extending the number of pages permitted under Rule 28(h) for the opposing party's next brief.

Under Rule 27, a motion for leave to file an *amicus* brief is decided by a single justice.

[Amended effective August 2, 2012.]

RULE 30. RECORD EXCERPTS

(a) Mandatory Record Excerpts. Appeals shall be on the record as designated pursuant to Rule 10. Also, at the time of filing appellant's brief, appellant shall file four (4) copies of the following portions of the trial court record, to be indexed and bound together, but not in the brief:

(1) a true copy of the trial court docket;

(2) the judgment or interlocutory order appealed from;

(3) all other orders or rulings sought to be reviewed; and

(4) all supporting opinions, findings of fact or conclusions of law filed or delivered orally by the trial court.

(b) Optional Record Excerpts. Appellant may add to the mandatory record excerpts brief extracts from the pleadings, instructions, transcript, or exhibits if they are essential to an understanding of the issues raised.

At the time the appellee's brief is filed, the appellee may add other such extracts by filing four (4) copies of the same with an index and separately bound in a like manner, and labeled "Appellee's Record Excerpts."

(c) Exemption From Requirements of Rule for Inmate Appeals. The requirements of this rule are not applicable to appeals filed *pro se* by inmates of a facility of the Department of Corrections.

[Adopted to govern matters filed on or after January 1, 1995; amended effective June 27, 2002.]

Advisory Committee Historical Note

Effective June 27, 2002, Rule 30(a) was amended to provide that the record excerpts shall include a copy of the trial court docket instead of a list of documents in the record and

the transcript index. 819-821 So.2d XXII (West Miss.Cases 2002).

Effective January 1, 1995, Miss.R.App.P. 30 replaced Miss.Sup.Ct.R. 30. 644-647 So.2d LXIX (West Miss.Cases 1994).

Effective July 1, 1994, the Comment to Miss.Sup.Ct.R. 30 was amended to delete material concerning the transition from statutory procedures to Rule practice. 632-635 So.2d LII (West Miss.Cases 1994).

Effective February 20, 1991, Rules 30(a) and (b) were amended to state that all record excerpts should be filed with an index. The Rule was further amended by the addition of Rule 30(c) which states that the requirements of Rule 30 are not applicable to appeals filed pro se by inmates in the state penitentiary. 566-573 So. 2d XXXIV-XXXV (West Miss. Cases 1991).

Comment

The requirement for record excerpts with the provision for optional additions is modeled upon 5th Cir.R. 30.1.

All parties are cautioned that Rule 30(b) allows optional record excerpts that are essential to an understanding of the issues raised. If non-essential materials are included in the record excerpts, its usefulness to the court as a convenient adjunct to study of the briefs will be diminished. The fact that parts of the record are not included in the record excerpts shall not prevent the parties or the court from relying on such parts. The court will have before it the entire designated record when making its decision.

RULE 31. FILING AND SERVICE OF BRIEFS

(a) Notice of Briefing Schedule. Immediately upon filing of the record in the office of the clerk of the Supreme Court, the clerk shall notify counsel of the filing of the record. However, failure of the clerk to give, or of a party to receive, notice of the filing of the record shall not excuse any delay in filing briefs.

(b) Time For Filing and Service of Briefs. The appellant shall serve and file the appellant's brief within 40 days after the date on which the record is filed. The appellee shall serve and file the appellee's brief within 30 days after service of the brief of the appellant. The appellant may serve and file a reply brief within 14 days after service of the brief of the appellee. In cross-appeals, the appellant and cross-appellee may serve and file a combined responsive brief within 30 days after service of the combined brief of the appellee and cross-appellant. The cross-appellant's reply under Rule 28(d) may then be served within 14 days after service of the appellant's combined responsive brief.

(c) Number of Copies to Be Filed. An original and three (3) copies of all briefs shall be filed with the clerk. In cases in which the appellant has been sentenced to suffer the death penalty, the party shall file the original and nine (9) copies of all briefs. The Supreme Court or the Court of Appeals may require that additional copies be furnished.

(d) Consequences of Failure to File Briefs. If an appellant fails to file the appellant's brief within the time provided by this rule or within the time as extended, the appeal may be dismissed on motion of appellee or on the Supreme Court's own motion as provided in Rule 2. If an appellee fails to file the appellee's brief as required, such brief, if later filed, may be stricken from the record on motion of appellant or on the motion of the appropriate appellate court. An appellee who fails to file a brief will not be heard at oral argument except by permission of the court.

(e) Suspension of Briefing. When ordered by the Supreme Court, the clerk shall suspend the briefing schedule. The clerk may suspend the briefing schedule in response to a filing or other action which affects the record or the briefing process, or when suspension is not opposed by any party.

[Adopted to govern matters filed on or after January 1, 1995; amended effective August 2, 2012.]

Advisory Committee Historical Note

Effective January 1, 1995, Miss.R.App.P. 31 replaced Miss.Sup.Ct.R. 31, embracing proceedings in the Court of Appeals. Rule 31(c) was further amended to enhance clarity. 644-647 So.2d LXX (West Miss.Cases 1994).

Effective July 1, 1994, the last sentence of the Comment to Miss.Sup.Ct.R. 31 was deleted. 632-635 So.2d LIII (West Miss.Cases 1994).

Comment

Rule 31 is based on Fed. R. App. P. 31, and the former rules of the Supreme Court. Under Rule 25(a), briefs and record excerpts are deemed filed on the day of mailing by first class mail with postage prepaid, or any more expeditious form of delivery. Under Rule 26(c), service by mail adds three days to the prescribed period.

RULE 32. FORM OF BRIEFS, RECORD EXCERPTS AND OTHER PAPERS

(a) Form of Briefs and Record Excerpts. Briefs and record excerpts may be produced by standard commercial printing or by any duplicating or copying process which produces a clear black image on white paper. The text in the body of briefs shall appear in at least 12 point type; the text of foot notes must appear in at least 11 point type.

Briefs and record excerpts shall be bound in volumes and shall be typed on one side of the page only and shall be in black non-copying ink on white paper without the name of any person or advertising matters on the paper. Pages of briefs shall not exceed 8 ½ by 11 inches with margins of 1 ½ inches on the left, 1 inch on the top, 3/4 of an inch on the bottom, and ½ inch on the right, with double spacing between each line of text, excluding quotations and footnotes. All pages shall be numbered.

It is preferred that briefs and record excerpts be bound so as to permit them to lie flat when opened, and they must be so bound if the cover is plastic or any material not easily folded.

The cover of the brief of the appellant shall be blue; that of the appellee, red; that of an intervenor or *amicus curiae*, green; that of any reply brief, gray. In cross-appeals, the reply brief of appellant shall be combined with the brief of cross-appellee, and the combined brief shall be red. The reply brief of cross-appellant shall be gray. The cover of the record excerpts shall be white. The front covers of the briefs and of record excerpts shall contain: (1) the caption, name of the court and the number of the case; (2) the style (title) of the case [*see* Rule 13(a)]; (3) the nature of the proceeding (*e.g.*, Appeal; Interlocutory Appeal; Petition for Writ of Prohibition) and the name of the court or commission below; (4) the title of the document (*e.g.*, Brief for Appellant, Record Excerpts); (5) the names, bar numbers, addresses and business telephone numbers of counsel representing the party on whose behalf the document is filed, and (6) a statement on the cover of a brief filed by each party that oral argument is or is not requested. *See* M.R.A.P. 34(b).

(b) Form of Other Papers. Motions for rehearing shall be produced in a manner prescribed by Rule 32(a) and Rule 28(m), and motions and other papers may be produced in like manner, or they may be typewritten upon opaque, unglazed paper, 8 ½ by 11 inches in size. Lines of typewritten text shall be double spaced except for quotations and footnotes. Consecutive sheets shall be attached at the top left corner.

A motion or other paper addressed to either the Court of Appeals or the Supreme Court shall contain a caption setting forth the name of the court, the style (title) of the case, the tracking or docket number, and a brief descriptive title indicating the purpose of the paper. Prior to notification by the clerk that the case has been assigned to the Court of Appeals, all pleadings shall be captioned in the name of the Supreme Court. A motion filed after notice of assignment to the Court of Appeals shall be captioned with the name of that court.

[Amended effective May 27, 2004 to revise the size of fonts in the text of briefs; amended effective April 19, 2007; amended effective August 2, 2012.]

Advisory Committee Historical Note

Effective September 18, 1997, Rule 32(b) was amended to effect technical changes. 699-701 So. 2d XXIX (West Miss. Cases 1997).

Effective February 10, 1995, the Comment to Rule 32 was amended to provide that appellant's reply, not principal, brief must state whether oral argument is requested. 648 So.2d XXXII-XXXIII (West Miss.Cases 1995).

Effective January 1, 1995, Miss.R.App.P. 32 replaced Miss.Sup.Ct.R. 32, embracing proceedings in the Court of Appeals. Rule 32(b) and the Comment were further amended to provide that the cover of a brief filed by each party must state whether oral argument is requested. 644-647 So.2d LXXI-LXXII (West Miss.Cases 1994).

Comment

Rule 32 is based on Fed. R. App. P. 32, 5th Cir. R. 32, and the former rules of the Supreme Court. The Rule changes former Supreme Court practice in that it requires the appellant and the appellee to designate on the cover of the reply brief of the appellant and the principal brief of the appellee whether or not oral argument is requested. *See* M.R.A.P. 34(b).

[Amended February 10, 1995.]

RULE 33. PREHEARING CONFERENCE

At any time after the filing of a notice of appeal, the Supreme Court or the Court of Appeals may direct the attorneys for the parties to appear before the court, a justice of the Supreme Court or a judge of the Court of Appeals, or a person designated by the appropriate court for a prehearing conference to consider the simplification of the issues and such other matters as may aid in the disposition of the proceeding by the court, including settlement. The court, justice, judge, or person designated shall make an order which recites the action taken at the conference and the agreements made by the parties as to any of the matters considered and which limits the issues to those not disposed of by admissions or agreements of counsel. Such order, when entered, controls the subsequent course of the proceeding, unless modified to prevent manifest injustice.

Advisory Committee Historical Note

Effective January 1, 1995, Miss.R.App.P. 33 replaced Miss.Sup.Ct.R. 33, embracing proceedings in the Court of Appeals. 644-647 So.2d LXXII (West Miss.Cases 1994).

[Adopted August 21, 1996.]

Comment

Rule 33 is similar to Fed. R. App. P. 33. The prehearing conference can be a valuable tool in simplifying complex appeals or in promoting settlement in a manner similar to the pretrial conference used at the trial level.

RULE 34. ORAL ARGUMENT

(a) When Allowed. Oral argument will be had in all death penalty cases. In all other cases, oral argument will be allowed unless the court, or the panel to which the case is assigned, unanimously agrees that:

(1) the appeal is frivolous; or

(2) the dispositive issue or set of issues has been recently authoritatively decided; or

(3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

(b) When Requested. Any party desiring to be heard orally shall so state on the cover of his brief (*e.g.*, ORAL ARGUMENT REQUESTED). Parties not seeking oral argument must also so note: ORAL ARGUMENT NOT REQUESTED. The appellee shall make this notation on his principal brief; the appellant shall make this notation on his reply brief or, if no reply brief is filed, by letter within the time allowed for filing of the reply brief. The party requesting oral argument shall, in his or her brief or letter, include a concise statement of the reasons that oral argument will be helpful to the court. Unless a party desiring oral argument complies with this requirement, he shall not be heard orally except by special permission or order of the appropriate appellate court. By agreement of the parties, a case may be submitted for decision on the briefs, but the appropriate appellate court may direct that the case be argued.

(c) Notice of Argument; Postponement. At least 14 days before the date set for argument, the clerk shall serve on counsel of record notice of the time and place for argument, and the time to be allowed each side. A request for postponement of the argument or for allowance of additional time must be made by motion filed reasonably in advance of the date fixed for hearing.

(d) Time Allowed for Argument. Each side shall be allowed 30 minutes for argument, unless otherwise ordered by the court. A party is not obliged to use all of the time allowed, and the court may terminate the argument whenever in its judgment further argument is unnecessary.

(e) Order and Content of Argument. The appellant is entitled to open and to conclude the argument. The opening argument shall include a fair statement of the case. Counsel will not be permitted to read at length from briefs, records, or authorities. The court may, in its discretion, advise the parties of the points upon which the court would like to hear argument.

(f) Cross and Separate Appeals. A cross or separate appeal shall be argued with the initial appeal at a single argument, unless the appellate court otherwise directs. If a case involves a cross-appeal, the party first filing a notice of appeal shall be deemed the appellant for the purpose of this rule unless the parties otherwise agree or the court otherwise directs. If separate appellants support the same argument, care shall be taken to avoid duplication of argument.

(g) Non-appearance of Parties. If the appellee fails to appear to present argument, the court may hear argument on behalf of the appellant, if present. If the appellant fails to appear, the court may hear argument on behalf of the appellee. If neither party appears, the case will be decided on the briefs unless the court shall otherwise order. If a party or attorney who requested the oral argument fails to appear or present argument, the court may assess a penalty in the amount of the reasonable cost for appearance incurred by the party or the attorney for the party who does appear for argument. In its discretion, the court may include a reasonable attorney's fee as a part of such costs, and assess such other sanctions as may be appropriate.

(h) Use of Physical Exhibits at Argument; Removal. If physical exhibits other than documents are to be used at the argument, counsel shall arrange to have them placed in the courtroom before the court convenes on the date of the argument. After the argument, counsel shall cause the exhibits to be removed from the courtroom unless the court otherwise directs.

Advisory Committee Historical Note

Effective January 1, 1995, Miss.R.App.P. 34 replaced Miss.Sup.Ct.R. 34, embracing proceedings in the Court of Appeals. In addition, a new subsection (b) was added, altering the procedure by which a party may request oral argument; the Comment was also amended to reflect this change. 644-647 So.2d LXXII-LXIV (West Miss.Cases 1994).

[Adopted August 21, 1996.]

Comment

Rule 34 is based on Fed. R. App. P. 34, Ala. R. App. P. 34, and the former rules of the Supreme Court. If counsel has a conflicting prior trial setting at the time counsel receives a notice of oral argument under Rule 34(b), counsel should immediately notify the clerk of the Supreme Court of the conflict. *See Leonard v. Leonard*, 486 So. 2d 1240, 1241-1242 (Miss. 1986).

RULE 35-A. WRITTEN OPINIONS AND ENTRY OF JUDGMENT IN THE SUPREME COURT

(a) Written Opinions. The Supreme Court may write opinions on all cases heard by that Court and shall publish all such written opinions. In cases where the judgment of the trial court is affirmed, an opinion will be written in all cases where the Supreme Court assesses damages for a frivolous appeal and in other cases if a majority of the justices deciding the case determine that a written opinion will add to the value of the jurisprudence of this state or be useful to the parties or to the trial court.

(b) Citation of unpublished opinions. Opinions in cases decided prior to the effective date of this rule which have not been designated for publication shall not be cited, quoted or referred to by any court or in any argument, brief or other materials presented to any court except in continuing or related litigation upon an issue such as res judicata, collateral estoppel or law of the case.

(c) Per Curiam Affirmance. The Court, with the concurrence of all justices participating in the case, may affirm the action of the trial court without rendering a formal opinion when an opinion would have no precedential value and one or more of the following circumstances exist and are dispositive of the appeal:

(1) the Court concurs in the facts as found or as found by necessary implication by the trial court;

(2) there is material evidence to support the verdict of the jury;

(3) no reversible error of law appears.

(d) Entry of Judgment. The notation of a judgment in the minute book of the Supreme Court constitutes entry of the judgment. The clerk of the Supreme Court shall enter the judgment following receipt of the opinion and judgment of the Court. If a judgment is rendered without an opinion, the clerk shall enter the judgment following instruction from the appropriate court.

[Amended July 25, 1996; amended effective November 1, 1998.]

Advisory Committee Historical Note

Effective November 1, 1998, Rule 35-A and the Comment were extensively amended to provide for publication of all written opinions, for issuance of *per curiam* affirmances, and to make related changes. 717-722 So.2d XXVII (West Miss.Cases 1998).

Effective July 25, 1996, Rule 35-A(c) was deleted and Rules 35-A(d) and (e) were renumbered accordingly. 673-678 So.2d XLIV (West Miss. Cases 1996).

RULE 35-B. WRITTEN OPINIONS AND ENTRY OF JUDGMENT IN THE COURT OF APPEALS

(a) Written Opinions in the Court of Appeals. The Court of Appeals may write opinions on all cases heard by that court and shall publish all such written opinions. In cases where the judgment of the trial court is affirmed, an opinion will be written in all cases where the Court of Appeals assesses damages for a frivolous appeal and in other cases if a majority of the judges deciding the case determine that a written opinion will add to the value of the jurisprudence of this state or be useful to the parties or to the trial court.

(b) Citation of unpublished opinions. Opinions in cases which have not been designated for publication shall not be cited, quoted or referred to by any court or in any argument, brief or other materials presented to any court except in continuing or related litigation upon an issue such as res judicata, collateral estoppel or law of the case.

(c) Publication of Court of Appeals Opinions. An opinion may be published only after it is final. An opinion of the Court of Appeals is final where: (i) no motion for rehearing is filed pursuant to Rule 40 or, (ii) where a motion for rehearing is timely filed and the motion for rehearing is denied. The filing of a petition for writ of certiorari in the Supreme Court shall not, for the purpose of this subsection, prevent or delay finality of the Court of Appeals opinion for publication.

(d) Per Curiam Affirmance. The Court of Appeals, with the concurrence of all judges participating in the case, may affirm the action of the trial court without rendering a formal opinion when an opinion would have no precedential value and one or more of the following circumstances exist and are dispositive of the appeal:

(1) the Court concurs in the facts as found or as found by necessary implication by the trial court;

(2) there is material evidence to support the verdict of the jury;

(3) no reversible error of law appears.

(e) Entry of Judgment. The notation of a judgment in the minute book of the Court of Appeals constitutes entry of the judgment. The clerk of the Supreme Court shall enter the

judgment following receipt of the opinion and judgment of the court. If a judgment is rendered without an opinion, the clerk shall enter the judgment following instructions from the court.

[Amended effective September 1, 1996; amended effective November 1, 1998; amended effective March 7, 2002.]

Advisory Committee Historical Note

Effective March 7, 2002, Rule 35-B(b) and the Comment were amended regarding finality of opinions of the Court of Appeals and a related technical change. ____ So.2d ____ (West Miss.Cases 2002).

Effective November 1, 1998, Rule 35-B and the Comment were extensively amended to provide for publication of all written opinions, for issuance of *per curiam* affirmances, and to make related changes. 717-722 So.2d XXVII (West Miss.Cases 1998)

Effective September 1, 1996, new Rules 35-B(b) and (c) were added. In addition, Rule 35-B(a) was amended to reflect the new Rules, and former Rules 35-B(b) and (c) were renumbered Rules 35-B(d) and (e). 673-678 So.2d XLV (West Miss. Cases 1996).

Effective January 1, 1995, Miss.R.App.P. 35-A replaced Miss.Sup.Ct.R. 35. In addition, the Supreme Court promulgated new Rule 35-B, entitled "Written Opinions and Entry of Judgment in the Court of Appeals." The Comment to Rule 35 was further amended to delete the third sentence. 644-647 So.2d LXXIV-LXXVI (West Miss.Cases 1994).

Effective July 1, 1994, the Comment to Miss.Sup.Ct.R. 35 was amended to delete a reference to a repealed statute. 632-635 So.2d LIII (West Miss.Cases 1994).

Comment to Rules 35-A and 35-B

The portions of Rule 35 dealing with written opinions are based upon former rules of the Supreme Court. The appellate courts' practice is to write opinions when it reverses or remands a trial court or administrative agency, and Rule 35-A(c) and Rule 35-B(d) therefore address those circumstances in which judgment is affirmed and no opinion is written. Rule

45(c) governs furnishing of copies of the courts' opinions and judgments by the clerk.

While it is the policy of the appellate courts to publish all opinions, there are opinions which have been issued prior to, November 1, 1998, the date of the adoption of that policy, which have been designated "Not for Publication." Rules 35-A(b) and 35-B(b) restrict the citation of those unpublished opinions. Prior to March 7, 2002, by further amendment to Rule 35-B(c), opinions of the Court of Appeals were not defined as final opinions where they were subject to petitions for writ of certiorari in the Supreme Court until the Supreme Court had denied certiorari or had granted certiorari but later dismissed as improvidently granted. On that date, Rule 35-B(c) was amended to allow publication of Court of Appeals opinions when no motion for rehearing is filed, or where rehearing is denied, even though review on petition for writ of certiorari is sought in the Supreme Court. There remain opinions which were issued prior to each of these amendments which remain designated “Not for Publication,” and are not to be cited due to the prohibition of Rule 35-B(b). Although the filing of a petition for writ of certiorari does not delay publication of a Court of Appeals opinion, the filing of such a petition does defer the mandate in the case as provided for in Rule 41(b).

[Amended effective November 1, 1998; amended effective, March 7, 2002.]

RULE 36. COSTS

(a) To Whom Allowed. Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the Supreme Court or the Court of Appeals. If a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered. If a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered. If a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court which decided the case.

(b) Costs for and Against the State of Mississippi. Costs may be awarded for or against the State of Mississippi or any of its agencies, or officers, or political subdivisions unless otherwise provided by law.

(c) Costs on Appeal Taxable in Court Below. Costs incurred in the preparation and transmission of the record, the costs of the reporter's transcript, if necessary for the determination of the appeal, the premiums paid for cost of *supersedeas* bonds or other bonds to preserve rights pending appeal, and the fee for filing the appeal shall be taxed in the trial court as costs of the appeal in favor of the party entitled to costs under this rule.

(d) Rehearing and Retaxing Costs. If the allowance or disallowance of costs or other matter affecting the judgment has been incorporated in the opinion, a party seeking relief may file a motion for rehearing under Rule 40. All motions to retax costs in the Supreme Court or the Court of Appeals must be filed within 14 days after issuance of the mandate or any addition to the mandate. A party who is not aggrieved by the opinion or mandate but who seeks relief as to any other matter involving costs shall seek relief in the trial court.

[Amended June 21, 1996.]

Advisory Committee Historical Note

Effective June 21, 1996, Rule 36(d) and the Comment were amended to redesignate rehearing “petitions” as “motions.” 673-678 So.2d XLI (West Miss. Cases 1996).

Effective January 1, 1995, Miss.R.App.P. 36 replaced Miss.Sup.Ct.R. 36, embracing proceedings in the Court of Appeals. 644-647 So.2d LXXVI-LXXVII (West Miss.Cases 1994).

Effective January 1, 1994, the Comment to Miss.Sup.Ct.R. 36 was amended to delete unnecessary statutory references and delete a reference to a repealed statute. 632-635 So.2d LIII-LIV (West Miss.Cases 1994).

Comment

Rule 36 follows Fed.R.App.P. 39 and, in some respects, prior law. Subdivision (a) gives the both appellate courts discretion in taxation of costs. The Supreme Court has traditionally taxed costs as it thought "proper." *See* Miss. Code Ann. §§ 11-3-37, 11-3-39 (1991).

Subdivision (b) departs from Fed.R.App.P. 39(b) and reflects the general state rule that the state and its agencies are liable for costs unless a statute provides otherwise. Without such liability, court officials would have no source from which to collect costs. *See State Board of Registration v. Rogers*, 121 So. 2d 720, 721 (Miss. 1960); Miss. Code Ann. §§ 25-7-7, 99-35-105 (Supp. 1986). The state, its subdivisions, and their officers, by statute, are not generally liable, however, for prepayment of costs. Miss. Code Ann. § 11-53-13 (1972); *City of Mound Bayou v. Roy Collins Construction Co.*, 457 So. 2d 337, 340 (Miss. 1984).

Subdivision (c), for the convenience of the parties, makes all costs taxable in the trial court. Judgment may be rendered against an obligor on a *supersedeas* bond. *See* Rule 8(d); Miss. Code Ann. § 11-3-27 (1991). A party suing to enforce a judgment for costs is entitled to recover attorneys' fees. Miss. Code Ann. § 11-3-41 (1991). While execution should ordinarily be sought in the trial court, the appellate court retains the power to issue execution for costs.

Subdivision (d) provides that if the allowance or disallowance of costs or other matter affecting the judgment has been incorporated in the opinion, the proper procedure for seeking relief is a motion for rehearing under Rule 40. Normally, however, each court will tax costs in its judgment, and not in its opinions. The court does not send the parties a copy of the judgment until the mandate issues. *See* Rule 41. For this reason, subdivision (d) provides a 14 day period after issuance of the mandate for the filing of a motion to retax costs. Other parties may not be aggrieved by the mandate and yet may wish to challenge some aspect of the taxation of costs. For example, the mandate usually does not fix the amount of costs to

be taxed. A party may admit liability yet wish to challenge the amount taxed. Subdivision (d) provides that relief in such cases is to be sought in the trial court.

The clerk of the Supreme Court continues to have the discretion to deny costs to a trial court clerk if the record is not properly prepared.

[Amended June 21, 1996.]

RULE 37. INTEREST ON JUDGMENTS

Unless otherwise provided by law, if a judgment for money in a civil case is affirmed, whatever interest is allowed by law shall be payable from the date judgment was entered in the court or commission below. If a judgment is modified or reversed with direction that a judgment for money be entered in the court below, the mandate shall contain instructions with respect to the allowance of interest.

Advisory Committee Historical Note

Effective January 1, 1995, Miss.R.App.P. 37 replaced Miss.Sup.Ct.R. 37. 644-647 So.2d LXXVII-LXXVIII (West Miss.Cases 1994).

Effective July 1, 1994, the second paragraph of the Comment to Miss.Sup.Ct.R. 37 was rewritten to enhance clarity. 632-635 So.2d LIV (West Miss.Cases 1994).

Comment

In determining the date interest is payable, this rule basically follows former Mississippi practice and case law. *Porter v. Ainsworth*, 288 So. 2d 709, 710 (Miss. 1974); *United States Fidelity & Guaranty Co. v. Stafford*, 253 So. 2d 388, 393 (Miss. 1971).

Unless otherwise provided by law, if a judgment for money in a civil case is affirmed, interest will be payable from the date judgment was entered in the court or commission below. However, if the judgment affirmed provides for payments on a future date, the judgment is deemed, for the purpose of this rule only, to have been entered on that date. *Cf. Brand v. Brand*, 482 So. 2d 236, 237-38 (Miss. 1974) (interest on past due child support payable from the date each past due payment became due).

The final sentence of Rule 37 is a departure from prior law. *See Grice v. General Electric Power Ass'n*, 230 Miss. 437, 456-458, 96 So. 2d 909, 911 (1957); *Stubblefield v. Jesco, Inc.*, 464 So. 2d 47, 60-63 (Miss. 1985). Those cases established the rule that when the Supreme Court reverses a judgment notwithstanding the verdict and renders a judgment for money, the prevailing party can only collect pre-mandate interest on the amount of the verdict if a judgment was entered on that verdict before the trial court set it aside. Federal practice rejects this technical distinction. Following federal practice, this rule grants the Supreme Court or the Court of Appeals authority to use its mandate to control awards of

interest when a judgment is modified or reversed with directions that a judgment for money be entered in the court below. In cases where interest is simply overlooked in the mandate, a party who claims entitlement to interest from a date other than the date of entry of judgment in accordance with the mandate should be entitled to seek recall of the mandate for determination of the question.

RULE 38. DAMAGES FOR FRIVOLOUS APPEAL

In a civil case if the Supreme Court or Court of Appeals shall determine that an appeal is frivolous, it shall award just damages and single or double costs to the appellee.

Advisory Committee Historical Note

Effective January 1, 1995, Miss.R.App.P. 38 replaced Miss.Sup.Ct.R. 38, embracing proceedings in the Court of Appeals. 644-647 So.2d LXXVIII (West Miss.Cases 1994).

Comment

Unlike Fed.R.App.P. 38, this rule applies only to civil appeals, and does not apply to criminal cases. The rule applies when an appeal is frivolous. There is no requirement that the appeal have resulted in delay.

The damages to be awarded may include attorneys' fees and other expenses incurred by an appellee. Interest is treated separately and is governed by Rule 37.

RULE 39. EXECUTION OF JUDGMENT IN CRIMINAL CASES

(a) Execution of Judgment After Appeal in Cases Where the Appellant Is at Liberty on Appearance Bond. After the submission of a felony case in which the appellant is at liberty on an appearance bond, the appropriate appellate court will determine a date for rendition of its judgment and will so notify appellant. On the day so fixed, appellant shall surrender at 12:30 p.m. to the sheriff of the county in which he was convicted, and the sheriff shall notify the clerk of the Supreme Court no later than 1:00 p.m. whether the appellant has surrendered. On failure of the appellant to surrender to the sheriff as required, the Supreme Court or the Court of Appeals will forfeit the bail bond. Bail shall not be allowed after affirmance in the appellate court, except as provided in Rule 41.

(b) Procedure Following Issuance of Mandate in Criminal Cases. In all criminal cases in which a judgment is to be executed, except those in which a sentence of death has been imposed, the circuit clerk of the county of conviction shall, within 30 days after receipt of the mandate, notify the clerk of the Supreme Court in writing of the status of execution of the judgment. In any case where the judgment has not been executed, the clerk of the Supreme Court shall promptly notify in writing both the Chief Justice of the Supreme Court or the Chief Judge of the Court of Appeals and the Attorney General.

Advisory Committee Historical Note

Effective January 1, 1995, Miss.R.App.P. 39 replaced Miss.Sup.Ct.R. 39, embracing proceedings in the Court of Appeals. 644-647 So.2d LXXVIII-LXXIX (West Miss.Cases 1994).

Comment

Rule 39 continues the practice under former rules.

RULE 40. MOTION FOR REHEARING

(a) Time for Filing; Content; Answer; Action by Court if Granted. A motion for rehearing may be filed within 14 days after a decision is handed down on the merits of a case by the Supreme Court or the Court of Appeals. The motion shall state with particularity the points of law or fact which, in the opinion of the movant, the court has overlooked or misapprehended and shall contain such argument in support of the motion as movant desires to present. The motion for rehearing should be used to call attention to specific errors of law or fact which the opinion is thought to contain; the motion for rehearing is not intended to afford an opportunity for a mere repetition of the argument already considered by the court. Oral argument in support of the motion will not be permitted.

A motion for rehearing in the Court of Appeals shall be heard by the panel which rendered the judgment in the matter unless the Court of Appeals shall vote to consider the matter *en banc*.

Within seven days after the filing of a motion for rehearing, any other party may, but need not, file and serve a written response in opposition to the motion. Failure to file a response within this time period waives the right to respond but does not confess the arguments made in the motion. If a motion for rehearing is granted, the appropriate court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances in a particular case.

After a motion for rehearing has been denied, no further motion for rehearing shall be filed by any party. After a motion for rehearing has been granted, a party has the option of filing a second motion for rehearing within 14 days after the judgment on rehearing.

(b) Form of Motion; Length. The motion shall be in a form prescribed by Rule 32 and in cases decided by the Supreme Court an original and ten (10) copies shall be filed with the clerk of the Supreme Court, and in cases decided by the Court of Appeals an original and eleven (11) copies shall be filed. The Supreme Court or the Court of Appeals may require that additional copies be furnished. The motion shall be served as prescribed by Rule 31 for the service and filing of briefs. Except by permission of the appropriate court a motion for rehearing shall not exceed twenty-five (25) pages. If responses are filed, they shall be filed with like numbers of copies and shall not exceed twenty-five (25) pages.

(c) Disrespectful Language Stricken. Any motion for rehearing containing language

showing disrespect or contempt for either appellate court will be stricken, and the appropriate court will take such further action as it may deem proper.

[Adopted to govern matters filed on or after January 1, 1995; amended June 21, 1996; amended July 15, 1996; amended effective October 15, 1998; amended effective January 1, 1999; amended effective April 13, 2000; amended April 4, 2002.]

Advisory Committee Historical Note

Effective April 4, 2002, Rule 40(b) was amended to increase the number of copies required to be filed. 813-815 So.2d XXXVII (West Miss.Cases 2002).

Effective April 13, 2000, Rule 40(a) and the Comment were amended to allow a second motion for rehearing after a first motion for rehearing has been granted. 753-754 So. 2d XXX (West Miss.Cases 2000).

Effective January 1, 1999, Rule 40(b) was amended to require filing of 10 copies in cases decided by the Court of Appeals and to make an editorial change. 717-722 So.2d XXVII (West Miss.Cases 1998).

Effective June 21, 1996, Rule 40 and the Comment were amended to redesignate rehearing "petitions" as "motions." In addition, the Comment was further amended to provide that "Motions for rehearing are limited to cases on the merits and motions which have been decided by panels of the Court or by the court sitting *en banc*. Motions for rehearing are not entertained upon motions decided by a single justice." 673-678 So.2d XLI-XLII and LXXXVIII (West Miss. Cases 1996).

Effective January 1, 1995, Miss.R.App.P. 40 replaced Miss.Sup.Ct.R. 40, embracing proceedings in the Court of Appeals. Subsection (a) was further amended to provide that any response to a petition for rehearing must be filed within 7, not 14, days of the filing of the petition. 644-647 So.2d LXXIX-LXXX (West Miss.Cases 1994).

Comment

Rule 40 is modeled on Fed.R.App.P. 40 and the former rules of the Supreme Court. Following federal practice, the rule provides that the motion is to be written in the form of

a brief, and no separate brief is required. The rule also provides an automatic time period in which to respond to a motion for rehearing if desired; however, the appropriate court may call for additional response on specific issues. A motion for rehearing should be distinguished from a motion for clarification or correction of opinion. Such a motion, filed in the manner and form prescribed by Rule 27, does not seek to alter the judgment of the court, and will not stay the mandate. Motions for rehearing are limited to cases on the merits and to motions as expressly allowed under Rule 27(g).

[Amended June 21, 1996 ; amended effective April 13, 2000.]

RULE 41. ISSUANCE OF MANDATES; STAY OF MANDATE

(a) Date of Issuance: Supreme Court. The mandate of the Supreme Court shall issue 21 days after the entry of judgment unless the time is shortened or enlarged by order. The mandate shall consist of both a certified copy of the judgment of the Supreme Court with any direction as to costs, and a copy of the Court's written opinion, if any. The timely filing of a motion for rehearing will stay the mandate until disposition of the motion, unless otherwise ordered by the Court. If the motion is denied, the mandate will issue seven (7) days after entry of the order denying the motion unless the time is shortened or enlarged by order.

(b) Date of Issuance: Court of Appeals. Unless otherwise ordered, the mandate of the Court of Appeals shall issue 21 days after the latest of: the entry of judgment; the disposition of a timely motion for rehearing; or the denial or dismissal of a petition for *certiorari* review in the Supreme Court. If the Mississippi Supreme Court grants *certiorari* review, the mandate shall issue in accordance with Rule 41(a).

(c) Stay of Mandate Pending Application for *Certiorari*. A stay of the mandate pending application to the United States Supreme Court for a writ of *certiorari* may be granted upon motion, reasonable notice of which shall be given to all parties. The stay shall not exceed 90 days unless the period is extended for cause shown. If during the period of the stay there is filed with the clerk of Supreme Court a notice from the clerk of the United States Supreme Court that the party who has obtained the stay has filed a petition for the writ in that Court, the stay shall continue until final disposition by that Court. Upon the filing of a copy of an order of the United States Supreme Court denying the petition for writ of *certiorari*, the mandate shall issue immediately. A bond or other security may be required as a condition to the grant or continuance of a stay of the mandate.

(d) Stay of Mandate and Release in Criminal Cases. Stay of the mandate in criminal cases shall be governed by Rule 41(c), but, in addition, the petitioner must set forth good cause for the stay and clearly demonstrate that a substantial federal question previously presented on appeal is to be presented to the United States Supreme Court. In order to obtain release, the petitioner must also post a fully executed and approved appearance bond in a penal sum equal to double the amount of the bond upon which the petitioner was released from custody after conviction.

(e) Motion to Amend or Correct Mandate; Time For Filing. Any motion to amend

or correct the mandate may be filed within fourteen (14) days after the court has issued the mandate or any addition to the mandate.

[Amended February 10, 1995; amended June 21, 1996; amended effective September 30, 2004 to allow the stay of a mandate under Rule 41(c) for 90 days.]

Advisory Committee Historical Note

Effective September 18, 1997, Rule 41(d) was amended to effect a technical change. 699-701 So. 2d XXX (West Miss. Cases 1997).

Effective June 21, 1996, Rule 41 was amended to redesignate rehearing "petitions" as "motions." 673-678 So.2d XLIII (West Miss. Cases 1996).

Effective February 10, 1995, Rule 41(b) was entirely rewritten. 648 So.2d XXXII-XXXIII (West Miss.Cases 1995).

Effective January 1, 1995, Miss.R.App.P. 41 replaced Miss.Sup.Ct.R. 41, adding a new subsection (b) to govern the issuance of mandates by the Court of Appeals. 644-647 So.2d LXXX-LXXXI (West Miss.Cases 1994).

Comment

Rule 41 is based upon Fed.R.App.P. 41. Under Rule 41(a) and (b) the appropriate appellate court issues a formal mandate which includes a certified copy of the judgment with any direction as to costs and a copy of the written opinion, if any. The mandate must correctly and adequately reflect the decision and judgment of the Court. *Deposit Guaranty National Bank v. E.Q. Smith Plumbing & Heating, Inc.*, 396 So. 2d 6 (Miss. 1981).

Subsection (c) is based upon Fed.R.App.P. 41(b).

Under subsection (d), a motion for a stay of the issuance of the mandate in a criminal case will not be granted unless the petition sets forth good cause for the stay and clearly demonstrates that a substantial question previously presented on appeal is to be presented to the United States Supreme Court. A motion for a stay of the issuance of the mandate in such

a criminal appeal shall not be granted simply upon request. A party is no longer required to file a copy of the party's *certiorari* petition prior to obtaining release. However, the motion for stay must demonstrate that a substantial federal question exists, and the party must obtain a notice that the *certiorari* petition has been filed in order to obtain an extension of the stay and release beyond 90 days.

RULE 42. VOLUNTARY DISMISSAL

(a) Dismissal in the Lower Court. If an appeal has been perfected in accordance with these rules but has not been docketed with the clerk of the Supreme Court, the appeal may be dismissed by the lower court upon the filing in either the trial court or the appellate court of a stipulation for dismissal signed by all parties or their attorneys.

(b) Dismissal in the Appellate Court. After the appeal has been docketed with the clerk of the Supreme Court, an appeal may be dismissed on motion of the appellant upon such terms as may be agreed upon by the parties or fixed by the Supreme Court or, if the case has been assigned to the Court of Appeals, by the Court of Appeals. If the parties to an appeal or other proceeding or their attorneys agree that the proceeding be dismissed, they may file a joint motion to dismiss specifying the terms as to the payment of costs and that all fees have been paid.

Advisory Committee Historical Note

Effective January 1, 1995, Miss.R.App.P. 42 replaced Miss.Sup.Ct.R. 42, embracing proceedings in the Court of Appeals. 644-647 So.2d LXXXI-LXXXII (West Miss.Cases 1994).

Comment

Subdivision (a) of Rule 42 is modeled on Fed.R.App.P. 42(a). It departs from previous practice and procedure in that the lower court may dismiss an appeal which has been perfected in the lower court, but not yet docketed with the Supreme Court, where all parties or their attorneys sign a stipulation of dismissal. However, because an appeal is docketed when the notice of appeal is filed with the Supreme Court clerk, *see* Rule 13(a), the circumstances in which such a dismissal can take place should be rare.

Section (b) is a restatement of existing case law in Mississippi regarding voluntary dismissal of an appeal. It reiterates the long recognized rule that while a voluntary dismissal of an appeal will usually be granted, the appellate court may have special reasons to refuse to grant the motion for a voluntary dismissal filed by the appellant, and further recognizes that an appellant's right to dismiss an appeal is not absolute, but subject to the discretion of the court. *See Wolf v. Miss. Valley Trust &*

Co., 130 Miss. 144, 93 So. 581 (1922). Once an appeal is voluntarily dismissed, no further appeal may be brought. Miss. Code Ann. § 11-3-15 (1991).

RULE 43. SUBSTITUTION OF PARTIES

(a) Death of a Party. If a party dies after a notice of appeal is filed or while a proceeding is otherwise pending, the personal representative of the deceased party may be substituted as a party on motion filed by the representative or by any party with the clerk of the Supreme Court. The motion of a party shall be served upon the representative in accordance with the provisions of Rule 25. If the deceased party has no representative, any party may suggest the death on the record and proceedings shall then be had as the appropriate appellate court may direct. If a party against whom an appeal may be taken dies after entry of a judgment or order in the lower court but before a notice of appeal is filed, an appellant may proceed as if death had not occurred. After the notice of appeal is filed, substitution shall be effected in the appellate court in accordance with this Rule 43(a). If a party entitled to appeal shall die before filing a notice of appeal, the notice of appeal may be filed by that party's personal representative, or, if there is no personal representative, by that party's attorney of record within the time prescribed by these rules. After the notice of appeal is filed, substitution shall be effected in the appellate court in accordance with this Rule 43(a).

(b) Substitution for Other Causes. If substitution for a party in either appellate court is necessary for any reason other than death, substitution shall be effected in accordance with the procedure prescribed in Rule 43(a).

(c) Public Officers: Death or Separation From Office.

(1) *Substitution.* When a public officer is a party in an official capacity to an appeal or other proceeding in either appellate court and, during its pendency, the officer dies, resigns, or otherwise ceases to hold office, the action does not abate and the public officer's successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted 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 failure to enter such an order shall not affect the substitution.

(2) *Use of Title.* When a public officer is a party to an appeal or other proceeding in an official capacity, that public officer may be described as a party by the public officer's official title rather than by name, but the court may require the public officer's name be added.

Advisory Committee Historical Note

Effective January 1, 1995, Miss.R.App.P. 43 replaced Miss.Sup.Ct.R. 43, embracing proceedings in the Court of Appeals. 644-647 So.2d LXXXII-LXXXIII (West Miss.Cases 1994).

Effective July 1, 1994, the Comment to Miss.Sup.Ct.R. 43 was amended to delete references to repealed statutes and material concerning the transition from statutory procedures to Rule practice, and to effect attendant technical changes. 632-635 So.2d LIV (West Miss.Cases 1994).

Comment

Rule 43 is patterned after Fed.R.App.P. 43. It applies to civil cases only, and not to criminal cases. *Cf. Berryhill v. State*, 492 So. 2d 288 (Miss. 1986) (dismissing criminal appeal on death of defendant).

When the party against whom an appeal is taken dies after judgment in the lower court but before the appeal has been perfected, the appellant may proceed as if death had not occurred and substitute under Rule 43 after the appeal has been perfected.

Likewise, the personal representative of a deceased party who dies before perfecting the appeal may file the notice of appeal. If there is no representative, the attorney of record may perfect the appeal and substitute a representative after perfection. However, the perfection still must be timely in accordance with Rule 4 or 5.

RULE 44. QUESTIONS CONCERNING VALIDITY OF STATUTES AND ORDERS

(a) Service. If the validity of any statute, executive order or regulation, municipal ordinance, franchise or written directive of any governmental officer, agent, or body is raised in the Supreme Court or the Court of Appeals, and the state, municipal corporation, or governmental body which enacted or promulgated it is not a party to the proceeding, the party raising such question shall serve a copy of its brief, which shall clearly set out the question raised, on the Attorney General, the city attorney, or other chief legal officer of the governmental body involved.

(b) Right to Respond. The state, municipal corporation, or governmental body shall, within the time allowed for the filing of a response to the brief, be entitled to file a response and may subsequently be heard orally in the discretion of the court.

(c) Necessity. Except by special order of the court to which the case is assigned, in the absence of such notice neither the Supreme Court nor the Court of Appeals will decide the question until the notice and right to respond contemplated by this rule has been given to the appropriate governmental body.

Advisory Committee Historical Note

Effective January 1, 1995, Miss.R.App.P. 44 replaced Miss.Sup.Ct.R. 44, embracing proceedings in the Court of Appeals. 644-647 So.2d LXXXIII-LXXXIV (West Miss.Cases 1994).

Comment

Rule 44 is based on Fed.R.App.P. 44 and Ala.R.App.P. 44. Failure to give notice is an omission which may be cured. Subsection (c) permits action to proceed in the case without notice by special order if the court determines that urgent action is necessary or that the challenged statute, order, or directive is so patently invalid that no response need be required from the affected body. Also, the governmental body may waive its right to respond.

The appearance of the governmental body will ordinarily be in accord with the

provisions of Rule 29 concerning an *amicus curiae.* Pursuant to Rule 25, the certificate of service of the party raising the question of validity should reflect compliance with this rule.

The term "validity" is intended to be broad enough to encompass the method of enactment as well as the constitutionality and authority for any statute, ordinance or regulation. It does not include mere questions of construction and interpretation. This rule applies not only to appeals, but also to any extraordinary proceeding before the court. A provision for notice to the Attorney General in trial proceedings is found in M.R.C.P. 24(d).

RULE 45. DUTIES OF THE CLERK

(a) General Provisions. The clerk of the Supreme Court shall take the oath and give the bond required by law, and shall serve as clerk for the Supreme Court and the Court of Appeals. The Supreme Court and the Court of Appeals shall be deemed always open for the purpose of filing any proper paper, of issuing and returning process, and of making motions and orders. The office of the clerk shall be open during business hours on all days except Saturdays, Sundays, and legal holidays specified in Rule 26.

(b) The Docket; Other Records Required. The clerk shall keep a book or record known as the docket and shall enter each case in it. Cases shall be assigned consecutive file numbers. All papers filed with the clerk and all process, orders, and judgments shall be entered chronologically in the docket assigned to the case. Entries shall be brief but shall show the nature of each paper filed or judgment or order entered. The entry of an order or judgment shall show the date the entry is made. The clerk shall keep a suitable index of cases contained in the docket.

The clerk shall prepare, under the direction of the court, a list of cases awaiting argument or submission.

The clerk shall keep such other books and records as may be required by the Supreme Court.

(c) Notice of Orders or Judgment. Immediately upon the entry of an order or judgment, the clerk shall serve a notice of entry by mail upon each party to the proceeding and shall make a note in the docket of the mailing. Service on a party represented by counsel shall be made on counsel.

(d) Custody of Records and Papers. The clerk shall have custody of the records and papers of the Supreme Court and of the Court of Appeals. The clerk shall not permit any original record or paper to be taken from the clerk's custody during the pendency of the appeal except by or on behalf of a party. After the completion of the time for briefing prescribed by Rule 31 and before decision, no party will be permitted to withdraw the record except upon motion accompanied by an affidavit stating that the trial court record retained under Rule 11(e) is not available. After, a mandate has been issued, any member of the bar in good standing may withdraw from the clerk's office any record after paying in advance a fee of $15.00. Incarcerated pro se litigants may withdraw from the clerk’s office the appellate record in their cause after paying in advance a fee of $15.00. A reasonable mailing

and handling fee of $10.00 will be assessed in the event the record requires mailing to the requesting party. Records containing more than 10 volumes will be assessed actual mailing cost. No record shall be held out of the clerk's office more than 90 days. If the record is held out past the 90 day period, a record delinquency fee will be assessed in the amount of $50.00. The clerk shall maintain a separate accounting dealing solely with records and documents which have been withdrawn from the clerk's files in accordance with this rule. The clerk shall advise the Supreme Court in writing on the first Monday of each month of any records, briefs, or papers which have not been returned in compliance with this rule. The Supreme Court may also take such other action with respect to records as the circumstances warrant, and may require any party failing to return a record to pay the full cost of reproducing the record from other sources. A copy of this rule shall be attached to any records or documents removed from the clerk's office indicating the estimated cost for reproduction. This rule does not apply to those cases which the Supreme Court has delivered to the Mississippi Department of Archives and History pursuant to Section 9-3 -25 of the Mississippi Code of 1972, for which cases the Mississippi Department of Archives and History is solely responsible.

Advisory Committee Historical Note

Effective January 3, 2002, Rule 45(d) was amended regarding removal of closed files from the Clerk's office. 803-804 So.2d XXI (West Miss.Cases 2002).

Effective January 1, 1995, Miss.R.App.P. 45 replaced Miss.Sup.Ct.R. 45, providing that the clerk of the Supreme Court shall serve as the clerk for the Court of Appeals. Subsection (b) was further amended to effect a technical change concerning the docket. 644-647 So.2d LXXXIV-LXXXV (West Miss.Cases 1994).

Comment

Rule 45 follows Fed.R.App.P. 45 and prior state practice.

The Rule provides that the clerk of the Supreme Court also serves as the clerk of the Court of Appeals. This is consistent with the general policy under which the administrative structure and employees of the Supreme Court support and serve the Court of Appeals, and consistent with the Supreme Court's general authority to set administrative policies and procedures for the Court of Appeals. Of course, references throughout these rules to the clerk of the Supreme Court include any duly appointed deputy clerk. *See* Miss Code Ann. § 9-4-7(2) (Supp. 1994).

[Amended effective July 1, 2010, to eliminate the requirement that copies of the opinions be mailed to each party of the proceedings.]

RULE 46. ADMISSION, WITHDRAWAL, AND DISCIPLINE OF ATTORNEYS

(a) Admission to Practice. Attorneys who have not been admitted to practice in the Supreme Court or the Court of Appeals shall not be permitted to argue orally, or file briefs or any paper in any cause in either Court. Upon presentation to the clerk of a certified copy of the order of a trial court admitting an attorney to practice in this state, together with a certificate of good standing from the Executive Director of the Mississippi Bar, the clerk may admit such attorneys to practice before the Supreme Court and the Court of Appeals and administer the oath to each such attorney.

(b) Admission of Foreign Attorneys Pro Hac Vice.

(1) Terminology

i. "Administrative agency" shall include any agency, department, board or commission of the State of Mississippi, or any county, city, public school district or other political subdivision of the State of Mississippi.

ii. "Appearance" shall include the appending or allowing the appending of the foreign attorney's name on any pleading or other paper filed or served, or appearing personally before a court or administrative agency or participating in a deposition or other proceeding in which testimony is given. Presentation of uncontested matters to administrative agencies does not constitute appearance as the term is used in this Rule 46(b). Appearance of a foreign attorney shall commence with the first appearance and continue until final determination or until an order permitting the foreign attorney to withdraw has been issued.

iii. "General practice of law" shall be deemed to include, when applied to a foreign attorney, appearances by the foreign attorney in more than five (5) separate unrelated causes or other matters before the courts or administrative agencies of this state within the twelve (12) months immediately preceding the appearance in question.

iv. "Foreign attorney" shall mean an attorney licensed to practice law

and in good standing in another state, the District of Columbia, or other American jurisdiction, but not licensed and in good standing to practice law in Mississippi.

v. "Local attorney" shall mean an attorney who is licensed and in good standing to practice law in Mississippi.

(2) *Appearance of a Foreign Attorney Pro Hac Vice Permitted.* A foreign attorney shall not appear in any cause except as allowed pro hac vice under this Rule 46(b). A foreign attorney who is of good moral character and familiar with the ethics, principles, practices, customs, and usages of the legal profession in this state, may, subject to the provisions of this Rule 46(b), appear as counsel *pro hac vice* in a particular cause before any court or administrative agency in this state upon compliance with the conditions stated in this subdivision.

(3) *Foreign Attorney Appearing Pro Hac Vice Subject to Local Jurisdiction.* A foreign attorney appearing as counsel *pro hac vice* before any court or administrative agency of this state shall be subject to the jurisdiction of the courts of this state in any matter arising out of the attorney's conduct in such proceedings. The foreign attorney shall study and comply with the standards of professional conduct required of members of the Mississippi Bar and shall be subject to the disciplinary jurisdiction of the courts of this state, of the disciplinary tribunals of the Mississippi Bar, and of the Mississippi Board of Bar Admissions with respect to any acts occurring during the course of such appearance. A foreign attorney who has been found in an appropriate disciplinary proceeding to have advertised services in violation of Rule 7.2 of the Mississippi Rules of Professional Conduct, or who is employed by or is a member of a firm which has been so found, shall not be granted leave to appear *pro hac vice* before the courts or administrative agencies of this state.

(4) *Association of Local Attorney.* No foreign attorney may appear *pro hac vice* before any court or administrative agency of this state unless the foreign attorney has associated in that cause a local attorney. The name of the associated local attorney shall appear on all notices, orders, pleadings, and other papers filed in the cause. The local attorney shall personally appear and participate in all trials, and, unless specifically excused from such appearance by the court or administrative agency, in all pretrial conferences, hearings, other proceedings conducted in open court and all depositions or other proceedings in which testimony is given in this state. By associating with a foreign attorney in a particular cause, the local counsel accepts joint and several responsibility with such foreign attorney to the client, to opposing parties and counsel, and to the court or administrative agency in all matters arising from that particular cause.

(5) *Verified Application, Clerk's Statement and Filing Fees.* A foreign attorney desiring to appear *pro hac vice* before any court or administrative agency of this state shall file with the subject court or administrative agency and with the Clerk of the Supreme Court (1) a verified application and (2) a statement obtained from the Clerk of the Supreme Court indicating all causes or other matters in which the foreign attorney previously requested leave to appear as counsel *pro hac vice* showing the date and disposition of each request. Such application and statement shall be accompanied by a certificate of service on all parties in accordance with the Mississippi Rules of Civil Procedure.

The verified application shall contain the following information:

i. the name of the court or administrative agency before which the foreign attorney desires to appear as counsel *pro hac vice*;

ii. the style of the cause in which the foreign attorney desires to appear;

iii. the full name, residence address, office address, voice and facsimile telephone numbers, and e-mail address, if any, of the foreign attorney;

iv. each jurisdiction in which the foreign attorney has been admitted and the date of admission;

v. a statement that the foreign attorney: (a) does not maintain an office within this state, or that the foreign attorney is a member of a firm which maintains an office or offices within this state which are staffed, full time, by an attorney or attorneys who are licensed to practice in this state and (b) has not engaged in the general practice of law in this state without being properly admitted and licensed to practice law in this state;

vi. a statement that the foreign attorney is currently licensed in good standing to practice law in each jurisdiction in which the foreign attorney has been admitted or, if the foreign attorney is not currently licensed in good standing to practice law in any jurisdiction in which the foreign attorney has previously been admitted, a full explanation of circumstances;

vii. a statement that the foreign attorney is not currently suspended or disbarred by any jurisdiction in which the foreign attorney has been admitted;

viii. a statement of whether or not the foreign attorney has been the subject of disciplinary action by the bar or courts of any jurisdiction during the preceding five (5) years, and, if so, a full explanation of the circumstances;

ix. a statement that the foreign attorney is of good moral character and familiar with the ethics, principles, practices, customs, and usages of the legal profession in this state;

x. the style and number of each cause, including the name of the court or administrative agency, in which the foreign attorney has appeared as counsel pro hac vice within this state within the immediately preceding 12 months, is presently appearing as counsel pro hac vice, or has requested admission to appear as counsel pro hac vice;

xi. a statement that, unless permitted to withdraw by order of the court or administrative agency, the foreign attorney will continue to represent the client in the cause until the final determination of the cause, and that, with reference to all matters incident to such cause, the foreign attorney consents to the jurisdiction of the courts of the State of Mississippi, of the disciplinary tribunals of the Mississippi Bar, and of the Mississippi Board of Bar Admissions in all respects as if the foreign attorney were a regularly admitted and licensed member of the Mississippi Bar;

xii. the name and office address of the member or members in good standing of the Mississippi Bar whom the foreign attorney has associated in the particular cause; and

xiii. the verified application of the foreign attorney for appearance pro hac vice shall also be signed by the associated local attorney, certifying the local attorney's agreement to be associated by the foreign attorney in the particular cause.

Simultaneously with the filing of the application, the foreign attorney shall pay to The Mississippi Bar the sum of $200 which will be used by the Bar to provide legal services to the indigent, and shall certify to the court or agency and to the Clerk of the Supreme Court that such payment has been made, and shall pay to the Clerk of the Supreme Court the customary

miscellaneous docket fee as provided in Miss. Code Ann. § 25-7-3. In cases involving indigent clients, the court or agency may waive the filing fees for good cause shown.

(6) *Proceedings on Application of Foreign Attorney to Appear as Counsel Pro Hac Vice.* No hearing on an application to appear *pro hac vice* is required except upon motion of a party or where the court considers such a hearing to be desirable. Upon motion of a party opposing such appearance, or on the court's motion, a hearing may, in the discretion of the judge, be held to determine whether the foreign attorney has complied with Rule 46(b).

(7) *Order Authorizing Appearance.* A foreign attorney shall not appear as counsel pro hac vice before any court or administrative agency until the foreign attorney certifies to the court or administrative agency that the foreign attorney has provided a copy of the order authorizing such appearance to the Clerk of the Supreme Court.

(8) *Prohibition of General Practice of Law in Mississippi Under Pro Hac Vice Privilege.*

i. General Prohibition. No foreign attorney shall appear as counsel *pro hac vice* before any court or administrative agency of this state if the foreign attorney: (a) maintains an office within this state, unless the foreign attorney is a member of a firm which maintains an office or offices within this state which are staffed, full time, by an attorney or attorneys who are licensed to practice in this state or (b) has engaged in the general practice of law in this state without being properly admitted and licensed to practice law in this state.

ii. General Practice . Appearances by a foreign attorney before the courts or administrative agencies of this state in more than five (5) separate unrelated causes or other matters within the twelve (12) months immediately preceding the appearance in question shall be deemed the general practice of law in this state, which may be performed only by an attorney properly admitted and in good standing as a member of the Mississippi Bar. Appearance of a foreign attorney shall commence with the first appearance and continue until final determination on the merits or until the foreign attorney has obtained an order permitting him to withdraw.

iii. Exception for Law Teachers. The limitations in this subdivision (b)(8) shall not apply to a foreign attorney employed full-time as a law school teacher by a law school located in this state, provided that such law teacher must

be in good standing in the jurisdictions in which the law teacher is admitted and must associate a local attorney in order to appear.

(9) *Suspension or Disbarment Terminates Permission to Appear Pro Hac Vice.*

i. Foreign Attorney. Permission for a foreign attorney to appear pro hac vice under the provisions of this rule shall terminate upon such attorney's suspension or disbarment in any jurisdiction in which the foreign attorney has been admitted. The foreign attorney shall have the duty to promptly report to the court or administrative agency of this state before which the foreign attorney is appearing any disciplinary action which has been taken in any other jurisdiction.

ii. Local Attorney. In the event that the local attorney associated by a foreign attorney in a particular case is suspended, disbarred or incapacitated by virtue of health or otherwise from the practice of law in the State of Mississippi, the foreign attorney shall, before proceeding further in the pending cause, associate a new local attorney who is in good standing to practice law in this state and shall file an amendment to the verified application required by subdivision (b)(5).

(10) *Exclusions.*

i. Appearance *Pro Se.* Nothing in this rule shall be construed to prohibit any attorney from appearing before any court or administrative agency of this state on the attorney's own behalf in any civil or criminal matter.

ii. United States Attorneys. Attorneys representing the United States government in matters before the courts or administrative agencies of this state shall be permitted to appear on behalf of the United States government and to represent its interest in any matter in which the United States government is interested without the association of local counsel.

(11) *Enforcement.*

i. By Clerks and Filing Officers. No court clerk or filing officer of any administrative agency of this state shall accept or file any pleadings or other papers from a foreign attorney who has not complied with the requirements of this rule. Any pleadings or other papers filed in violation of this rule shall be stricken from

the record upon the motion of any party or by the court or administrative agency sua sponte. A request for the issuance of a subpoena pursuant to Rule 45(a)(3) of the Rules of Civil Procedure is not subject to this Rule.

ii. By Courts and Administrative Agencies. The courts and administrative agencies of this state shall have the duty and authority to enforce the provisions of this rule by denying violators the right to appear. If a foreign attorney engages in professional misconduct during the course of a special appearance, the judge or chief officer of the administrative agency before which the foreign attorney is appearing may revoke permission to appear pro hac vice and may cite the foreign attorney for contempt. In addition, the judge or administrative officer shall refer the matter to the disciplinary counsel of the Mississippi Bar for appropriate action by the disciplinary tribunal.

iii. Violation. Violation of this rule is deemed to be the unlawful practice of law. The Mississippi Bar, or its designated representatives, shall have the right to take appropriate action to enforce the provisions of this rule under the provisions of Miss. Code Ann. § 73-51-1 (1989).

iv. Cumulative Enforcement. Provisions of this rule shall be cumulative with all other statutes and rules providing remedies against the unauthorized practice of law within the State of Mississippi.

(c) Withdrawal. An attorney who appears before the Supreme Court or the Court of Appeals in an appeal or other proceeding may withdraw from the representation only with the approval of the appropriate court. If an attorney desires to withdraw, the attorney shall file a motion giving the attorney's reasons for desiring to withdraw and requesting approval of the appropriate court. Such motion shall be served upon the attorney's client and upon all parties. The motion shall be accompanied by an appearance form of substitute counsel or a signed statement by the client indicating that the client agrees to proceed *pro se*, or shall explain why neither can be obtained. If the motion is accompanied by a signed statement by a client in a criminal appeal, then pursuant to Rule 6(c), the appellate court shall request that the trial court determine whether the appellant knowingly and intelligently waives counsel on appeal.

(d) Disciplinary Power of the Court Over Attorneys. Every petition, motion, brief, or other paper filed by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. The appellate court may, after reasonable notice and an opportunity to show cause to the contrary,

and after hearing, if requested by the attorney, take any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the bar, or for failure to comply with these rules or any order of the Supreme Court or the Court of Appeals, or for filing any frivolous petition, motion, brief, or other paper.

(e) Military Legal Assistance Program

(1) A lawyer admitted to the practice of law in a state or territory of the United States, other than Mississippi, who is serving in or employed by the armed services as an attorney and is otherwise authorized to provide legal assistance pursuant to 10 U.S. Code § 1044, may apply to the Supreme Court for a certificate as a Registered Military Legal Assistance Attorney in Mississippi to represent clients eligible for legal assistance in the courts and tribunals of this state while the lawyer is employed, stationed, or assigned within Mississippi.

(2) Each applicant for a Registered Military Legal Assistance Attorney Certificate shall:

(i) file with the clerk of the Supreme Court an application, under oath, upon a form furnished by the clerk;

(ii) furnish a certificate, signed by the presiding judge of the court of last resort, or other appropriate official of the jurisdiction in which the applicant is admitted to practice law, stating that the applicant is licensed to practice law and is an active member in good standing of the bar of such jurisdiction;

(iii) file an affidavit, upon a form furnished by the clerk of the Supreme Court, from the commanding officer, staff judge advocate or chief legal officer of the military base in Mississippi where the applicant is employed, stationed, or assigned, attesting to the fact that the applicant is serving as a lawyer to provide legal services exclusively for the military, that the nature of the applicant's employment or service conforms to the requirements of this rule, and that the commanding officer, staff judge advocate or chief legal officer, or his or her successor, shall notify the clerk of the Supreme Court immediately upon the termination of the applicant's employment or service at the military base.

(3) Upon a finding by the clerk of the Supreme Court that the applicant has produced evidence sufficient to satisfy the clerk that the applicant is a person of honest demeanor and good moral character who possesses the requisite fitness to perform the obligations and responsibilities of a practicing attorney at law and satisfies all other requirements of this rule, the clerk shall notify the applicant that he or she is eligible to be issued a Registered Military Legal Assistance Attorney Certificate. After the applicant has taken and subscribed to the oaths required of attorneys at law, the clerk shall issue to the applicant a Military Legal Assistance Attorney Certificate, which shall entitle the applicant to represent clients eligible for legal assistance in the courts and tribunals of this state solely as provided in this rule.

(4) The practice of a lawyer under this rule shall be subject to the limitations and restrictions of 10 U.S.C. § 1044 and the regulations of that lawyer's military service and shall be further limited to: (i) adoptions, (ii) guardianships, (iii) name changes, (iv) divorces, (v) paternity matters, (vi) child custody, visitation, child and spousal support, (vii) landlord-tenant disputes on behalf of tenants, (viii) consumer advocacy cases involving alleged breaches of contract or warranties, repossession, or fraud, (ix) garnishment defenses, (x) probate, (xi) enforcement of rights under the Servicemembers Civil Relief Act (50 U.S.C. App. § 501 et seq.), (xii) enforcement of rights under the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4301 et seq., and (xiii) such other cases within the discretion of the court or tribunal before which the matter is pending.

(5) All pleadings filed by a legal assistance attorney shall cite this rule, and include the name, complete address and telephone number of the military legal office representing the client, and the name, grade and armed service of the lawyer registered under this rule providing representation.

(6) No lawyer registered under this rule shall (a) undertake to represent any person other than an eligible legal assistance client before a court or tribunal of this state, (b) offer to provide legal services in this state to any person other than as authorized by his or her military service, or (c) hold himself or herself out in this state to be authorized to provide legal services to any person other than as authorized by his or her military service.

(7) Representing clients eligible for legal assistance in the courts or tribunals of this state under this rule shall be deemed the practice of law and shall subject the lawyer to all rules governing the practice of law in Mississippi, including the Mississippi Rules of Professional Conduct and the Rules of Discipline. Jurisdiction of the

Mississippi Bar shall continue whether or not the lawyer retains the Registered Military Legal Assistance Attorney Certificate and irrespective of the lawyer's presence in Mississippi.

(8) Each person receiving a Military Legal Assistance Attorney Certificate shall be registered with the Mississippi Bar as an active member on the basis of that certificate and shall be subject to the same membership obligations as other active members of the Mississippi Bar, other than the payment of dues and assessments and Continuing Legal Education requirements. A lawyer registered under this rule shall use as his or her address of record with the Mississippi Bar, the military address in Mississippi of the commanding officer, staff judge advocate or chief legal officer which filed the affidavit on the lawyer's behalf.

(9) Each person issued a Military Legal Assistance Attorney Certificate shall promptly report to the Mississippi Bar any changes in employment or military service, any change in bar membership status in any state or territory of the United States, or the District of Columbia where the applicant has been admitted to the practice of law, or the imposition of any disciplinary sanction in a state or territory of the United States or the District of Columbia or by any federal court or agency where the applicant has been admitted to the practice of law.

(10) The limited authority to practice law which may be granted under this rule shall be automatically terminated when (a) the lawyer is no longer employed, stationed, or assigned at the military base in Mississippi from which the affidavit required by this rule was filed, (b) the lawyer has been admitted to the practice of law in this state by examination or pursuant to any other provision of the Rules Governing Admission to the Mississippi Bar, (c) the lawyer fails to comply with any provision of this rule, (d) the lawyer fails to maintain current good standing as an active member of a bar in at least one state or territory of the United States other than Mississippi, or (e) when suspended or disbarred for disciplinary reasons in any state or territory of the United States or the District of Columbia or by any federal court or agency where the lawyer has been admitted to the practice of law.

(f) Pro Bono Publicus Attorneys.

(1) *Terminology*

(i) A "pro bono publicus attorney" is: (a) an inactive member of the Mississippi Bar who is not otherwise engaged in the practice of law; or (b) an attorney licensed in a state

other than Mississippi who:

will provide free legal services under the supervision of a qualified legal services provider as defined in this rule;

is licensed to practice law in at least one state and has no record of public discipline for professional misconduct imposed at any time within the past fifteen years and who did not resign or retire from the practice of law with disciplinary charges pending or in lieu of discipline; and

neither asks for nor receives personal compensation of any kind for the legal services rendered under this rule.

(ii) A "qualified legal services provider" for the purposes of this rule is a not-for-profit legal aid organization that is approved by the Mississippi Bar as set forth in this rule. A legal aid organization seeking approval from the Mississippi Bar for purposes of this rule shall file a petition with the Office of General Counsel of the Mississippi Bar certifying that it is a not-for-profit organization and specifically stating:

(a) the structure of the organization and whether it accepts funds from its clients;

(b) the major sources of funds used by the organization;

(c) the criteria used to determine potential clients' eligibility for legal services performed by the organization;

(d) the types of legal and non-legal services performed by the organization;

(e) the names of all members of the Mississippi Bar who are employed by the organization or who regularly perform legal work for the organization; and

(f) the existence of professional liability insurance that will cover the pro bono publicus attorney.

(2) *Limitations.*

(i) Except for the acts and services performed in association with a qualified legal services provider, a pro bono publicus attorney shall not otherwise engage in the active practice of law.

(ii) The pro bono publicus attorney shall not be paid by the qualified legal services provider, but the qualified legal services provider may reimburse the pro bono publicus attorney for actual expenses incurred while rendering services. The qualified legal services provider shall be entitled to receive any court-awarded attorneys fees for representation rendered by the pro bono publicus attorney. Collection of any money from the

client, including but not limited to reimbursements for expenses incurred, shall be handled exclusively by and through the qualified legal services provider.

(iii) An attorney who complies with this rule permitting practice as a pro bono publicus attorney shall not be deemed to be engaged in the unauthorized practice of law as defined by Miss. Code Ann. § 73-3-55 (1972, as amended), the Mississippi Rules of Professional Conduct and pertinent case law.

(3) *Duties of pro bono publicus attorney*.

Before providing services under the authority of this rule, an attorney shall first present to the Office of General Counsel of the Mississippi Bar an affidavit containing the following:

(i) the attorney's full name, firm name, residence address, principal business address, telephone numbers, jurisdiction or jurisdictions in which the attorney is admitted, and bar identification numbers;

(ii) affirmation that the attorney is an inactive member of the Mississippi Bar or is duly licensed and in good standing and authorized to practice law in at least one state and has no record of public discipline for professional misconduct imposed at any time within the past fifteen years and did not resign or retire from the practice of law with disciplinary charges pending or in lieu of discipline;

(iii) affirmation that in performing all services under the authorization of this rule, the attorney will be acting as a volunteer for a qualified legal services provider;

(iv) affirmation that all services to be performed will be at no charge or expense to the client;

(v) affirmation that the attorney will abide by the Mississippi Rules of Professional Conduct and consents to the jurisdiction of the State of Mississippi for disciplinary action; and

(vi) affirmation that the attorney will not undertake to represent any person other than an eligible legal assistance client for a qualified legal services provider, shall not offer to provide legal assistance in this State to any person or for any matter other than through a qualified legal services provider, and shall not hold himself or herself out in this State to be authorized to provide legal services to any person or for any matter other than through a qualified legal services provider.

[Amended effective January 16, 2003; amended effective May 27, 2004 to place the responsibility of obtaining, filing and serving the statement of the Clerk of the Supreme Court with the foreign attorney seeking leave to appear pro hac vice; amended effective January 27,

2005 to provide legal assistance to certain military personnel and their families; amended effective March 24, 2005 to make technical corrections in references to federal laws; amended effective December 14, 2006, to delete the 21-day waiting period for proceedings on application of foreign attorney to appear pro hac vice; amended effective October 18, 2007, to provide for pro bono publicus attorneys; amended effective July 1, 2009; amended effective August 2, 2012.]

Advisory Committee Historical Note

Effective as to verified applications for leave to appear *pro hac vice* filed on or after March 1, 2003, Rule 46(b) and the Comment to Rule 46 were substantially amended to designate the Clerk of the Supreme Court as the central source from which to obtain a record of appearances by foreign attorneys, to enlarge the definition of "appearance," to clarify the definition of "general practice of law," to increase the role of local counsel, and to make other associated changes. _____ So. 2d _____ (West Miss. Cases).

Effective June 24, 1999, Rule 46(b)(5) was amended to effect editorial changes. 735 So. 2d XIX (West Miss. Cases 1999).

Effective January 1, 1999, new Rule 46(b)(5) was adopted and existing subsections renumbered. 717-722 So. 2d XXVII (West Miss. Cases 1998).

Effective June 24, 1999, Rule 46(b)(5) was amended to effect editorial changes. 735 So. 2d XIX (West Miss. Cases 1999).

Effective January 1, 1999, new Rule 46(b)(5) was adopted and existing subsections renumbered. 717-722 So. 2d XXVII (West Miss. Cases 1998).

Effective January 1, 1995, Rule 46 replaced Miss.Sup.Ct.R. 46, embracing proceedings in the Court of Appeals. 644-647 So. 2d LXXXVI-XC (West Miss. Cases 1994).

Effective October 29, 1992, Rule 46(c) was amended to state that an attorney must have the Court's approval to withdraw from representation before the Supreme Court. 603-605 So. 2d XLVIII-XLIX (West Miss. Cases 1992)

Comment

Rule 46 is based on Fed. R. App. P. 46(c) and the former rules of the Supreme Court. If the verified application required by Rule 46(b)(5) for admission pro hac vice is filed in a trial court or administrative agency, the application should be included in the record on appeal. In such cases, it is not necessary to file a separate application in the Supreme Court. Withdrawal from a criminal case is governed additionally by Rule 6 of these Rules. The Supreme Court has general disciplinary authority over attorneys practicing in this State. See Miss. Code Ann. § 73-3-301 (Supp.1994). Rule 46(d) recognizes the Court's power to impose sanctions for frivolous pleadings. Cf. M.R.C.P. 11 (sanctions in trial court).

Major amendments to Rule 46(b) were adopted by order entered effective January 16, 2003 made to Rule 46(b). By the terms of the order adopting those amendments, Rule 46(b) as adopted applies to verified applications for leave to appear pro hac vice filed on or after March 1, 2003. Under the 2003 amendments, the Clerk of the Supreme Court was responsible for filing and serving a statement indicating all causes or other matters in which the foreign attorney previously requested leave to appear as counsel pro hac vice and the date and disposition of each request. By further amendment effective May 27, 2004, Rule 46(b)(5) was redrafted and now requires the attorney to obtain, file and serve the Clerk's statement with the verified application.

By the 2003 amendments, Rule 46(b)(1) broadens the previous definition of "appearance," and clarifies the definition of "general practice of law." "Appearance" now includes filing or appearing on "any pleading or other paper filed or served" in the cause or matter, "appearing personally before a court or administrative agency," and "participating in a deposition or other proceeding in which testimony is given."

"General practice of law" is now defined to include appearance as counsel pro hac vice by a foreign attorney in more than five (5) separate and unrelated causes or other matters before the courts or administrative agencies of this state within the 12 months immediately preceding the appearance in question. Consequently, a foreign attorney may not appear as counsel pro hac vice in more than five separate unrelated cases or other matters within any 12 month period, even if representation is terminated, or appear in more than five pending cases or other matters, regardless of when the appearance commenced.

As amended in 2003, Rule 46(b)(4) departs from prior practice and now requires that associated local counsel personally appear and participate in all depositions or other

proceedings in which testimony is given in this state, in addition to all trials, pretrial conferences, hearings other proceedings conducted in open court. The local attorney may be specifically excused by the judge from attending proceedings other than trials.

The purpose of Rule 46(f) is to permit and encourage attorneys who do not engage in the active practice of law in Mississippi to provide legal representation to persons who cannot afford private legal services. Under certain circumstances, inactive members of the Mississippi Bar as defined by Miss. Code Ann. § 73-3-120(b) and members of bars in other states may provide pro bono legal services in the State of Mississippi. Attorneys over the age of seventy-five (75) who qualify as active members of the Mississippi Bar even if not engaged in the active practice of law are also encouraged to provide pro bono legal representation.

Rule 46(f)(1)(i) provides that a pro bono publicus attorney will provide free legal services under the supervision of a qualified legal services provider. This means that the legal services provider shall bear ultimate responsibility for the services provided under this rule.

[Comment amended effective January 16, 2003; amended effective May 27, 2004, to place the responsibility of obtaining, filing and serving the statement of the Clerk of the Supreme Court with the foreign attorney seeking leave to appear pro hac vice; amended effective October 18, 2007; amended effective August 2, 2012.]

RULE 47. PROHIBITION AGAINST PRACTICE

No one serving as clerk of the Supreme Court or as a law clerk or secretary to a justice of the Supreme Court or a judge of the Court of Appeals or as an employee of either court shall practice as an attorney or counselor in any court or before any agency of government while holding that position. No such person shall, after separating from that position, ever participate, by way of any form of professional consultation or assistance, in any case that was

pending in either court during the tenure of such position.

[Adopted to govern matters filed on or after January 1, 1995.]

Advisory Committee Historical Note

Effective January 1, 1995, Miss.R.App.P. 47 replaced Miss.Sup.Ct.R. 47, embracing proceedings in the Court of Appeals. 644-647 So.2d XC (West Miss.Cases 1994).

Comment

Rule 47 is based on U.S. Sup. Ct. R. 7 and the prior rules of the Supreme Court.

RULE 48. APPELLATE PROCEDURE FOLLOWING DENIAL OF WAIVER OF CONSENT TO ABORTION

Notwithstanding any provision in the Mississippi Rules of Appellate Procedure to the contrary, this Rule shall govern appeals by an unemancipated minor or her next friend from an adverse judgment or order of a chancery court in a waiver proceeding under Miss. Code Ann. § 41-41-55 (1993). For the purposes of this Rule, the term "minor" means a person under the age of eighteen (18) years.

If, in a proceeding initiated under said enactment by a minor or her next friend for waiver of the parental consent requirements to an abortion, judgment is entered denying such waiver, and the minor or next friend desires to appeal from such adverse judgment, an appeal to the Supreme Court may be taken by filing within forty-eight (48) hours after entry of such adverse judgment a written request that the record of the proceeding be certified to that Court. Promptly after filing of such request, the trial judge, within thirty-six (36) hours of notice, shall certify the judgment, together with the petition initiating the proceeding and either a stipulation of the facts or an electronic transcription of the evidence taken in the proceeding, and shall forward same to the Supreme Court. No motion to correct error or notice of appeal shall be filed.

In order to ensure anonymity and confidentiality, any written transcripts of the lower court proceedings, documents, or briefs shall make reference to said minor's identity by use of her initials only. The minor's name is not to be disclosed for purposes of this appeal.

The appeal shall be determined on the record so certified within seventy-two (72) hours of receipt in the office of the Mississippi Supreme Court clerk excluding Saturdays, Sundays, and holidays without briefs or oral argument unless the Supreme Court orders otherwise. Any party may, however, file a short statement of special points desired to be brought to the attention of the Supreme Court, which statement need not conform to the usual requirement for appellate briefs.

As provided under Mississippi Code Ann. § 41-41-55 3(7), "No filing fees shall be required by any minor who avails herself of the procedures provided by this section."

Advisory Committee Historical Note

Effective January 1, 1995, Miss.R.App.P. 48 replaced Miss.Sup.Ct.R. 48. 644-647 So.2d XCI (West Miss.Cases 1994).

RULE 48A. CONFIDENTIAL CASES AND SEALED FILINGS

(a) Cases Treated as Confidential on Filing. Any case filed with the clerk of the Supreme Court and Court of Appeals which was previously closed to the public by action of the trial court or which by statute is subjected to restriction on access to the public in the trial court by statute**,** shall be closed to public access in the appellate courts and shall be treated as a confidential case by the clerk of the appellate courts.

(b) Cases which May be Designated as Confidential on Order of the Appellate Court. In the event that the appellate court shall determine that a case contains information the public disclosure of which will cause substantial harm to the welfare of a child or otherwise contains sensitive information the public disclosure of which will cause substantial harm, the appellate court may direct that such case be closed to public access and shall, upon order of the appellate court, be treated as a confidential case by the clerk. Pending determination by the appellate court of whether a case should be so treated, the clerk is authorized to deny access without order.

(c) Sealed documents. Where parties shall file documents physically under seal with the clerk of the appellate courts, such documents shall remain sealed until the appellate court by order removes the seal. The mere filing of documents with a request that they be sealed shall not constitute the filing of sealed documents. Such documents shall remain open until the appellate court on motion of a party or on its own motion orders that they be sealed.

(d) Requests for Access. Any person or entity with an interest in the proceedings may by motion request access to any case or filings therein by motion presenting their interest and argument for access, and such motions shall be ruled on expeditiously.

(e) Other Provisions. The designation of a case as closed shall not restrict access of the parties, counsel of record, appellate court or of court staff as needed to address the case. Sealed documents may be opened at the direction of a justice as needed to address the case without ordering that the seal, as to the public, be removed. Where necessary to accomplish the purpose of designating a case as confidential, the style of the case shall be amended so as to prevent disclosure of the names of parties. Access to the records concerning such cases shall be granted only upon order of the appellate court.

[Adopted effective March 29, 2001.]

Advisory Committee Historical Note

Effective March 29, 2001, Rule 48-A was adopted. 777-782 So.2d XVII (West Miss.Cases 2001).

RULE 48B. PROCEEDINGS ON MOTION FOR DISQUALIFICATION OF TRIAL JUDGE.

If a judge of the circuit, chancery or county court shall deny a motion seeking the trial judge's recusal, or if within 30 days following the filing of the motion for recusal the judge has not ruled, the filing party may within 14 days following the judge's ruling, or 14 days following the expiration of the 30 days allowed for ruling, seek review of the judge's action by the Supreme Court. A true copy of any order entered by the subject judge on the question of recusal and transcript of any hearing thereon shall be submitted with the petition in the Supreme Court. The Supreme Court will not order recusal unless the decision of the trial judge is found to be an abuse of discretion. Otherwise, procedure in the Supreme Court shall be in accordance with M.R.A.P. 21. Appointment of another judge to hear the case shall be made as otherwise provided by law.

[Adopted April 4, 2002.]

Advisory Committee Historical Note

Effective April 4, 2002, Rule 48-B was adopted. 813-855 So.2d LXXXIII (West Miss.Cases 2002).

RULE 48C. DISQUALIFICATION OF JUSTICES OR JUDGES OF THE APPELLATE COURTS

(a) Disqualification of Justices and Judges of the Supreme Court or Court of Appeals.

(i) Any party may move for the recusal of a justice of the Supreme Court or a judge of the Court of Appeals if it appears that the justice or judge's impartiality might be questioned by a reasonable person knowing all the circumstances, or for other grounds provided in the Code of Judicial Conduct or otherwise as provided by law. A motion seeking recusal shall be filed with an affidavit of the party or, if the party is represented, by the party's attorney setting forth the factual basis underlying the asserted grounds for recusal and declaring that the motion is filed in good faith and that the affiant truly believes the facts underlying the grounds stated to be true.

(ii) Any such motion for recusal shall be filed no later than 30 days following the notification by the clerk of the court that a case has been assigned to either appellate court, or, in the case of a motion or petition which is not filed within a proceeding initiated by a notice of appeal or where the facts upon which the motion is based could not reasonably have been known to the filing party within such time, it shall be filed within 30 days after the filing party could reasonably discover the facts underlying the grounds asserted.

(iii) Motions for recusal shall be decided in the first instance by the justice or judge who is the subject of the motion. The remainder of the court on which such justice or judge serves shall, prior to the order being entered, be informed of a decision of a justice to deny recusal, and such decision shall be subject to review by the entire court upon motion for reconsideration filed within 14 days following the issuance of an order denying recusal.

Advisory Committee Historical Note

Effective October 17, 2002, Rule 48-C and the Comment were adopted. 827-829 So.2d XX (West Miss.Cases 2002).

Comment

Although Rule 27(h) generally provides that motions, other than those addressed by the Clerk of the Courts under Rule 27(b), are only subject to reconsideration on the court's own motion, special provision is made in this rule for reconsideration of motions for recusal of appellate court justices and judges.

(b) Supreme Court Review of Orders of the Court of Appeals Addressing recusal of Judges. No decision concerning the recusal of a judge of the Court of Appeals shall be subject to review by the Supreme Court unless, upon timely motion, the Court of Appeals has denied reconsideration of the motion. A party may, within 14 days following the denial of reconsideration by the Court of Appeals, file a motion with the Supreme Court seeking further review, and the Supreme Court, en banc, shall promptly consider such recusal. Such motion for further review by the Supreme Court shall be accompanied by a copy of the order entered by the judge who is the subject of the motion for recusal, the order denying reconsideration, and the motions for recusal and reconsideration by the Court of Appeals.

[Adopted effective October 17, 2002.]

RULE 49. TITLE

These Rules shall be known as the Mississippi Rules of Appellate Procedure and may be cited as M.R.A.P.

Comments to the Supreme Court Rules have been amended to reflect the application of the rules to the Court of Appeals.

Advisory Committee Historical Note

Effective January 1, 1995, Miss.R.App.P. 49 replaced Miss.Sup.Ct.R. 49, changing the name of the Rules to the Mississippi Rules of Appellate Procedure. 644-647 So.2d XCI-XCII (West Miss.Cases 1994).

Comment

The Mississippi Rules of Appellate Procedure, effective January 1, 1995, are based on the Mississippi Supreme Court Rules and were adopted to include procedure in the Court of Appeals of the State of Mississippi pursuant to Miss. Code Ann. § 9-4-1 *et seq*. (Supp. 1994).

RULE 50. APPELLATE MEDIATION

(a) Notice. Upon either receipt of the copy of the notice of appeal transmitted by the clerk of the trial court under Rule 3(d) or entry of the order granting permission to appeal under Rule 5(d), the clerk of the Supreme Court must notify the parties in eligible civil cases that appellate mediation is available under this Rule. The notification must include contact information for the appellate mediation coordinator designated by the Alternative Dispute Resolution Section of The Mississippi Bar.

(b) Participation. Participation in appellate mediation is voluntary.

(c) Eligibility. *(1) Eligible Cases.* Except as provided in paragraph (c)(2), any appeal from a final or interlocutory order in a civil case may be mediated if all parties consent and are represented by counsel.

(2) Ineligible Cases. Appellate mediation is unavailable for criminal cases or civil cases involving utility rates, annexations, bond issues, election contests, the Mississippi Public Service Commission, the Mississippi Uniform Post-Conviction Collateral Relief Act, or a ruling that a statute is unconstitutional.

(d) Procedure. *(1) Selection of a Mediator.* If the parties agree to mediate, they must first either agree on and retain a mediator or contact the appellate mediation coordinator designated by the Alternative Dispute Resolution Section of The Mississippi Bar for assistance in selecting a mediator.

(2) Joint Motion for Stay. Upon agreement to mediate, the parties must file a joint motion to stay the appeal. Parties may also agree—without supersedeas bond or other security—to stay execution of a money judgment or enforcement of an order or injunction while the case is being mediated. If the joint motion is filed within 90 days of the filing of the notice of appeal, a 90-day stay must be granted. If the joint motion is filed thereafter, a stay may be granted in either appellate court's discretion.

(3) Effect of Stay. The appellate process—including preparing and filing the court reporter's transcript, the clerk's record, and briefs—will be stayed according to the terms of the order.

(4) Matters Not Stayed. The time for filing a notice of appeal or notice of cross-appeal is not stayed.

(e) Settlement. If a full and final settlement is reached, the parties must file a joint motion to dismiss the appeal.

(f) Impasse. If mediation reaches an impasse, any party may move to have the stay lifted immediately.

(g) Extensions. If good cause for additional time is shown, the parties may jointly move to extend the stay before it expires.

(h) Resumption of Deadlines. The stay lifts upon the expiration date set forth in the order granting or extending the stay, and all appellate duties and deadlines will resume. Within 7 days after the stay expires or is lifted, the appellant must make satisfactory arrangements with the court reporter and trial court clerk for preparation of the transcript and record on appeal.

(i) Fees and Expenses. Unless otherwise agreed, the parties shall split the costs of mediation.

APPENDIX I. FORMS

FORM 1

IN THE ___ COURT OF THE ___ JUDICIAL
DISTRICT OF ___ COUNTY, MISSISSIPPI

_____ PLAINTIFF

VS. NO. _____

_____ DEFENDANT

NOTICE OF APPEAL

By this notice, _____appeals to the Supreme Court of Mississippi against _____ [name(s) of appellee(s)] from the final judgment entered in this case on _____, 20____, and the denial of the Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for New Trial, by order entered on _____, 20___.

Respectfully submitted,
[Appellant]
s/_____
Attorney for Appellant
[Address]

CERTIFICATE OF SERVICE

I, _____, attorney for appellant, _____, certify that I have this day filed this Notice of Appeal with the clerk of this Court together with the docket fee to be received by the clerk on behalf of the Supreme Court of Mississippi, and have served a copy of this Notice of Appeal by United States mail with postage prepaid on the following persons at these addresses:

[Attorney for Appellee with Address]

[Court Reporter with Address]

This the ___day of _____, 20__.

s/_____
Attorney for Appellant

[Adopted to govern matters filed on or after January 1, 1995; amended May 23, 2002.]

FORM 2

IN THE _____ COURT OF THE ____ JUDICIAL
DISTRICT OF _____ COUNTY, MISSISSIPPI

_____ PLAINTIFF

VS.

NO. _____

_____ DEFENDANT

DESIGNATION OF THE RECORD

_____, appellant, by counsel, pursuant to M.R.A.P. 10(b)(1), designates the following parts of the record as being necessary to be included on appeal:

All clerk's papers, trial transcripts and exhibits filed, taken or offered in this case.

[or]

1. The Complaint.

2. The Answer and Defenses.

3. Plaintiff's Motion to Compel Discovery, and the Court's Order entered on _____, 20___, overruling that motion.

4. A transcript of the trial of this case on _____, 20____, including voir dire and all in chambers conferences, and all exhibits offered and marked for identification or admitted into evidence.

5. All jury instructions filed or granted.

6. The judgment entered on _____, 20__.

7. The Motion for Judgment Notwithstanding the Verdict, or, in the Alternative for New

Trial, and the Court's Order filed _____, 20__, overruling the motion.*

THIS the ____ day of _____, 20__.

Respectfully submitted,

[Appellant]

s/ _____
Attorney for Appellant
[Address]

* In a criminal case, the sentencing order should be included.

CERTIFICATE OF SERVICE

I, _____, attorney for appellant _____, certify that I have this day served a copy of this Designation of the Record by United States mail with postage prepaid on the following persons at these addresses:

[Attorney for Appellee w/Address]

[Court Reporter w/Address]

This the ___ day of _____, 20___ .

s/ _____
Attorney for Appellant

[Adopted to govern matters filed on or after January 1, 1995; amended May 23, 2002; amended January 12, 2017, to delete Court Reporter's Acknowledgment.]

FORM 3

IN THE _____ COURT OF THE ____ JUDICIAL DISTRICT OF _____ COUNTY, MISSISSIPPI

_____ PLAINTIFF

VS.

NO. _____

_____ DEFENDANT

CERTIFICATE OF COMPLIANCE WITH RULE 11(b)(1)

I, _____, attorney for appellant _____, I have complied with M.R.A.P. 11(b) and that the estimated cost of preparing the designated record on appeal is $ _____, and I have on or before this day deposited that sum with the clerk of this Court.

This the ___ day of _____, 20___.

Respectfully submitted,

[APPELLANT]

s/ _____

Attorney for Appellant

[Address]

CERTIFICATE OF SERVICE

I, _____, attorney for appellant _____, certify that I have this day served a copy of this Certificate of Compliance with Rule 11(b)(1) by United States mail with postage prepaid on the following persons at these addresses:

[Attorney for appellee with address]

[Court reporter with address]

This the ___ day of _____, 20___.

_____

Attorney for Appellant

[Adopted to govern matters filed on or after January 1, 1995; amended May 23, 2002.]

FORM 4

IN THE CIRCUIT COURT OF THE _____ JUDICIAL DISTRICT
OF _____ COUNTY, MISSISSIPPI*

STATE OF MISSISSIPPI
VS. NO._____

_____

AFFIDAVIT TO ACCOMPANY MOTION FOR LEAVE TO
APPEAL IN FORMA PAUPERIS

I, _____, being first duly sworn, depose and say that I am the _____ _____ in this case; that, in support of my motion to proceed on appeal without being required to prepay fees and costs, I state that because of my poverty I am unable to pay the fees and costs of this proceeding and that I believe I am entitled to redress.

I further swear that the responses which I have made to the question and instructions below relating to my ability to pay the fees and costs of prosecuting the appeal are true.

1. Are you presently employed? _____

   a. If the answer is yes, state the amount of your salary and wages per month and give the name and address of your employer.

   _____
   _____
   _____

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

   _____
   _____
   _____

2. Have you received within the past twelve months any income from a business,

profession or other form of self-employment, or in the form of rental payments, interest, dividends, or other source? _____

a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months. _____

3. Do you own any cash or checking or savings account? _____

   a. If the answer is yes, state the total value of the items owned.

   _____

   _____

   _____

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

   _____

   _____

   a. If the answer is yes, describe the property and state its approximate value.

   _____

   _____

   _____

5. List the persons who are dependent upon you for support and state your relationship to those persons.

   _____

   _____

   _____

   _____

I understand that a false statement or answer to any question or instruction in this affidavit will subject me to penalties for perjury.

_____

Signature of Applicant

STATE OF _____

COUNTY OF _____

SUBSCRIBED AND SWORN TO before me this ____ day of _____, 20___.

_____

Notary Public

MY COMMISSION EXPIRES _____

* An affidavit filed in the Supreme Court accompanying an application under M.R.A.P. 22 for post-conviction collateral relief after an appeal has been affirmed or dismissed should be captioned "In the Supreme Court of Mississippi."

[Adopted to govern matters filed on or after January 1, 1995; amended May 23, 2002.]

FORM 5

IN THE _____ COURT OF THE _____ JUDICIAL
DISTRICT OF _____ COUNTY, MISSISSIPPI

_____ PLAINTIFF

VS. NO. _____

_____ DEFENDANT

APPEAL BOND TO SUPREME COURT OF MISSISSIPPI
WITH SUPERSEDEAS

STATE OF MISSISSIPPI
COUNTY OF _____

BECAUSE IN THIS CAUSE pending in the _____ Court of the _____ Judicial District of _____ County, Mississippi, a final judgment was entered in favor of _____, plaintiff, against _____, [one of the] defendant[s], on _____, 20___ , and defendant's post-trial motions were denied, the defendant, _____, desires to prosecute an appeal to the Supreme Court of Mississippi with supersedeas pursuant to Mississippi Rule of Civil Procedure 62 and M.R.A.P. Rule 8.

KNOW ALL BY THIS BOND, that we, _____, as principal, and _____, a guaranty or surety company authorized to do business in the State of Mississippi, are held and firmly bound unto plaintiff _____, or [his/her/its] administrators, executors, successors or assigns, in the penal sum of $_____ for which payment to be made, we bind ourselves, our successors and assigns, jointly and severally.

THE CONDITION OF THE FOREGOING OBLIGATION is that, if the defendant, _____, shall prosecute this appeal with effect in the Supreme Court of Mississippi and shall satisfy the judgment complained of in full, together with costs, interest, penalties, and damages, if for any reason the appeal is dismissed or if the judgment is affirmed, or shall satisfy in full such modification of the judgment and such costs, interest and damages as the Supreme Court of Mississippi or the Court of Appeals may adjudge against the defendant, then this obligation will be void; otherwise, it will remain in full force and effect.

[Principal]

BY: s/ _____
[Principal or Attorney]

[Guaranty or Surety Company]

BY: s/ _____
Agent and Attorney-in-Fact
[Guaranty or Surety Company]
[Address]*

THIS SUPERSEDEAS BOND AND SURETY ARE APPROVED and the judgment complained of is stayed pending appeal on this the ___day of _____, 20___.

_____
_____ Clerk,
_____ County, Mississippi

* The address should be an address to which the clerk of the trial court can send notice of a motion to enforce liability. *See* M.R.A.P. 8(d).

[Adopted to govern matters filed on or after January 1, 1995; amended May 23, 2002.]

FORM 6

IN THE _____ COURT OF THE ____ JUDICIAL
DISTRICT OF _____ COUNTY, MISSISSIPPI

_____ PLAINTIFF

VS. NO. _____

_____ DEFENDANT

LIST OF CLERK'S PAPERS*

PAPER FILED	**PAGE NUMBER ON APPEAL**
1. Docket Sheet	1
2. Complaint	etc.
3.	
4.	
5.	

* Use this separate typed list if docket sheet is illegible or for any other reason a satisfactory

list cannot be produced by adding record page numbers to the docket sheet. M.R.A.P. 11(d)(1)(i).

APPENDIX II.

STATUTES MODIFIED OR SUPPLANTED

Miss. Code Ann. §	M.R.A.P.	Effect of Rule
SUPREME COURT		
9-3-3		
	26(d)	Period of time unaffected by terms.
COMMON PRACTICE PROVISIONS		
11-1-17	15	Writ of mandamus to require trial court decision replaces automatic appeals.
PRACTICE IN CIRCUIT COURTS		
APPEALS		
11-51-3	8	Procedure for *supersedeas* now set forth in Rule 8
11-51-9	1, 5	All orders that meet requirements of Rule 5 may be considered on interlocutory appeal.
11-51-37	8	Supersedeas bond, when judgment directs sale or delivery of possession of real estate, to be set at 125% of value, or at lower amount at discretion of trial judge.
11-51-39	8	Supersedeas bond when judgment directs sale or delivery of possession of real estate, to be set at 125% of value, or at lower amount at discretion of trial judge.
11-51-43	8	Judges have discretion in all supersedeas cases

[Amended March 17, 1995]

Advisory Committee Historical Note

Effective March 17, 1995, Appendix II was amended to delete references to repealed statutes. 650 So.2d XXXIV-LXXXV (West Miss.Cases 1995).

[Adopted August 21, 1996.]

APPENDIX III

MISSISSIPPI SUPREME COURT RULES
GUIDELINES FOR COURT REPORTERS

I. TRANSCRIPTS - HOW PREPARED

Transcripts of all administrative and judicial proceedings shall be uniform in and for all state courts throughout the State of Mississippi. The form, size, spacing and method of transcript preparation are as follows:

(a) All proceedings shall be typewritten only on one side of every leaf of paper eight and one-half (8 ½) inches wide and eleven (11) inches long, prepared for binding at the left margin. The purpose of this requirement is to facilitate a system-wide transfer from legal size paper to letter size paper effective July 01, 1993. *See* M.R.A.P. 11, 32, and M.R.C.P. Rule 7. Voluntary compliance with this Rule is to begin January 01, 1993; mandatory compliance will become effective July 01, 1993.

The cost of transcription shall be two dollars forty cents ($2.40) per page. The court reporter shall make an electronic disk of the transcript. No charge shall be made for the electronic disk or for the copy of the transcript provided for under Section II of this Appendix.

(b) Type size or print shall be nine to ten characters per inch.

(c) Each page shall be numbered consecutively at the top right hand corner. In cases where proceedings have been taken by more than one reporter, each court reporter shall consecutively number his or her portion of the transcript in the upper right hand corner of each page. After completion of the entire transcript, including all pretrial and post-trial hearings, the entire transcript shall be consecutively numbered in the center of the bottom of each page, beginning with page one and continuing throughout the remainder of the proceedings. This final numbering of the pages shall be the responsibility of the court reporter who reported the trial on the merits, or, in the case of disposition prior to trial on the merits, the court reporter who reported the majority of the proceedings prior to disposition. The final numbering of the pages, which may be made by hand or machine, shall be made by the designated court reporter within 20 days of receipt of written notification from the trial court clerk that all portions of the original transcript have been

completed and are awaiting final numbering for appeal purposes.

(d) All margins, measured from the edge of the paper, shall be not more than one (1) inch from the top and exactly one and one-half inches at the left, three-quarters of one inch (3/4) from the bottom, and one-half (½) inch at the right.

(e) There shall be no fewer than twenty-nine (29) typed lines per page. Each typed line is to be numbered at the left margin. All typing shall extend to the right margin, and shall be double spaced with no more than a double space between paragraphs.

(f) Colloquy material shall begin on the same line following the identification of the speaker, but in no event shall there be more than two spaces between the identification of the speaker and the commencement of the colloquy. The identification of the speaker in colloquy shall begin no more than fifteen (15) spaces from the left margin and carry-over colloquy shall be indented no more than ten (10) spaces from the left margin. The identification of the speaker in colloquy shall be capitalized.

(g) Each question and answer shall begin on a separate line no more than five (5) spaces from the left margin with no more than five (5) spaces from the "Q." or "A." to the text. Carry-over question and answer lines shall be brought to the left margin.

(h) Identification of the witness and type of examination shall appear at the top left corner of each page above the first line of numbered text. In all jury trials when the jury is out, the top of each page shall be so marked (Jury Out).

(i) Opening statement and closing arguments shall begin at the left margin and extend to the right margin of the transcript.

(j) The transcript shall be prefaced with a title page setting out the style, number and counsel appearances. A comprehensive table of contents of the entire transcript numbered *seriatim* at the right top, shall immediately follow the title page. A Court Reporter's Certificate shall conclude the transcript. In cases involving more than one court reporter, the certification shall appear at the end of the section of the transcript prepared by that reporter.

(k) Exhibits shall be identified in all capital letters. Where possible, all exhibits shall be marked on the front page with an exhibit label.

[Amended effective June 3, 2004.]

Comment

Miss. Code Ann. § 25-7-89 (Rev. 2004 establishes the rate to be charged by the court reporters for transcripts at $2.40 per page. Under the statute, the reporter is also required to file with the clerk an additional copy of the transcript at no additional charge.

[Adopted effective June 3, 2004, 2004.]

II. TRANSCRIPTS - HOW FILED

(a) Upon completion of the transcript, the court reporter shall certify the transcript and attach the certification at the end of the transcript. The reporter shall then make a copy of the original transcript and bind in suitable covers both the original and copy at the left. Each volume shall contain no more than 150 pages and shall be consecutively labeled with Roman Numerals, *i.e.* Volume I, Volume II, etc. The reporter shall also prepare a copy of the transcript on electronic disk. The reporter shall simultaneously file the electronic disk and the transcript with the trial court clerk. *See* M.R.A.P. 11(c).

For electronic filing, upon completion of the record, the court reporter shall certify the transcript and attach the certification at the end of the transcript. The reporter's password issued by the Mississippi Electronic Courts (MEC) combined with the reporter's login identification serves as the reporter's signature for certification and other purposes. The reporter shall then either file the certified transcript electronically or deliver the certified transcript on an electronic disk to the clerk.

(b) Upon review of the completed transcript, should the parties agree on corrections, or should the trial court order corrections as to form only, the reporter shall verify that the corrections are required. Within seven (7) days after receiving the record for corrections, the reporter shall complete the corrections on the original transcript, the transcript copy and the electronic disk. M.R.A.P. 10(b)(5).

(c) Unless otherwise ordered by the trial or appellate courts, deposition testimony shall not be taken by the reporter during the course of the trial, provided a written transcript (not a videotape or other recording) of the deposition testimony is marked as an exhibit for identification and made part of the record. If only portions of deposition testimony are

read, the page and line numbers shall be noted, along with all objections made and rulings of the court. Where only portions of the deposition are read in random order, such deposition shall be placed in the transcript as it is read into the record.

[Amended effective January 12, 2017 to accommodate electronic transmission of the appellate record.]

III. SANCTIONS FOR NON-COMPLIANCE

In the event that any court reporter shall fail to comply with the Mississippi Rules of Appellate Practice, the Guidelines for Court Reporters, or any order issued pursuant thereto, the Supreme Court may impose such sanctions as may be appropriate, including but not limited to, imposition of reasonable fines and citation of contempt. The judges of the lower courts shall have concurrent jurisdiction with the Supreme Court for the purpose of imposing sanctions in the event any court reporter, lower court clerk or attorney of record fails to comply with the rules governing appeals. If the judge of the lower court finds it necessary to impose sanctions, a copy of the sanction order shall be immediately forwarded to the Clerk of the Supreme Court. Sanctions imposed by a lower court judge are subject to review by the Supreme Court for abuse of discretion.

[Amended May 13, 1996.]

Advisory Committee Historical Note

Effective May 13, 1996, Appendix III, Section II was amended to add subsection (c). 668-672 So.2d XXXIII (West Miss. Cases 1996).

[Adopted April 17, 1997; amended effective July 1, 1998.]