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Form 1. Process server (front).

Form 1. Process server (back).

Form 2. Sheriff (front).

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Form 3. Notice and acknowledgment for service by mail (front).

Form 3. Notice and acknowledgment for service by mail (back).

Form 4. Summons by publication.

APPENDIX B. AFFECTED STATUES [Deleted in its entirety].

APPENDIX C. TIME TABLE FOR PROCEEDINGS UNDER THE MISSISSIPPI RULES OF CIVIL PROCEDURE [Deleted in its entirety].

MISSISSIPPI RULES OF CIVIL PROCEDURE

Adopted Effective 1/1/82

ORDER ADOPTING THE MISSISSIPPI RULES OF CIVIL PROCEDURE SUPREME COURT OF MISSISSIPPI

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

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

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

Neville Patterson,
Chief Justice
FOR THE COURT

ORDER REPEALING COMMENTS TO THE MISSISSIPPI RULES OF CIVIL PROCEDURE
SUPREME COURT OF MISSISSIPPI

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

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

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

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

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

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

SECTION 1. SCOPE OF RULES; ONE FORM OF ACTION

Rule 1. Scope; purpose.

(a) Scope. Unless Rule 81 states otherwise, these rules apply to all civil actions and proceedings in Mississippi circuit, chancery, and county courts.

(b) Purpose. The court and all parties must construe these rules to secure a just, speedy, and inexpensive determination of every action.

Advisory Committee Notes

These rules apply to a civil action as broadly as is judicially feasible regardless if the action is one at law or in equity. But the rules should not be interpreted as abridging or modifying traditional jurisdictional separations between Mississippi law and equity courts.

One of the most important provisions of these rules, the mandate in Rule 1(b) reflects the spirt of the rules' conception and writing; the same spirit should guide their interpretation.

Procedural rules should promote the ends of justice. These rules seek to do so by establishing a single form of action. The resulting "civil action" unites procedures in law and equity, minimizes technicalities, simplifies rules, and places considerable discretion in the trial judge for construing them consistent with the purpose stated in Rule 1(b).

Rule 2. One form of action.

One form of action exists: the civil action.

Advisory Committee Notes

Rule 2 does not affect various remedies previously available in Mississippi courts. Abolishing the forms of action furnishes a single, uniform procedure and allows a litigant to present a claim in an orderly manner in a court empowered to give appropriate and just relief; substantive and remedial principles applicable prior to these rules remain unchanged. What was an action at law remains a civil action founded on legal principles; what was a bill in equity remains a civil action founded on equitable principles.

SECTION 2. COMMENCING AN ACTION; SERVING PROCESS; PLEADINGS, MOTIONS, AND ORDERS

Rule 3. Commencing an action.

(a) Filing a complaint; costs. Filing a complaint with the court commences a civil action. When filing a complaint, the plaintiff must make a costs deposit in an amount local rule decides. A required amount becomes effective when a court issues a local rule rule, and the Mississippi Supreme Court approves it.

(b) Motion for security for costs. If the court orders costs, the clerk or a party may file a motion requiring the plaintiff to give security within 60 days.

(1) The motion must include an affidavit stating:

(A) Whether the plaintiff is a state resident;
(B) For a nonresident plaintiff, that the movant believes the plaintiff lacks sufficient in-state property to satisfy a cost award;
(C) For a resident plaintiff, that the movant believes and has good reason for believing the plaintiff cannot satisfy a cost award;
(D) If the movant is a defendant, that the defendant believes in a meritorious defense and that the affidavit is not filed for delay; and
(E) If the movant is not a defendant, that the affidavit is not filed at the request of a party defendant.

(2) If the plaintiff fails to give the security, the court should dismiss the suit and issue execution for accrued costs.

(3) For good cause shown, the court may extend the 60 days for giving security.

(c) Proceeding in forma pauperis. A party may proceed in forma pauperis according to Miss. Code Ann. §§ 11-53-17 and 11-53-19. On the clerk's motion, a party's motion, or its own, the court may examine facts and circumstances of the affiant's pauperism.

(d) Accounting for costs. Within 60 days of dismissal or final judgment, the clerk must prepare an itemized costs statement and submit it to the parties. The clerk's statement will include a refund of the costs deposit or a bill for additional costs.

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

Advisory Committee Historical Note

Effective 6/24/92, Rule 3(a) was amended to provide that before they are effective, the amounts of required costs deposits must be promulgated by Uniform Court Rule and approved by the Mississippi Supreme Court. 598-602 So. 2d XXI (West Miss. Cas. 1992).

Effective 9/1/87, Rule 3(e) was amended by providing that the amount required as a deposit for filing suit will be the amount required by the Uniform Rule governing the court where the action is filed. 508-511 So. 2d XXV (West Miss. Cas. 1988).

Advisory Committee Notes

Rule 3(a) establishes a precise date for commencing a civil action. Filing a complaint is the first step in a civil action. Service of process is not essential to commence the action. But Rule 4(h) requires the summons and complaint to be served within 90 days.

The date of commencement is important for determining: (1) whether an action is premature; (2) whether a statute of limitations bars an action; and (3) whether a court should retain an action if multiple ones involving the same parties and issues have been instituted.

Rule 3 seeks to make the assessment, accounting, and funding of costs a uniform procedure.

Rule 3(c) allows indigents to sue without depositing security for costs. But the court may examine the affiant’s financial condition and dismiss the action if the allegation of indigency is false.

Rule 4. Summons.

(a) Issuance.

(1) When a complaint is filed, the clerk must issue a summons on the plaintiff's written request and:

(A) Deliver the summons to the plaintiff for service under Rule 4 (c)(1), 4(c)(3), 4(c)(4), or 4(c)(5);
(B) Deliver the summons to the sheriff of the county where the defendant resides or is found for service under Rule 4(c)(2); or
(C) Effect service by publication under Rule 4(c)(4).

(2) The person to whom the summons is delivered must promptly serve the summons and a copy of the complaint.

(A) On the plaintiff's request, a summons or copy of one addressed to multiple defendants must be issued for each defendant to be served.

(b) Form.

(1) **Content.** A summons must:

(A) Be dated and signed by the clerk;
(B) Bear the court's seal;
(C) Name the court;
(D) Name the parties;
(E) Be directed to the defendant;
(F) State the name and address of the plaintiff's attorney or an unrepresented plaintiff;
(G) State the time in which the defendant must appear and defend; and
(H) Notify the defendant a failure to appear and defend will result in a default judgment against the defendant for the relief demanded in the complaint.

(2) **Multiple parties.** Unless service is by publication, if there are multiple plaintiffs or defendants, the summons may contain in place of the names of all parties:

(A) The name of the first party on each side; and
(B) The name and address of the party to be served.

(3) Forms 1 and 2.

(A) Process server. A summons served by a process server must substantially conform to Form 1 in the Appendix.

(B) Sheriff. A summons served by the sheriff must substantially conform to Form 2 in the Appendix.

(c) Service.

(1) Process server. Unless Rule 4(c)(2) or (c)(4) states otherwise, a nonparty age 18 or older may serve a summons and complaint. If completed by a process server, a sum not exceeding the statutory amount payable to the sheriff for service may be taxed as recoverable costs in the action.

(2) Sheriff. On a party's written request, the sheriff of the county where the defendant resides or is found must serve a summons and complaint under Rule 4(d). The sheriff must:

(A) Mark the date the summons was received; and

(B) Return the summons to the clerk who issued it within 30 days.

(3) Mail.

(A) First-class mail and acknowledgment service; requirements. A summons and complaint may be served under Rule 4(d)(1) or (d)(4) by mailing the person first class, postage prepaid:

(i) A copy of the summons and complaint;

(ii) Two copies of a notice and acknowledgment substantially conforming to Form 3 of the Appendix; and

(iii) A self-addressed return envelope, postage prepaid.

(B) Service if no acknowledgment received. If the sender does not receive an acknowledgement of service within 20 days, service may be made in a manner this rule allows.

(C) Costs for failing to complete and return acknowledgment. Unless good cause is shown for not completing and returning the notice and acknowledgment of receipt within 20 days, the court must order the person to pay costs for personal service.

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

(4) Publication.

(A) When publication service is authorized; requirements. In a chancery or other proceeding where a statute authorizes process by publication, when the complaint, petition, or account is filed or when the proceeding otherwise commences, the clerk promptly must prepare and publish a summons substantially conforming to Form 4 of the Appendix to the defendant to appear and defend the suit if:

(i) According to a sworn complaint or petition or a filed affidavit, the defendant is not a Mississippi resident;
(ii) According to a sworn complaint or petition or a filed affidavit stating the defendant's post-office address, the defendant cannot be found in Mississippi after diligent inquiry;
(iii) According to a sworn complaint or petition or a filed affidavit, the plaintiff or petitioner does not know the defendant's post-office address after diligent inquiry; or
(iv) According to another person's filed affidavit for the plaintiff or petitioner, the affiant does not know—and believes the plaintiff or petitioner does not know— the defendant's post-office address after diligent inquiry.

(B) Duration; where. The summons must be published weekly for three successive weeks in a public newspaper in the county where the complaint, petition, account, cause, or other proceeding is pending.

(i) No newspaper. If no county newspaper exists, the notice must be posted at the courthouse door of the county where the complaint, petition, account, cause, or other proceeding is pending. And the notice must be published as stated in Rule 4(c)(4)(B) in a public newspaper in an adjoining county or at the seat of state government.
(ii) Filing proof. When completed, proof of publication must be filed in the action or other proceeding.
(iii) Time to appear and defend. The defendant has 30 days from the date of first publication to appear and defend.

(iv) Street address. Where a defendant's post-office address is given, a street address must also be included unless the Rule 4(c)(4)(A) complaint, petition, or affidavit states it is unknown after diligent search and inquiry.

(C) Clerk's duty. The clerk has a duty to hand the summons to the plaintiff or petitioner to be published.

(i) At the plaintiff's or petitioner's request and expense, the clerk may deliver the summons to the proper newspaper's publisher for publication.

(ii) Where the absent defendant's post-office address is stated, the clerk has a duty to mail a copy of the summons and complaint first class, postage prepaid, to the defendant and to record the fact of issuance and mailing on the general docket. The clerk's notation will be evidence the summons was mailed to the defendant.

(D) Unknown heir; unknown party defendant.

(i) Unknown heir. In a chancery proceeding with an unknown heir as a party defendant where the plaintiff files an affidavit stating the heir's name is unknown, service may be by publication. The proceedings will be as authorized in the case of a nonresident defendant.

(ii) Unknown party defendant. When a party in interest is unknown, and the plaintiff files an affidavit stating that fact, the unknown party may become a party defendant through service by publication.

(E) Additional Rule 4(d)(2) requirements if serving certain individuals. Service on another person under Rule 4(d)(2) must also occur if summons by publication is on:

(i) An unmarried infant;

(ii) A mentally incompetent person; or

(iii) An individual incapable of managing his or her own estate because of advanced age, physical incapacity, or mental weakness.

(5) Certified mail service on out-of-state person.

(A) Certified mail service. In addition to service by a method according to this rule, a summons may be served on an out-of-state person by sending a copy of the summons and complaint by certified mail, return receipt requested.

(B) Requirement if natural person. Where the defendant is a natural person, the envelope containing the summons and complaint must be marked "restricted delivery."

(C) When complete. Service by this method will be complete on the delivery date evidenced by the return receipt or returned envelope marked "refused."

(d) Person to be served. The summons must be served with a copy of the complaint. Service by sheriff or process server must be made according to Rule 4(d)(1) through (d)(8).

(1) Individual. Other than an unmarried infant or mentally incompetent person, an individual may be served:

(A) Personal service. By delivering a copy of the summons and complaint to the individual personally or to an agent authorized by appointment or law to receive service; or

(B) Residence service. If service under Rule 4(d)(1)(A) cannot be made with reasonable diligence, by leaving a copy of the summons and complaint at the defendant's usual place of abode with the defendant's spouse or other family member age 16 or older and willing to receive service.

(i) Mailing requirement. And the plaintiff must mail a copy of the summons and complaint first class, postage prepaid, to the defendant at the place where a copy of the summons and complaint was left.

(ii) When complete. Service in this manner is complete on the 10th day after mailing.

(2) Unmarried minor; mentally incompetent.

(A) Unmarried minor. An unmarried minor may be served by delivering a copy of the summons and complaint to:

(i) The mother;
(ii) The father;
(iii) The legal guardian of the minor or minor's estate;
(iv) The person who cares for the minor; or

(v) The person with whom the minor lives; and
(vi) Also to the minor if age 12 or older.

(B) Mentally incompetent (not judicially confined); incapable of managing estate. A mentally incompetent person not judicially confined to an institution for the mentally ill or disabled or a person incapable of managing the person's own estate because of advanced age, physical incapacity, or mental weakness may be served by delivering a copy of the summons and complaint to the person and to:

(i) The guardian of the person or person's estate; or
(ii) The conservator of the person or person's estate; and
(iii) If the person has no guardian or conservator, the individual with whom the person lives or the individual who cares for the person.

(C) Mentally incompetent (judicially confined). A mentally incompetent person judicially confined to an institution for the mentally ill or disabled may be served by delivering a copy of the summons and complaint to the confined person and if one, to the person's guardian or guardian of the person's estate.

(i) When service is not required. If the institution's superintendent or similar official or person certifies on the summons or an accompanying certificate that the person is mentally incapable of responding to process, service of the summons and complaint will not be required.
(ii) Appointing guardian ad litem if guardian or conservator does not exist. If the person does not have a guardian or conservator, the court must appoint a guardian ad litem to whom copies will be delivered.

(D) Person other than minor or mentally incompetent person who is a plaintiff or has adverse interest.

(i) Considered not to exist. If Rule 4(d)(2)(A), (B), or (C) requires service on a person other than the minor, incompetent, or incapable defendant, and if the other person is a plaintiff in the action or has an interest in it adverse to the defendant, then the other person must be considered not to exist for purposes of service.

(ii) Fails to satisfy Rule 4(d)(2)(A), (B), and (C). And serving the other person fails to satisfy Rule 4(d)(2)(A), (B), or (C).

(E) Appointing guardian ad litem if person other minor or mentally incompetent person does not exist.

(i) When appointed. If Rule 4(d)(2)(A) or (B) requires service on a person who does not exist other than the minor, incompetent, or incapable defendant, the court may appoint for the defendant a guardian ad litem to whom a copy of the summons and complaint will be delivered and must do so for a minor under age 12.

(ii) Additional service. Serving the guardian ad litem with a copy of the summons and complaint does not satisfy a requirement in Rule 4(d)(2)(A), (B), and (C) to also deliver a copy to the minor, incompetent, or incapable defendant.

(3) Confined to penal institution; exception for unmarried minor or mentally incompetent.

(A) Individual confined to penal institution. An individual confined to a Mississippi state or local penal institution may be served by delivering a copy of the summons and complaint to the person.

(B) Exception for unmarried minor or mentally incompetent. But if the person is an unmarried minor or mentally incompetent, Rule 4(d)(2) applies.

(4) Corporation, partnership, or other unincorporated association. A domestic or foreign corporation, partnership, or other unincorporated association subject to suit under a common name may be served by delivering a copy of the summons and the complaint to an officer, managing agent, general agent, or other agent authorized by appointment or law to receive process.

(5) State of Mississippi or state department, officer, or institution. The following may be served by delivering a copy of the summons and complaint to the Attorney General of the State of Mississippi:

(A) The State of Mississippi; and

(B) A department, officer, or institution of the State of Mississippi.

(6) County. A county may be served by delivering a copy of the summons and complaint to the president or clerk of the board of supervisors.

(7) Municipal corporation. A municipal corporation may be served by delivering a copy of the summons and complaint to the mayor or municipal clerk.

(8) Other governmental entity. A governmental entity not otherwise mentioned in this rule may be served by delivering a copy of the summons and complaint:

(i) To the person, officer, group, or body responsible for the entity's administration;
(ii) The appropriate legal officer representing the entity; or
(iii) A person who is a member of the "group" or "body" responsible for the entity's administration.

(e) Waiver.

(1) Who may waive process; effect of waiver.

(A) Who may waive process. Other than an unmarried minor or mentally incompetent person, a party defendant may waive service of process, enter an appearance, or both without filing a pleading.
(B) Effect of waiver. The effect is the same as if the defendant was served with process in the manner required by law on the same date.

(2) Requirements. The waiver of service or entry of appearance must be:

(A) Written;
(B) Dated;
(C) Signed by the defendant; and
(D) Sworn or acknowledged by the defendant or if not sworn or acknowledged, proven by two subscribing witnesses before an officer authorized to administer oaths.

(3) By guardian, conservator, executor, administrator, or trustee; requirements.

(A) By guardian or conservator. A guardian or conservator may waive process on the guardian, conservator, and ward.

(B) By executor, administrator, or trustee. An executor, administrator, or trustee may waive process on the executor, administrator, or trustee in a fiduciary capacity.

(C) Requirements. In addition to Rule 4(e)(2) requirements, the waiver of service or entry of appearance must:

(i) Be executed after the day the action was commenced;
(ii) Filed; and
(iii) Recorded on the general docket.

(f) Return.

(1) Who. The person serving the process promptly must file proof of service with the court.

(2) Form. Unless service is by the sheriff, a person must make proof of service by affidavit.

(3) Service under Rule 4(c)(3). If service is by mail under Rule 4(c)(3), the sender must make a return by filing the required acknowledgment.

(4) Service under Rule 4(c)(5). If service is made on an out-of-state person under Rule 4(c)(5), the sender must make a return by filing the return receipt or the returned envelope marked "refused."

(5) Failing to make proof of service. Failing to make proof of service does not affect the validity of the service.

(g) Amendment. Unless it clearly appears that material prejudice would result to substantial rights of the party against whom process is issued, the court may allow process or proof of service to be amended:

(1) At any time;
(2) In its discretion; and
(3) On terms it deems just.

(h) Time limit. If a defendant is not served within 90 days after the complaint is filed, and if the party required to serve the defendant cannot show good cause why service was not made within that period, the court—on its own with notice to that party or on a motion—must dismiss the action as to that defendant without prejudice.

[Amended effective 5/1/82; 3/1/85; 2/1/90; 7/1/98; 1/3/02].

Advisory Committee Historical Note

Effective 1/3/02, Rule 4(e) was amended to delete a prohibition against waiver of service of process by one convicted of a felony. 802-04 So. 2d XVII (West Miss. Cases 2002).

Effective 7/1/98, Rule 4(f) was amended to state that the person serving process must promptly make proof of service to the court.

Effective 2/1/90, Rule 4(c)(4)(B) was amended by striking the word "calendar" following the word and figure "thirty (30)"; Rule 4(c)(4) was amended by adding subsection (E); Rule 4(c)(5) was amended by changing the title to reflect service by certified mail; Rule 4(d)(2)(A) was amended by substituting the word "person" for "individual" in reference to the one having care of the infant. 553-56 So. 2d XXXIII (West Miss. Cas. 1990).

Effective 3/1/85, a new Rule 4 was adopted. 459-62 So. 2d XVIII (West Miss. Cas. 1985).

Effective 5/1/82, Rule 4 was amended. 410-16 So. 2d XXI (West Miss. Cas. 1982).

Advisory Committee Notes

Unless summons is by publication, after a complaint is filed, the clerk must issue a separate summons for each defendant. The summons must contain the information required by Rule 4(b). Under Rule 4(b), the summons must notify the defendant that a failure to appear will result in a default judgment. The strong language intends to encourage a defendant to appear to protect the defendant's interests. Forms 1, 2, 3, and 4 provide suggested forms for the various summonses.

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

Rule 4(d)(1)(A) authorizes personal service and requires a copy of the complaint and summons to be delivered to the person to be served.

Rule 4(d)(1)(B) authorizes residence service and requires a copy of the complaint and the summons to be left at the defendant's usual place of abode with the defendant's spouse or other family member age 16 or older and willing to accept service. In addition, residence

service requires a copy of the summons and complaint to be mailed to the defendant at the location where the complaint and summons were left.

Personal service and residence service may be made by a process server or the sheriff in the county where the defendant resides or can be found. A party using a process server may pay the person an agreed amount. Only the amount statutorily allowed as payment to the sheriff under Section 25-7-19 of the Mississippi Code of 1972 Annotated may be taxed as recoverable costs in the action. Summonses served by process servers should substantially conform with Form 1. Summonses served by sheriffs should substantially conform with Form 2.

Rule 4(c)(3) authorizes first-class mail and acknowledgement service. The plaintiff must mail the defendant: (1) a copy of the summons and complaint; (2) two copies of a notice and acknowledgement conforming substantially to Form 3; and (3) a prepaid-postage envelope addressed to the sender. The defendant may execute the acknowledgement of service under oath or by affirmation. If the defendant fails to execute and return the acknowledgement of service in a timely fashion, the defendant may be ordered to pay costs incurred by the plaintiff in serving the defendant by another method. This provision intends to encourage a defendant to acknowledge service by first-class mail in order to avoid having to pay costs that would otherwise be incurred by the plaintiff in serving that defendant. Executing and returning the acknowledgement of service does not waive objections to jurisdiction or venue. All jurisdictional and venue objections are preserved whether Form 3 is completed and returned from inside or outside the state. Although Miss. R. Civ. P. 4(c)(3) is modeled after Fed. R. Civ. P. 4(d), defendants who execute and return the acknowledgement of service under Miss. R. Civ. P. 4(c)(3) are acknowledging actual service, but defendants who execute and return the waiver under Fed. R. Civ. P. 4(d) are waiving service.

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

Rule 4(c)(5) authorizes service by certified mail and is limited to out-of-state persons. The plaintiff must send a copy of the summons and complaint to the person to be served by certified mail, return receipt requested. Afterwards, the plaintiff must mail by first-class mail, postage prepaid, a copy of the summons and complaint to the person to be served at the same address. The proof of service must indicate the date on which the summons and

complaint were mailed by first-class mail and must also include as an attachment the signed return receipt or the return envelope marked "refused." Service on a foreign corporation, partnership, or unincorporated association is effective even if the certified mail is delivered to and signed for or refused by a person other than the addressee if the person accepting delivery and signing or refusing delivery is an officer or employee of the defendant and authorized to receive certified mail or regularly receives it. *See Flagstar Bank, FSB v. Danos*, 46 So. 3d 298 (Miss. 2010) (finding service by certified mail on foreign corporation effective where addressed to registered agent for service of process, delivered to proper address, and signed for by mail clerk rather than registered agent). Service of process is not effective under Rule 4(c)(5) if the mailing is returned marked *unclaimed*, *refused*, or *undeliverable as addressed*. *See Bloodgood v. Leatherwood,* 25 So. 3d 1047 (Miss. 2010).

Rule 4(d) identifies the person to be served with process when the defendant is: (1) a mentally competent married infant or mentally competent adult; (2) an unmarried infant; (3) a mentally incompetent person not judicially confined to an institution for the mentally ill or deficient; (4) a mentally incompetent person judicially confined to an institution for the mentally ill or deficient; (5) an individual confined to a state/local penal institution; (6) a domestic or foreign corporation, partnership, or unincorporated association subject to suit under a common name; (7) the State of Mississippi or one of its departments, officers, or institutions; (8) a county; (9) a municipal corporation; or (10) other governmental entity.

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

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

Under Rule 4(h), if a defendant is not served within 90 days after the complaint is filed, the claims against that defendant will be dismissed without prejudice absent good cause for failing to timely serve the defendant. If service cannot be made within the 90-day period, it is clearly advisable to move the court within the original time period for an extension. If the motion for extension of time is filed within the 90-day time period, the time period may be extended for "cause" under to Rule 6(a)(5). If a motion for extension of time is filed outside of the original 90-day time period, the movant must show "good cause" for the failure. *See Johnson v. Thomas,* 982 So. 2d 405 (Miss. 2008) (former 120-day time period).

Rule 5. Serving and filing pleadings and other papers.

(a) When required.

(1) Service on parties. Unless these rules provide otherwise, all parties must be served with:

(A) An order stating it must be served;
(B) A pleading filed after the original complaint unless the court orders otherwise because there are numerous defendants;
(C) A discovery paper required to be served upon a party unless the court orders otherwise;
(D) A written motion except one that may be heard ex parte; and
(E) A written notice, appearance, demand, offer of judgment, designation of record on appeal, or similar paper.

(2) Defaulted party. Service is not required on a party in default for failing to appear. But a pleading asserting new or additional claims for relief against the defaulting party must be served according to Rule 4.

(3) Seizing property. If seizing property begins an action, and no person is or needs to be named as a defendant, service required prior to filing an answer, claim, or appearance must be made on the person who had custody or possession of the property when it was seized.

(b) Manner.

(1) Attorney of record. Unless the court orders service on a party, service must be made on a party's attorney.

(A) How. Service must be made on an attorney/party by:

(i) Delivering a copy;
(ii) By electronically transmitting it;
(iii) By mailing it to the last known address;
(iv) If no address is known, by leaving it with the court clerk; or
(v) If no address is known, by electronically transmitting it to the court clerk.

(B) Defining delivery. Delivering a copy means:

(i) Handing it to the attorney/party;
(ii) Leaving it at the attorney's/party's office with a clerk or other person in charge;
(iii) Leaving it at the attorney's/party's office in a conspicuous place if no one is in charge; or
(iv) If the office is closed or the attorney/party does not have one, leaving it at the attorney's or party's dwelling house or usual place of abode with a person of suitable age and discretion residing at it.

(C) Defining electronically transmitting. Electronically transmitting means sending by fax or email. Electronic transmission by fax must be to the attorney's fax number listed in the Mississippi Bar's Lawyer Directory. Electronic transmission by email must be to the attorney's email address listed in the Mississippi Bar's Lawyer Directory.

(i) Service by fax is complete when the sender obtains a proof of fax from the recipient's machine showing the transmission was successfully received.
(ii) Service by email is complete when sent. But if the email is electronically returned to the sender shortly after transmission because the email address was incorrect, an attachment exceeded a size limit, or other reason, then service by email is not complete.
(iii) If the sender does not obtain a proof of fax showing the transmission was successfully received or if an email is electronically returned shortly after sending, service is not complete until the sending party obtains an acknowledgment from the recipient.

(D) When complete. Service by mail is complete upon mailing.

(2) Electronic court system. Where a court has adopted the Mississippi Electronic Court system, service allowed or required under these rules must conform with the Administrative Procedures for Mississippi Electronic Courts.

(c) Numerous defendants.

(1) If there are an unusually large number of defendants, on a motion or its own, the court may order:

(A) That the defendants' pleadings and replies to them do not need to be served between the defendants;

(B) That a crossclaim, counterclaim, or matter constituting an avoidance or affirmative defense in the defendants' pleadings will be considered to be denied or avoided by all other parties; and

(C) That filing the pleading and serving the plaintiff constitutes due notice to all parties.

(2) A copy of the order must be served on parties in a manner and form the court directs.

(d) Filing.

(1) When. Before service or within a reasonable time afterwards, a paper after the complaint that requires service on a party must be filed with the court.

(2) Discovery papers. Unless the court orders otherwise, discovery papers do not need to be filed until used in a proceeding.

(3) Proof of service. Proof a paper was served must be by a signed certificate of service.

(e) Defining filing with the court; electronically filing.

(1) Filing with court. Under these rules, pleadings and other papers must be filed with the court clerk. But the court may allow papers to be filed with the judge; if so the judge must note the filing date on the papers and transmit them to the clerk.

(2) Electronically filing with the court. By local rule conforming with the Administrative Procedures for Mississippi Electronic Courts, a court may allow pleadings and other papers to be filed, signed, or verified by electronic means. Pleadings and other papers filed electronically in compliance with the procedures are written papers for purposes of these rules.

[Amended effective 3/1/89; Amended effective 1/8/09, for the purpose of establishing a pilot program for Mississippi Electronic Court System.]

Advisory Committee Historical Note

Effective 3/1/89, Rule 5(b) and Rule 5(e) were amended by authorizing the service and filing of pleadings and documents by electronic means. 536-38 So. 2d XXI (West Miss. Cas. 1989).

Advisory Committee Notes

Rule 5 promotes (1) expeditious written and electronic communications between parties and (2) efficient filing with the clerk. The rule presupposes the court already has personal jurisdiction. A pleading filed after the original complaint asserting a claim for relief against a person over whom the court has not acquired jurisdiction at the time must be served with a summons.

An ex parte motion does not need to be served but should be filed. *See also* Miss. R. Civ. P. 81(b). The list of papers in Rule 5(a)(1) is not exhaustive. A motions with an affidavit must also be served under Rules 6(d) and 25.

Rule 5(b)(C) addresses transmission by fax or email. The rule presupposes attorneys maintain up-to-date fax numbers and email addresses in the Mississippi Bar's Lawyer Directory.

Under Rule 5(b)(C)(i), service by fax is complete when the sender receives a proof of fax. The proof of fax must show the transmission was successful, including the date it was sent, the number of pages transmitted, the recipient's fax number, and other usual confirmatory information. In contrast, under Rule 5(b)(C)(ii), service by email is complete when sent. But if the email is returned shortly afterwards, service is incomplete.

If the sender fails to obtain a proof of fax or the sender's email is "bounced" back, service is incomplete unless the recipient acknowledges otherwise under Rule 5(b)(C)(iii). These provisions intend to update the rule and align it with modern practice, including service by email.

The Mississippi Electronic Court (MEC) system is an optional electronic case management and electronic filing system for chancery, circuit, and county courts. But procedures in the Administrative Procedures for Mississippi Electronic Courts must be followed if a court has adopted and implemented the MEC by local rule. To the extent the Administrative Procedures for Mississippi Electronic Courts addresses serving and filing pleadings and other papers, the procedures should be followed to satisfy Rule 5(b) and 5(d). For purposes of Rule 5(d), the Administrative Procedures for Mississippi Electronic Courts provides reasonable exceptions to requiring electronic filing. *See* State of Mississippi Judiciary Administrative Office of Courts, Administrative Procedures for Mississippi Electronic Courts: Electronic Means for Filing, Signing, Verification, and Service of Pleadings and Papers, https://courts.ms.gov/mec/mec.html.

Service must be made within specified times. But filing may occur after service within a reasonable time. Examples where filing occurs before service include a complaint and other pleadings stating a claim for relief served with a summons. Under Rule 5(c), filing a pleading and serving the plaintiff constitutes notice to the parties. Rule 65(b)(C)(ii) requires temporary restraining orders to be filed in the clerk's office.

To obtain immediate court action, under Rule 5(d)(1) a party may file papers with the judge and obtain an order if allowed. Rule 5(d)(1) should be read in conjunction with Rules 77(a), 77(b), and 77(c).

Rule 5(b) does not apply to serving a summons; Rules 4 and 81(d) completely cover that subject.

Rule 6. Time.

(a) Computing. The following applies when computing time in these rules, local rules, court orders, and statutes silent on how to do so:

(1) Days or longer. For days or longer time periods:

(A) Exclude the first day;
(B) Count all days, including intermediate Saturdays, Sundays, and legal holidays; and
(C) Include the last day.

(i) If the last day occurs on a Saturday, Sunday, or legal holiday, continue counting until the next day that is not one.
(ii) If the last day occurs on a day the courthouse or clerk's office is closed, continue counting until the next day it opens.

(2) Hours. For hours:

(A) Begin counting on the event that triggers the time period; and
(B) Count all hours, including intermediate Saturdays, Sundays, and legal holidays.

(i) If the last hour occurs on a Saturday, Sunday, or legal holiday, continue to the same time on the next day that is not one.

(3) "Last day." Unless a statute, local rule, or court order states otherwise:

(A) For electronic filing, the last day ends at midnight in the court's time zone.
(B) For filing by other means, the last day ends when the clerk's office is scheduled to close.

(4) "Legal holiday." A legal holiday means the day defined as one by statute or governor.

(b) Extensions.

(1) When an act may or must be done within a specified time, the court for cause shown may:

(A) Extend it with or without a motion or notice if acting or requested to do so before the original time or an extension expires.
(B) Extend it on a motion if the original time expired and if the movant failed to act because of excusable neglect.
(C) The court may not extend the time for acting under Rules 50(b), 52(b), 59(b), 59(d), 59(e), 60(b), and 60(c) unless one of those rules states otherwise.

(c) Expiration of court term. The continued existence or expiration of a court term does not affect or limit a court's power to act consistent with these rules.

(d) Time for motion, hearing notice, and affidavit; exceptions.

(1) Time for motion and hearing notice; exceptions.

(A) A written motion and notice of hearing must be served at least 14 days before the hearing except when:

(i) The motion may be heard ex parte;
(ii) These rules set a different time; or
(iii) A court order sets a different time.

(B) For good cause shown, a party may move ex parte for a court order setting a different time.

(2) Time for affidavit; exceptions.

(A) A motion supporting an affidavit must be served with the motion.
(B) Unless Rule 59(c) states otherwise, an opposing affidavit must be served no later than seven days before the hearing.

(i) The court may allow an opposing affidavit to be served at some other time.

(e) Service by mail: additional time. When a party may or must act within a specified time after service by mail, three days are added after the period would otherwise expire. The additional time does not apply to responding to service of a summons under Rule 4.

[Amended effective 3/1/89; amended effective 6/24/92; amended effective 7/1/08.]

Advisory Committee Historical Note

Effective 6/24/92, Rule 6(a) was amended to provide that the legal holidays which cause a period of time to be enlarged are those defined by statute. 598-02 So. 2d XXII-XXIII (West Miss. Cas. 1992).

Effective 3/1/89, Rule 6(a) was amended to abrogate the inclusion of time periods established by local court rules. 536-38 So. 2d XXI (West Miss. Cas. 1989).

Advisory Committee Notes

Clerks' offices and courthouses occasionally close during normal working periods. Rule 6(a) obviates otherwise harsh results when an attorney faced with an important filing deadline unexpectedly discovers the courthouse or clerk's office is closed.

Rule 6(b) gives the court wide discretion to enlarge various time periods both before and after the allotted time terminates. But a court cannot extend the time for: (1) filing a motion for judgment notwithstanding the verdict under Rule 50(b); (2) filing a motion to amend the court's findings under Rule 52(b); (3) filing a motion for new trial under Rule 59(b); (4) filing a motion to alter or amend the judgment under Rule 60(b); (5) filing a motion to reconsider a court order transferring a case to another one under Rule 60(c); or (6) entering a sua sponte order requiring a new trial under to Rule 59(d).

Extending the time period requires a party to show cause for doing so. If a motion for additional time is filed before the period expires, the request may be made ex parte; if it is filed after the period expires, notice of the motion must be given to other parties, and the only cause for which extra time can be allowed is "excusable neglect."

Rule 6(c) does not abolish court terms; it merely provides greater flexibility to courts in performing a myriad of functions, many of which previously occurred only during term time. The rule is also consistent with other provisions specifying a number of days for taking certain actions rather than linking time expirations to opening day, final day, or other day of a court term. *E.g.*, Rule 6(d) (motions and notices of hearings to be served not less than 14 days before hearing); Rule 12(a) (defendant to answer within 30 days).

SECTION 3. PLEADINGS; MOTIONS; OTHER PAPERS

Rule 7. Allowed pleadings; motion and other papers: form.

(a) Allowed pleadings.

(1) Only these pleadings are allowed:
- **(A)** A complaint;
- **(B)** An answer to a complaint;
- **(C)** A reply to a counterclaim specifically designated as a counterclaim;
- **(D)** An answer to a crossclaim;
- **(E)** A third-party complaint;
- **(F)** An answer to a third-party complaint; and
- **(G)** If ordered by the court, a reply to an answer or third-party answer.

(2) No other pleading will be allowed.

(b) Motion. A request for a court order must be by a filed motion.

(1) Form. Unless filed during a hearing or trial, a motion must:

- **(A)** Be filed in writing;
- **(B)** State with particularity the grounds for seeking an order; and
- **(C)** State the requested relief.

(2) Rules governing captions, signing, and other matters of form in pleadings apply to motions and other papers.

(c) Paper size. Pleadings, motions, and other papers, including depositions, must be on 8 1/2" by 11" paper. Deposition formatting must comply with the Guidelines for Court Reporters according to Mississippi Rule of Appellate Procedure 11(c).

(d) Demurrer, plea abolished. A demurrer, plea, and exception for insufficiency of a pleading will not be used.

Advisory Committee Historical Note

Effective 11/19/92, Rule 7(c) was redesignated Rule 7(d), and a new Rule 7(c) requiring letter-size paper for all pleadings, motions, and other papers was adopted. 606-07 So. 2d XIX-XX (West Miss. Cas. 1993).

Rule 8. General pleading rules.

(a) Claims for relief. A pleading stating a claim for relief must contain:

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

(2) A demand for judgment for the requested relief.

(A) Relief in the alternative or different types of relief may be demanded.

(b) Defenses; admissions; denials.

(1) Requirements. In responding to a pleading, a party must:

(A) State in short and plain terms defenses to each asserted claim; and
(B) Admit or deny the allegations asserted against the party.

(2) Denials: responding to substance. A denial must fairly respond to the substance of an allegation.

(3) Denials: general; specific. Subject to Rule 11 obligations, a party may in good faith deny jurisdictional grounds and all other allegations by general denial.

(A) Otherwise, a party must either:

(i) Specifically deny designated allegations; or
(ii) Generally deny all allegations except those specifically admitted.

(4) Partial denials. A party intending in good faith to deny only part of an allegation must admit the part that is true and deny the rest.

(5) Lacking sufficient knowledge or information. A party lacking knowledge or information sufficient to form a belief about the truth of an allegation must state so. The statement has the effect of a denial.

(c) Affirmative defenses.

(1) Requirements. In responding to a pleading, a party must affirmatively state an avoidance or affirmative defense, including:

(A) Accord and satisfaction;
(B) Arbitration and award;
(C) Assumption of risk;
(D) Contributory negligence;
(E) Discharge in bankruptcy;
(F) Duress;
(G) Estoppel;
(H) Failure of consideration
(I) Fraud;
(J) Illegality
(K) Injury by fellow servant;
(L) Laches;
(M) License;
(N) Payment;
(O) Release;
(P) Res judicata;
(Q) Statute of frauds;
(R) Statute of limitations; and
(S) Waiver.

(2) Mistake. If justice so requires, when a party mistakenly designates a defense as a counterclaim or a counterclaim as a defense, the court must treat the pleading as properly designated and may impose terms for doing so.

(d) Failure to deny. When a responsive pleading is required, an allegation other than one relating to the amount of damages is admitted if not denied. If no responsive pleading is required, the allegation is denied or avoided.

(e) Pleading requirements.

(1) Generally. Each allegation must be simple, concise, and direct. No technical form of a pleading or motion is required.

(2) Consistency; number.

(A) A party may state two or more claims or defenses alternatively or hypothetically in a single count or defense or separately. If one of the statements is sufficient, so is the pleading.

(B) There is no limit on the number of separate claims or defenses a party may state. Separate claims or defenses do not have to be consistent. But obligations stated in Rule 11 apply to all statements.

(f) Construction. A pleading must be construed so as to do substantial justice.

(g) Not read or submitted. Except as admitted into evidence, pleadings must not be considered by the jury.

(h) Disclosing infancy or legal disability. A pleading or motion on behalf of a person under legal disability must state so unless disclosed in a previous pleading or motion in the action.

Advisory Committee Notes

Rule 8 allows claims and defenses to be stated in general terms so that the client's rights are not lost due to counsel's poor drafting skills. All cases must satisfy Rule 8(a) notice-pleading standards. The purpose of Rule 8 is to put parties on notice of the claims against them. *E.g.*, *BB Buggies, Inc. v. Leon*, 150 So. 3d 90, 101 (Miss. 1994).

Under Rule 8(a), "it is only necessary that the pleadings provide sufficient notice to the defendant of the claims and grounds upon which relief is sought." *See DynaSteel Corp. v. Aztec Industries, Inc.*, 611 So. 2d 977 (Miss. 1992). No "magic words" are required, and the pleadings must only provide sufficient notice of the claims and basis for relief. *BB Buggies, Inc.*, 150 So. 3d at 101 (quoting *Estate of Stevens v. Wetzel*, 762 So. 2d 293, 295 (Miss. 2000)).

But Rule 8 "does not eliminate the necessity of stating circumstances, occurrences, and events which support the proffered claim." *PACCAR Fin. Corp. v. Howard*, 615 So. 2d 583, 589 (Miss. 1993). A plaintiff must state direct or inferential fact allegations concerning all elements of a claim. *See Penn. Nat'l Gaming, Inc. v. Ratliff*, 954 So. 2d 427, 432 (Miss. 2005). Conclusory allegations or legal conclusions masquerading as factual conclusions are insufficient. *See Cook v. Wallot*, 172 So. 3d 788, 801 (Miss. Ct. App. 2013) (quoting *Penn Nat'l Gaming, Inc.*, 954 So. 2d at 431).

To modify child custody, a motion or pleading must allege adverse effects due to a material change. The motion or pleading is insufficient if it alleges that an adverse change will occur unless the modification is granted. *See, e.g., McMurry v. Sadler*, 846 So. 2d. 240, 244 (Miss. Ct. App. 2002).

In cases involving joinder of multiple plaintiffs, the complaint must identify: (1) the name of the defendant or defendants against whom each plaintiff asserts a claim; (2) the alleged harm caused by specific defendants as to each plaintiff; (3) the location at which the harm was caused; and (4) the time period when the harm was caused. *See 3M Co. v. Glass*, 917 So. 2d 90, 92 (Miss. 2005); *Harold's Auto Parts, Inc. v. Mangialardi*, 889 So. 2d 493, 495 (Miss. 2004). Failure to provide this "core information" is a violation of Rules 8 and 11. Plaintiffs in these cases must also plead sufficient facts to support joinder. *Glass*, 917 So. 2d at 93; *Mangialardi*, 889 So. 2d at 495.

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

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

The list of affirmative defenses in Rule 8(c) is not intended to be exhaustive. *See, e.g., Loggers, LLC. v. 1 Up Techs., LLC*, 50 So. 3d 992, 993 (Miss. 2011) (failure of foreign LLC transacting business in state to register to do business as prerequisite to action under Miss. Code Ann. § 79-29-1007(1)); *Price v. Clark*, 21 So. 3d 509, 524 (Miss. 2009) (immunity under Mississippi State Tort Claims Act); *Meadows v. Blake*, 36 So. 3d 1225, 1232-33 (Miss. 2010) (no certificate of expert consultation in medical malpractice cases under Miss. Code Ann. § 11-1-58); *Stuart v. Univ. of Miss. Med. Ctr.*, 21 So. 3d 544, 549-50 (Miss. 2009) (noncompliance with 90-day notice requirement under Miss. Code Ann. § 11-46-11(1)); *Ms. Credit Ctr., Inc. v Horton*, 926 So. 2d 167, 179 (Miss. 2006) (right to arbitrate); *Eckmann v. Moore*, 876 So. 2d 975, 989 (Miss. 2004) (apportionment of fault under Miss. Code Ann. § 85-5-7); *Hertz Comm'l Leasing Div. v. Morrison*, 567 So. 2d 832, 834 (Miss. 1990) (contractual acceleration clause as unenforceable penalty); *Bailey v.*

Georgia Cotton Goods Co., 543 So. 2d 180, 182-83 (Miss. 1989) (failure of foreign corporation transacting business in state to obtain certificate of authority as prerequisite to action under Miss. Code Ann. § 79-415.02); *O'Briant v. Hull*, 208 So. 2d 784, 785 (Miss. 1968) (election of remedies); *Charlot v. Henry*, 45 So. 3d 1237, 1243-44 (Miss. Ct. App. 2010) (adverse possession); *Ashburn v. Ashburn*, 970 So. 2d 204, 212-13 (Miss. Ct. App. 2007) (condonation).

The court may deny a party leave to amend an answer to include an affirmative defense if waived. *See Hutzel v. City of Jackson*, 33 So. 3d 1116, 1122 (Miss. 2010).

Rule 9. Pleading special matters.

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

(b) Fraud; mistake; condition of mind. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

(c) Conditions precedent. In pleading a condition precedent, it is sufficient to allege generally that all conditions precedent have occurred or been performed. A party must deny the performance or occurrence of a condition precedent with particularity.

(d) Official document or act; ordinance; special statute.

(1) In pleading an official document or act, alleging the document was legally issued or the act was legally done is sufficient.

(2) An allegation identifying an ordinance or statute by title, approval date, or otherwise is sufficient to plead a municipal or county ordinance; a special, local, or private statute; or a right derived from them.

(e) Judgment. Alleging a judgment or decision without showing jurisdiction to render it is sufficient to plead the judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or board or officer.

(f) Time and place. Alleging time and place is material for purposes of testing a pleading's sufficiency.

(g) Special damage. An item of special damage must be specifically stated.

(h) Fictitious parties. If a party states in a pleading that an opponent's name is unknown, the opposing party may be designated by any name. Process, pleadings and proceedings in the action may be amended by substituting the true name and giving proper notice to the opposing party once it is known.

(i) Unknown parties in interest. An unknown proper party interested in the subject matter of an action may be designated as an unknown party in interest.

Advisory Committee Notes

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

"Circumstances" in Rule 9(b) refers to matters like: (1) the time, place, and contents of false representations; (2) the identity of the person who made them; and (3) what the person obtained as a result.

Under Rule 9(g), special damages are alleged in detail. But general damages are alleged generally. General damages are typically caused by and flow naturally from alleged injuries. Special damages are unusual or atypical for the type of claim asserted. Special damages must be plead with specificity so as to give the defendant notice of the nature of the alleged damages. Examples of special damages include consequential damages, damages for lost business profit, and punitive damages. *See Puckett Mach. Co. v. Edwards*, 641 So. 2d 29, 37-38 (Miss. 1994) (consequential damages must be plead with specificity); *Lynn v. Soterra, Inc.*, 802 So. 2d 162, 169 (Miss. Ct. App. 2001) (lost business profits caused by blocking road are likely special damages). Failing to plead special damages with specificity could result in the reversal of a damages award. The requirement that special damages must be stated with specificity will be waived if special damages are tried by express or implied consent of the parties under Rule 15(b).

Rule 10. Pleadings form.

(a) Caption; party names. A pleading must contain a caption stating the court name, action title, file number, and Rule 7(a) designation.

(1) In the complaint, the action title must include the names of all parties.
(2) In other pleadings, it is sufficient to state the name of the first party on each side with an appropriate indication of all others.

(b) Paragraphs; separate statement.

(1) The first paragraph of a claim for relief must contain the names of all parties and their addresses if known.
(2) All allegations of a claim or defense must be asserted in numbered paragraphs.

(A) The contents of each numbered paragraph must be limited as far as practicable to a statement of a single set of circumstances.
(B) The paragraph may be referred to by number in subsequent pleadings.

(3) Each claim founded on a separate transaction or occurrence and each defense other than a denial must be stated in a separate count or defense when doing so facilitates presenting the matters clearly.

(c) Adoption by reference; exhibits. A statement in a pleading may be adopted by reference in the same pleading, another pleading, or a motion. A copy of a written instrument attached as an exhibit to a pleading is part of the pleading for all purposes.

(d) Copy must be attached. When a claim or defense is founded on an account or other written instrument, a copy should be attached to the pleading or filed with it unless the pleading alleges sufficient justification for its omission.

[Amended effective 4/13/00.]

Advisory Committee Historical Note

Effective 4/13/00, Rule 10(d) was amended to suggest rather than require documents on which a claim or defense is based to be attached to a pleading. 753-745 So. 2d XVII (West Miss. Cas. 2000.)

Advisory Committee Notes

Failure to comply with Rule 10(b) requirements is not a basis for dismissing the complaint or striking the answer. But on a motion or its own, the court may order a party to amend the pleading to comply with Rule 10(b). *See, e.g., 3M Co. v. Glass*, 917 So. 2d 90, 92-94 (Miss. 2005); *Harold's Auto Parts, Inc. v. Mangialardi*, 889 So. 2d 493, 494-95 (Miss. 2004).

Rule 11. Signing pleadings, motions, and other papers.

(a) Signature required.

(1) A pleading, motion, or other paper must be signed by at least one attorney of record in the attorney's name. An unrepresented party must personally sign that party's name. The pleading, motion, or other paper must state the signer's address, email address, and telephone number.

(2) Unless a rule or statute specifically states otherwise, a pleading does not need to be verified or accompanied by an affidavit. The rule in equity that sworn allegations in an answer must be overcome by testimony from two witnesses or one witness and corroborating circumstances is abolished.

(3) The signature of an attorney constitutes a certificate:

(A) That the attorney has read the pleading, motion, or other paper;
(B) That to the best of the attorney's knowledge, information, and belief there is good grounds to support it; and
(C) That it is not interposed for delay.

(4) Except on a verified motion for admission pro hac vice, the signature of an attorney not regularly admitted to practice in Mississippi also certifies that the foreign attorney has been admitted in the case according to Miss. R. App. P. 46(b) requirements and limitations.

(b) Sanctions. An unsigned pleading, motion, or other paper or one signed with intent to defeat the purpose of this rule may be stricken as false and a sham. The action may proceed as though the pleading, motion, or other paper had not been served.

(1) For willful violation of this rule, an attorney may be subjected to appropriate disciplinary action.
(2) Similar action may be taken if scandalous or indecent matter is inserted.
(3) If the court decides that a party's pleading, motion, or other paper is frivolous or intended to harass or delay, the court may order the party, the party's attorney, or both to pay to the opposing party or parties reasonable expenses, including reasonable attorney's fees, incurred by them and their attorneys.

[Amended effective 3/13/91; amended effective 1/16/03].

Advisory Committee Historical Note

Effective 1/16/03, Rule 11(a) was amended to provide that the signature of a foreign attorney certifies compliance with Miss. R. App. P. 46(b) and to make other editorial changes. ____ So. 2d ____ (West Miss. Cases 2003).

Effective 3/13/91, Rule 11(b) was amended to provide for sanctions against a party, his attorney, or both. 574-76 So. 2d XXI (West Miss. Cas. 1991).

Advisory Committee Notes

Good faith and professional responsibility are the core of Rule 11. For example, Rule 8(b) authorizes use of a general denial subject to Rule 11—in other words, counsel should do so only when in good faith he or she can fairly deny all allegations in the adverse pleading.

Verification will be the exception and not the rule to pleading in Mississippi. No pleading or petition requires verification or an accompanying affidavit unless a specific rule or statutory provision states otherwise. *See, e.g.*, Miss. R. Civ. P. 27(a) and 65.

The final sentence of Rule 11(b) intends to ensure the trial court has sufficient power to deal forcefully and effectively with parties or attorneys who may misuse the liberal, notice-pleadings system effectuated by these rules. It authorizes a court to award a party reasonable attorney's fees and expenses when an adverse party files a frivolous pleading, motion, or other paper or one intended to harass or delay. Therefore, Rule 11 provides two alternative grounds for imposing sanctions: (1) filing a frivolous pleading, motion, or other paper and (2) filing a pleading, motion, or other paper to harass or delay. *See Nationwide Mut. Ins. Co. v. Evans*, 553 So. 2d 1117, 1120 (Miss. 1989).

Bad faith is necessary for sanctions based on purposeful harassment or delay. But not for sanctions based on frivolous pleadings, motions, or other papers. A pleading, motion, or other paper is frivolous "only when, objectively speaking, the pleader or movant has no hope of success." *See In re Spencer*, 985 So. 2d 330, 339 (Miss. 2008). A pleading, motion, or other paper is "frivolous" if its "insufficiency. . . is so manifest upon a bare inspection of the pleadings, that the court or judge is able to determine its character without argument or research." *In re Estate of Smith*, 69 So. 3d 1, 6 (Miss. 2011). A defensive pleading is not frivolous unless "conceding it to be true does not, taken as a whole, contain any defense to any part of complainant's cause of action and its insufficiency as a defense is so glaring that the Court can determine it upon a bare inspection without argument." *Id.*

Sanctions against a party are improper in cases: (1) where the party relied strictly on counsel's advice and could not be expected to know whether the complaint was supported by law; (2) where the party relied on counsel's advice in filing the pleading and played no significant role in prosecuting the action; or (3) where the party was unaware and lacked responsibility for bad-faith harassment or delay. *See Stevens v. Lake*, 615 So. 2d 1177, 1184 (Miss. 1993).

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

Rule 12. Defenses and objections: when and how; Rule 12 motions; consolidating and waiving defenses; hearing.

(a) When presented.

(1) Serving a responsive pleading.

(A) Answer to complaint. A defendant must serve an answer within 30 days after being served with the summons and complaint or as Rule 4 states otherwise regarding waiver.

(B) Answer to crossclaim. A party must serve an answer to a crossclaim within 30 days after being served with a pleading stating one.

(C) Reply to counterclaim. A plaintiff must serve a reply to a counterclaim within 30 days after being served with an answer stating one or an order requiring a reply unless the court orders otherwise.

(2) Effect of motion.

(A) Unless the court orders a different time, serving a motion under this rule alters the periods in Rule 12(a)(1) as follows:

(i) If the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 10 days after notice of the court's action.

(ii) If the court grants a motion for a more definite statement, the responsive pleading must be served within 10 days after service of the more definite statement.

(B) The court may extend these times only once for a period not to exceed 10 days on counsel's written, filed stipulation.

(b) How presented. Every defense to a claim for relief in a pleading must be asserted in the responsive pleading if one is required. But a party may assert defenses in Rule 12(b)(1) through (b)(6) by motion. If no responsive pleading is required, a party may assert at trial a defense to that claim. No defense or objection is waived by joining one or more other defenses or objections in a responsive pleading or motion.

(1) Lack of subject-matter jurisdiction;
(2) Lack of personal jurisdiction;
(3) Improper venue;
(4) Insufficient process;

(5) Insufficient service of process;
(6) Failure to state a claim upon which relief can be granted; and
(7) Failure to join a party under Rule 19.

(c) Motion for judgment on the pleadings. After the pleadings are closed but early enough not to delay trial, a party may move for a judgment on the pleadings.

(d) Matters outside pleadings. On a Rule 12(b)(6) or 12(c) motion, if matters outside the pleadings are presented to the court and not excluded, the motion must be treated as one for Rule 56 summary judgment. All parties must be given reasonable opportunity to present all pertinent material.

(1) When the court grants a Rule 12 (b)(6) or 12(c) motion, leave to amend must be granted according to Rule 15(a) if matters outside the pleadings are not presented.

(e) Motion for more definite statement. If a pleading to which a responsive pleading is allowed is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before filing a responsive pleading. The motion must point out the pleading defects and the desired details.

(1) If a court order granting the motion is not obeyed within 10 days after notice of the order or as otherwise stated in it, the court may strike the deficient pleading or issue an order it deems just .

(f) Motion to strike. The court may strike from a pleading an insufficient defense or a redundant, immaterial, impertinent, or scandalous matter:

(1) On a party's motion before responding to a pleading;
(2) If no responsive pleading is required, on a party's motion within 30 days after the pleading is served; or
(3) On its own at any time.

(g) Consolidating defenses in motion. A motion under this rule may join other available Rule 12 motions. If the motion omits an available Rule 12 defense or objection, a party cannot raise the omitted defense or objection in another motion unless Rule 12(h) states otherwise.

(h) Waiving and preserving certain defenses.

(1) Lack of personal jurisdiction, improper venue, insufficient process, or insufficient service of process is waived:

(A) If omitted from a motion in circumstances described in Rule 12(g); or
(B) If not raised by motion under this rule, in a responsive pleading, or in an amendment under Rule 15(a) as a matter of course.

(2) Failure to state a claim upon which relief can be granted, failure to join an indispensable party under Rule 19, and failure to state a legal defense to a claim may be raised:

(A) In a pleading allowed or ordered under Rule 7(a);
(B) By a motion for judgment on the pleadings; or
(C) At trial.

(3) Whenever the court lacks subject matter jurisdiction, it must dismiss the action or transfer it to the proper court.

(i) Preliminary hearing. Unless the court defers them until trial, the following must be heard and decided before then:

(1) Defenses in Rule 12(b)(1) through (7) asserted in a pleading or motion; and
(2) A motion for judgment on the pleadings.

Advisory Committee Notes

A motion for a more definite statement requires merely that: a more definite statement and not evidentiary details. As one remedy for a vague or ambiguous pleading, a party—only when a responsive pleading is required—may move for a more definite statement . A defendant may also file a Rule 12(b)(6) motion to challenge a vague or ambiguous pleading.

Rule 12(f) ordinarily requires only objectionable portions of pleadings to be stricken rather than the entire pleading. Since the issue for the court is whether an allegation is prejudicial to the adverse party, a motion challenging redundant or immaterial allegations or allegations as to which relevancy is doubtful should be denied. When a motion to strike an insufficient defense is granted, the court should also order leave to amend.

Under Rule 12(g), a party making a pre-answer Rule 12 motion may join with it other available pre-answer Rule 12 motions. If a party makes a pre-answer Rule 12 motion and omits an available Rule 12 defense or objection, the party may raise the omitted defense or objection only as Rule 12(h)(2) allows. Rule 12(h)(2) allows a party to raise the defense of failure to state a claim, the defense of failure to join an indispensable party under Rule 19, or both (1) in the answer; (2) in a motion for judgment on the pleadings; or (3) at trial. Rule 12(g) encourages a party to consolidate all available Rule 12 motions to avoid successive motions.

Rule 12(h)(1) states that certain specified defenses available to a party when making a pre-answer motion but omitted from the pre-answer motion are waived, including: (1) lack of personal jurisdiction; (2) improper venue; (3) insufficient process; and (4) insufficient service of process. In addition, under Rule 12(h)(1), if a party answers rather than files a pre-answer motion, the party must raise these specified defenses in the answer or an amended answer made as a matter of course according to Rule 15(a) to avoid waiver.

Under Rule 12(h)(3), lack of subject matter jurisdiction may be presented at any time by motion or answer. It may also be asserted as a motion for relief from a final judgment under Rule 60(b)(4) or for the first time on appeal. Directing a court without subject matter jurisdiction to transfer the action to the proper court that does preserves the traditional Mississippi practice of transferring actions between the circuit and chancery courts. *See* Miss. Const. art. 6, §157 (all causes that may be brought in circuit court must be transferred to chancery court if it has exclusive jurisdiction); *see also id.* § 162 (all causes that may be brought in chancery court must be transferred to circuit court if it has exclusive jurisdiction). But not reversing because a court improperly exercised its jurisdiction. *See* Miss. Const. art. 6, §147 (prohibiting reversals because action brought in wrong court).

Rule 13. Counterclaim; crossclaim.

(a) Compulsory counterclaim.

(1) A pleading must state as a counterclaim a claim the pleader has against an opposing party at the time of service if:

(A) It arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and
(B) Does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction.

(2) But the pleader does not need to assert the claim if:

(A) At the time the action was commenced the claim was the subject of another pending action;
(B) The opposing party sued on attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not asserting a counterclaim under this rule; or
(C) An insurer is defending the opposing party's claim.

(3) In the event a compulsory counterclaim is not asserted in reliance on an exception in Rule 13(a), the doctrines of res judicata or collateral estoppel by judgment may subsequently bar the claim if issues are decided adversely to the party not asserting it.

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

(c) Counterclaim exceeding opposing claim. A counterclaim may or may not diminish or defeat the opposing party's recovery. It may claim greater or different relief compared to relief requested in the opposing party's pleading.

(d) Counterclaim against State of Mississippi. These rules must not be construed to enlarge beyond limits fixed by law the right to assert a counterclaim or to claim a credit against:

(1) The State of Mississippi;
(2) A political subdivision;

(3) An officer in a representative capacity; or
(4) An agent of the State of Mississippi or a political subdivision.

(e) Counterclaim maturing or acquired after pleading. A claim matured or acquired after serving a pleading may with the court's permission be presented as a counterclaim by supplemental pleading.

(f) Omitted counterclaim. The court may allow a pleader to assert a counterclaim by amendment on just terms when the pleader fails to assert a counterclaim:

(1) Through oversight, inadvertence, or excusable neglect; or
(2) When justice requires.

(g) Crossclaim against co-party.

(1) A pleading may state as a crossclaim a claim by one party against a co-party arising out of the transaction or occurrence:

(A) That is the subject matter of the original action or of a counterclaim in it or
(B) That relates to property which is the subject matter of the original action.

(2) The crossclaim may include a claim that the party against whom it is asserted is or may be liable to the crossclaimant for all or part of the claim asserted in the action against the crossclaimant.

(h) Claim exceeding court's jurisdiction. When a counterclaim or cross claim exceeding jurisdictional limits is filed in county court, on a motion by all parties within 20 days, the county court must transfer the action to the circuit or chancery court with jurisdiction where the county court is located.

(i) Joining additional parties. Persons other than parties to the original action may be made parties to a counterclaim or crossclaim according to Rules 19 and 20.

(j) Separate trial or judgment. If the court orders separate trials under Rule 42(b), judgment on a counterclaim or crossclaim may be rendered according to Rule 54(b) when the court has jurisdiction to do so even if the opposing parties' claims have been dismissed or otherwise decided.

(k) Appeals. When an action in justice court or in another court not subject to these rules is appealed for a trial de novo to one that is subject to them, the following applies:

(1) A Rule 13(a) compulsory counterclaim must be stated as an amendment to the pleading within 30 days after the appeal has been perfected or otherwise within additional time as the court may allow.
(2) Other counterclaims and crossclaims must be allowed as in other cases.
(3) The lower court's jurisdiction does not limit the amount of a defendant's counterclaim or crossclaim, and the defendant may claim and recover the full amount irrespective of the lower court's jurisdiction.

Advisory Committee Notes

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

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

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

Under Rule 13(g), a party may assert a crossclaim against a co-party if the crossclaim arises out of the same transaction or occurrence (1) that is the subject matter of the complaint; (2) that is a counterclaim to the subject matter of the complaint; or (3) that relates to property which is the subject matter of the complaint. A crossclaim may be a derivative claim asserting that the party against whom the crossclaim is asserted is or may be liable to the crossclaimant for all or part of the claim against the crossclaimant. A crossclaim is permissive rather than compulsory.

A party asserting a counterclaim or crossclaim may join additional parties as defendants to the counterclaim or crossclaim under Rules 19 and 20.

Rule 14. Third-party practice.

(a) By the defendant.

(1) When. A defending party may serve a summons and complaint on a nonparty who is or may be liable to the defending party for all or part of the plaintiff's claim against the defendant party:

(A) After the action is commenced;
(B) On authorization by the court where the action is pending;
(C) On a motion; and
(D) For good cause shown.

(2) Defenses; counterclaim; crossclaim.

(A) Defenses. The third-party defendant (e.g., the person served with the summons and third-party complaint) must assert defenses to the third-party plaintiff's claim according to Rule 12.

(B) Counterclaim; crossclaim. The third-party defendant must assert a counterclaim against the third-party plaintiff and a crossclaim against other third-party defendants according to Rule 13.

(3) Defenses; counterclaim: scope.

(A) Scope of defenses. The third-party defendant may assert against the plaintiff defenses the third-party plaintiff has to the plaintiff's claim.
(B) Scope of counterclaim. The third-party defendant may also assert a claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff.

(4) Crossclaim: scope; response.

(A) Scope of crossclaim. The plaintiff may assert against the third-party defendant a claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff.
(B) Response to crossclaim. If so, the third-party defendant must assert defenses, counterclaims, and crossclaims according to Rules 12 and 13.

(5) Motion to strike, sever, or for separate trial. A party may move to strike the third-party claim, for severance, or for separate trial.

(6) By a third-party defendant. A third-party defendant may proceed under this rule against a nonparty who is or may be liable to the third-party defendant for all or part of the plaintiff's claim against the third-party defendant.

(b) By the plaintiff. When a counterclaim is asserted against a plaintiff, the plaintiff may bring in a third party under circumstances entitling a defendant to do so under this rule.

(c) Admiralty and maritime claims. [Omitted].

[Former Rule 14 deleted effective 5/1/82; new Rule 14 adopted effective 7/1/86.]

Advisory Committee Historical Note

Effective 7/1/86, a new Rule 14 was adopted. 486-90 So. 2d XVII (West Miss. Cas. 1986).

Effective 5/1/82, Rule 14 was abrogated. 410-16 So. 2d XXI (West Miss. Cas. 1982).

Advisory Committee Notes

It is essential that a third-party defendant's liability for a third-party plaintiff's claim be derivative or secondary. Impleader is unavailable for asserting an independent action by the defendant against a third party even if the claim arose out of the same transaction or occurrence as the main one. But once a third-party claim is properly asserted, the third-party plaintiff may assert additional claims against the third-party defendant under Rule 18(a).

The requirement of derivative or secondary liability may be met, for example, by alleging a right of contractual or other indemnity, contribution, subrogation, or warranty. But the rule does not create derivative or secondary rights. It merely provides a procedure for expediting consideration of derivative or secondary rights available under substantive law.

An insured party has a derivative claim for indemnity against the insured party's liability insurer; the insured party may implead the party's liability insurer if sued for

damages allegedly covered by the liability policy and if the insurer disclaims coverage under the liability policy.

A defendant subject to joint and several liability for a plaintiff's damages may have a claim against joint tortfeasors for contribution. The fact that in Mississippi liability for damages imposed in civil cases based on "fault" is generally several only rather than joint and several obviates the need or basis for contribution claims. But under Miss. Code Ann. § 85-5-7(4), "[j]oint and several liability shall be imposed on all who consciously and deliberately pursue a common plan or design to commit a tortuous act, or actively take part in it." The statute also states that "[a]ny person held jointly and severally liable under this section shall have a right of contribution from . . . fellow defendants acting in concert." As a result, a defendant held jointly and severally liable for acting in concert has a right of contribution against codefendants also acting in concert.

A first-party insurer against loss sued by its policyholder for the loss has a derivative claim for subrogation against the person who allegedly caused it; the insurer may implead the person where a right of subrogation would arise if the insurer paid the insured plaintiff's claim.

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

Unlike the analogous federal rule, Rule 14 of the Mississippi Rules of Civil Procedure requires a defending party to obtain the court's authorization based on a showing of good cause before serving a summons and third-party complaint on a nonparty. Under Rule 14 of the Federal Rules of Civil Procedure, a defending party must obtain leave of court only if filing a third-party complaint more than 14 days after serving the original answer.

Rule 15. Amended and supplemental pleadings.

(a) Amendments.

(1) As a matter of course. A party may amend a pleading as a matter of course:

(A) Before a responsive pleading is served; or
(B) Within 30 days of service if:

(i) No responsive pleading is allowed; and
(ii) The action has not been set for trial.

(2) When Rule 12 motion granted. When a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted or a Rule 12(c) motion for judgment on the pleadings is granted, as long as matters outside the pleadings are not presented at the motion hearing, leave to amend must be granted when justice so requires on conditions and within a time period the court decides.

(3) When otherwise. Otherwise, a party may amend a pleading only by leave of court or on the adverse party's written consent of the adverse party; leave must be freely given when justice requires it.

(4) Response to amended pleading. Unless the court orders otherwise, a party must plead in response to an amended pleading within the longer of:

(A) The time remaining for responding to the original pleading; or
(B) 10 days after the amended pleading is served.

(b) Amendment to conform to the evidence. Issues not raised by the pleadings tried by express or implied consent of the parties must be treated in all respects as if they had been raised in the pleadings.

(1) When. Amending the pleadings as may be necessary to conform to the evidence and to raise these issues may be requested in a party's motion, including after judgment. But failing to do so does not affect the result of the trial of these issues.

(2) Trial objection. At trial, if evidence is objected to as outside issues asserted in the pleadings, the court may allow the pleadings to be amended. The court must do so freely if presenting the merits of the action will be subserved and if the

objecting party fails to show admitting the evidence would prejudice maintaining the action or defense on the merits.

(A) Continuance. The court may grant a continuance to enable the objecting party to meet the evidence.

(3) Amendment when justice so requires. A court should liberally grant permission to amend when justice so requires.

(c) Relation back.

(1) Same conduct, transaction, or occurrence. When the claim or defense in an amended pleading arose out of the conduct, transaction, or occurrence stated or attempted to be stated in the original pleading, the amendment relates back to the date of the original pleading.

(2) Amending party. An amendment changing the party against whom a claim is asserted relates back if it arose out of the conduct, transaction, or occurrence stated or attempted to be stated in the original pleading and if within the period stated in Rule 4(h) for serving the summons and complaint the party to be brought in by amendment:

(A) Has received notice of the institution of the action to the extent the party will not be prejudiced in maintaining the party's defense on the merits; and
(B) Knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

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

(d) Supplemental pleading. On a motion, reasonable notice, and just terms, the court may allow a party to serve a supplemental pleading stating transactions, occurrences, or events that have happened since the date of the original pleading.

(1) Permission may be granted even though the original pleading is defective in stating a claim for relief or a defense.
(2) If the court requires the adverse party to plead in response to the supplemental pleading, it must order the party to do so and specify the time for pleading.

[Amended effective 7/1/98; amended effective 4/17/03 to allow amendments on dismissal under Rule 12(b)(6) or judgment on the pleadings under Rule 12(c) where the court decides that justice so requires.]

Advisory Committee Historical Note

Effective 7/1/98, Rule 15(c) was amended to state that the relation back period includes the time allowed for service of process under Rule 4(h).

Advisory Committee Notes

Unlike the analogous federal rule, Mississippi Rule of Civil Procedure 15(a) places no limit on the number of amendments as a matter of course; the federal rule allows a party to amend the pleading only once as a matter of course.

Rule 16. Pretrial procedure.

(a) Pretrial conference.

(1) When. On its own or a party's motion, the court may order the parties' attorneys to appear at least 20 days before trial for one or more pretrial conferences. And must do so on a motion by all parties.

(2) Purpose; court action. At a pretrial conference, the court and parties may consider the following subject matter, and the court may take appropriate action regarding it:

(A) The possibility of settling the action;
(B) Simplifying the issues;
(C) Amending the pleadings if desirable or necessary;
(D) Itemizing expenses and special damages;
(E) Limiting the number of expert witnesses;
(F) Exchanging reports by expert witnesses expected to testify at trial;
(G) Exchanging medical reports, medical records, billing records, and similar documents to the extent doing so does not waive the physician-patient privilege;
(H) Referring matters to a master;
(I) Imposing Rule 37 sanctions;
(J) Obtaining admissions and stipulations about facts, documents, and other exhibits to avoid unnecessary proof;
(K) Proposing jury instructions or findings of fact and conclusions of law subject to subsequent amendments or supplements as justice may require; and
(L) Other matters that may aid in disposing of the action.

(b) Pretrial order.

(1) After a pretrial conference, the court may issue an order regarding all action taken at it, including:

(A) Amendments to the pleadings;
(B) Agreements made by the parties as to other matters considered at the pretrial conference;
(C) Limiting issues for trial to those not disposed of by admissions or agreements of counsel; and

(D) Other similar subject matter.

(2) The order controls the action's course unless the court modifies it to prevent manifest injustice.

[Amended effective 3/1/89; 4/13/00.]

Advisory Committee Historical Note

Effective 4/13/00, Rule 16 was amended to allow the conference to be held on the court's motion. 753-54 So. 2d. XVII (West Miss. Cas.. 2000.)

Effective 3/1/89, Rule 16 was amended to abrogate provisions for a pretrial calendar. 536-38 So. 2d XXI (West Miss. Cas. 1989).

Rule 16A. Recusal motion.

A motion seeking a judge's recusal must be timely filed with the court. Procedures in the Uniform Rules of Circuit and County Court Practice or the Uniform Chancery Court Rules control a motion for recusal.

[Adopted, 4/4/02.]

Advisory Committee Historical Note [Rule 16A]

Effective 4/4/02, Rule 16A and the Advisory Committee Historical Note were adopted. 813-15 So. 2d LXXXI (West Miss. Cases 2002).

SECTION 4. PARTIES

Rule 17. Plaintiff and defendant; capacity.

(a) Real party in interest.

(1) Who may sue. An action must be prosecuted in the name of the real party in interest. The following may sue in a representative capacity without joining the party for whose benefit the action is brought:

(A) An executor;
(B) An administrator;
(C) A guardian;
(D) A bailee;
(E) A trustee;
(F) A party with whom or in whose name a contract has been made for the benefit of another; or
(G) A party authorized by statute.

(2) Not basis for dismissal. The court may not dismiss an action on grounds it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for the real party in interest's ratification, joinder, or substitution. The real party in interest's ratification, joinder, or substitution has the same effect as if the action had been commenced in the name of the real party in interest.

(b) Subrogation case. In a subrogation case, regardless of whether subrogation has occurred by operation of law, assignment, loan receipt, or otherwise, the action must be brought in the subrogee's name if the subrogor no longer has a pecuniary interest in the claim

(1) If the subrogor still has a pecuniary interest in the claim, the action must be brought in the subrogor's and subrogee's names.

(c) Infant; legal disability. When a party is an infant or is under legal disability and has a representative duly appointed under Mississippi law or the laws of a foreign state or country, the representative may sue or defend on behalf of that party.

(1) Guardian ad litem. An unrepresented party defendant who is an infant or under legal disability may be represented by a guardian ad litem appointed by the court when necessary for protecting that defendant's interest. The guardian ad litem must:

(A) Be a Mississippi resident;
(B) File consent and oath with the clerk; and
(C) Give bond as the court may require.

(2) The court may issue other orders proper for protecting the defendant.

(3) When an unborn or unconceived person's interest is before the court, the court may appoint a guardian ad litem for that person's interest.

(4) If an infant or incompetent person does not have a duly appointed representative, the person may sue by a next friend.

(d) When guardian ad litem required; selection. When a guardian ad litem is required, the court where the action is pending:

(1) Must appoint an attorney to serve in that capacity;
(2) Order payment of a reasonable fee or compensation to the guardian ad litem for rendered services; and
(3) Require the guardian ad litem's fee or compensation to be taxed as part of costs in the action.

(e) Public officer. When a public officer sues or is sued in an official capacity, the person may be described as a party by official title rather than by name. But the court may require the officer's name to be added.

Rule 18. Joinder: claims; remedies.

(a) Joinder of claims. A party asserting a claim, counterclaim, crossclaim, or third-party claim may join either as independent or alternate claims as many claims as the party has against an opposing party.

(b) Joinder of remedies. Prior to these rules, if a claim was cognizable only after another one was prosecuted to conclusion, the two claims may be joined in a single action. But the court must grant relief in that action only according to the parties' substantive rights.

Advisory Committee Notes

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

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

Rule 19. Required joinder of parties.

(a) Persons to be joined if feasible. A person subject to the court's jurisdiction must be joined as a party in the action if:

(1) In the person's absence complete relief cannot be accorded among those already parties; or

(2) The person claims an interest relating to the subject of the action and is so situated that disposing of it in the person's absence may:

(A) As a practical matter impair or impede the person's ability to protect that interest; or

(B) Subject an existing party to substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the person's claimed interest.

(3) If the person has not been joined as required, the court must order that the person be made a party. A person who should join as a plaintiff but refuses to do so may be made a defendant or if proper, an involuntary plaintiff.

(b) When joinder is not feasible. If a person in Rule 19(a) cannot be joined, the court must decide whether in equity and good conscience the action should proceed among existing parties or be dismissed because the absent person is indispensable. The factors for the court to consider include:

(1) To what extent a judgment rendered in the person's absence might be prejudicial to that person or those already parties;

(2) The extent to which protective provisions in the judgment, shaping of relief, or other measures can lessen or avoid the prejudice;

(3) Whether a judgment rendered in the person's absence will be adequate; and

(4) Whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) Pleading nonjoinder. To the extent known to the pleader, a pleading asserting a claim for relief must state the names of persons in Rule 19(a) who are not joined and the reasons why.

Advisory Committee Notes

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

There are at least four main questions to be considered under Rule 19: (1) the plaintiff's interest in having a forum; (2) the defendant's interest in avoiding multiple litigation, inconsistent relief, or sole responsibility for liability shared with another; (3) an outsider's interest in joinder; and (4) the court's and public's interest in completely, consistently, and efficiently settling controversies. This list is by no means exhaustive or exclusive; pragmatism controls.

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

Rule 20. Permissive joinder of parties.

(a) Persons who may be joined.

(1) Plaintiffs. Persons may join in one action as plaintiffs if:

(A) They assert a right to relief jointly, severally, or alternatively with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and

(B) A question of law or fact common to all of them will arise in the action.

(2) Defendants. Persons may join in one action as defendants if:

(A) A right to relief is asserted against them jointly, severally, or alternatively with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and

(B) A question of law or fact common to all defendants will arise in the action.

(3) Neither a plaintiff nor a defendant needs to be interested in obtaining or defending against all demanded relief. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief and against one or more defendants according to their respective liabilities.

(b) Separate trials. The court may prevent a party from being embarrassed, delayed, or subjected to expense if no claim is asserted against or by the party. The court may also order separate trials or otherwise prevent delay or prejudice.

[Amended 2/20/04 to make rule gender neutral.]

Advisory Committee Notes

Rule 20(a) allows joinder in a single action of all persons asserting or defending against a joint, several, or alternative right to relief if (1) that right arises out of the same transaction or occurrence or series of transactions or occurrences and (2) presents a common question of law or fact. The phrase “transaction or occurrence” requires the existence of a distinct litigable event linking the parties. Rule 20(a) simply establishes a procedure under which several parties’ demands arising out of the same litigable event may be tried together and avoids the court and parties’ unnecessary loss of time and money due to duplicate presentation of evidence relating to facts common to more than one demand for relief.

Joinder of parties under Rule 20(a) is not unlimited as is joinder of claims under Rule 18(a). Rule 20(a) imposes two specific prerequisites to joinder of parties: (1) a right to relief must be asserted by or against each plaintiff or defendant relating to or arising out of the same transaction, occurrence, or the same series of transactions or occurrences; and (2) some question of law or fact common to all the parties will arise in the action. Both of these requirements must be satisfied under Rule 20(a). *See Am. Bankers, Inc. of Florida v. Alexander*, 818 So. 2d 1073, 1078 (Miss. 2001).

But even if the transaction requirement cannot be satisfied, the possibility always exists that under proper circumstances, separate actions can be instituted and then consolidated for trial under Rule 42(a) if there is a question of law or fact common to all parties. *See Stoner v. Colvin*, 2110 So. 2d 920, 924 (1959) (courts of general jurisdiction have inherent power to consolidate actions when called for by the circumstances). If Rule 20 criteria are otherwise met, the court should consider whether different injuries, different damages, different defensive postures, and other individualized factors will be so dissimilar as to make managing Rule 20 consolidated cases impractical. *See Illinois Cent. R.R. Co. v. Travis*, 808 So. 2d 928, 934 (Miss. 2002) (citing *Demboski v. CSX Transp., Inc.*, 157 F.R.D. 28 (S.D. Miss. 1994)).

In order to allow the court to promptly decide whether joinder is proper, the factual basis for joinder should be fully disclosed as early as practicable, and motions questioning joinder should be filed where possible sufficiently early to avoid delaying the proceedings.

Rule 21. Misjoinder and nonjoinder of parties.

Misjoinder of parties is not a basis for dismissing an action. Parties may be dropped or added by court order on a party's motion or the court on its own at any stage of the action and on terms that are just. A claim against a party may be severed and proceeded with separately.

Advisory Committee Notes

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

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

Rule 22. Interpleader.

(a) Plaintiff or defendant.

(1) Plaintiff. When the plaintiff is or may be exposed to double or multiple liability, a person with a claim against the plaintiff may be joined as a defendant and required to interplead.

(A) Joinder is proper even though:

(i) The claims of the several claimants or the titles on which their claims depend lack a common origin, are adverse to and independent of one another rather than identical; or

(ii) The plaintiff denies liability in whole or in part to one or more claimants.

(2) Defendant. A defendant exposed to similar liability may seek interpleader by way of crossclaim or counterclaim.

(3) Relation to Rule 20. This rule supplements and does not limit joinder of parties in Rule 20.

(b) Release from liability; deposit or delivery.

(1) A party seeking interpleader under Rule 22(a):

(A) May deposit the claimed amount with the court;
(B) Deliver claimed property to the court; or
(C) Deliver claimed property as the court otherwise orders.

(2) The court may discharge the party from liability as to those claims, and the action continues between claimants of the money or property.

Advisory Committee Notes

The protection afforded by interpleader takes several forms. Most significantly, it prevents a stakeholder from being obligated to decide at the stakeholder's peril which claimant has the better claim. When the stakeholder has no interest in the fund, interpleader forces the claimants to contest what essentially is a controversy between them without

embroiling the stakeholder in the litigation over the merits of the respective claims. Even if the stakeholder wholly or partly denies liability as to one or more claimants, interpleader still protects the stakeholder from multiple suits and liability that could result from adverse determinations in different courts. As a result, interpleader can be employed to reach an early and effective determination of disputed questions while saving the parties from trouble and expense. Like other liberal joinder provisions in these rules, interpleader benefits the judicial system by condensing numerous individual actions into a single comprehensive unit while saving court time and energy.

Interpleader also can be used to protect claimants by bringing them together in one action and by reaching an equitable division of a limited fund. This situation frequently arises when the insurer of an alleged tortfeasor is faced with claims aggregating more than its liability under the policy. If an insurance company were required to wait until claims were reduced to judgment, the first claimant to obtain a judgment or to negotiate a settlement might appropriate all or a disproportionate share of the fund before other claimants established their claims. The resulting difficulties a race to judgment poses for the insurer and unfairness to some claimants are among principal evils the interpleader device intends to remedy.

An additional advantage of interpleader to the claimant is that it normally involves a deposit of disputed funds or property in court. The deposit eliminates much of the delay and expense often associated with enforcing a money judgment.

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

Interpleader ordinarily is conducted in two “stages.” First, the court hears evidence to decide whether the plaintiff is entitled to interplead the defendants. Second, the court decides adverse claims on the merits and if appropriate, an interested stakeholder’s rights.

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

But an inflexible rule that the proceeding must be divided into two stages does not exist. The entire action may be disposed of at one time in cases where, for example, the

stakeholder has not moved to be discharged or has remained in the action by reason of an interest in it. In the event that deciding the second one does not resolve another dispute between the stakeholder and prevailing claimant or among prevailing claimants, there may even be a third stage.

Trial during stages later than the first is also appropriate for counterclaims raised by the claimants like those alleging an independent liability and for crossclaims between claimants which are appropriate for resolving in the course of interpleader proceedings.

Rule 23. Class actions. [Omitted].

Rule 23.1. Shareholder derivative actions. [Omitted].

Rule 23.2. Actions relating to unincorporated associations. [Omitted].

Rule 24. Intervention.

(a) Intervention of right.

(1) When. On a timely motion, anyone must be allowed to intervene in an action:

(A) When a statute confers an unconditional right to intervene; or

(B) When the movant claims an interest relating to the property or transaction which is the subject of the action, and as a practical matter, disposing of the action may impair or impede the ability to protect that interest unless existing parties adequately represent it.

(b) Permissive intervention.

(1) When. On a timely motion, anyone may be allowed to intervene in an action:

(A) When a statute confers a conditional right to intervene; or

(B) When a common question of law or fact exists between a movant's claim or defense and the main action.

(2) Government officer or agency: when; factors to consider.

(A) When. An officer or agency may intervene in the action on a timely motion when a party's claim or defense relies:

(i) On a statute or executive order administered by a federal or state governmental officer or agency; or

(ii) On a regulation, order, requirement, or agreement issued or made under the statute or executive order.

(B) Factors to consider. In exercising discretion, the court must consider whether the intervention will unduly delay or prejudice adjudicating the original parties' rights.

(c) Procedure.

(1) Motion; service. A person seeking to intervene must serve a motion to intervene on the parties under Rule 5.

(2) Form. The motion must state the grounds for it and be accompanied by a pleading stating the claim or defense for which intervention is sought.

(3) Statutory right. The same procedure must be followed when a right to intervene is based on a statute.

(d) Intervention by state. A party asserting a statute is unconstitutional must notify the Mississippi Attorney General within enough time to afford an opportunity to intervene and argue that question in an action:

(1) To restrain or enjoin enforcement, operation, or execution of a Mississippi statute by restraining or enjoining the action of a state officer; political subdivision; or agency, board, or commission acting under state law where a claim that the statute is unconstitutional is asserted; or

(2) For Rule 57 declaratory relief that includes declaring or adjudicating the unconstitutionality of a Mississippi statute.

Advisory Committee Notes

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

A motion to intervene as of right or for permissive intervention under Rule 24(a) and Rule 24(b) must be timely. Rather than including specific time limits in the rule, trial courts should weigh the following four factors when deciding timeliness: (1) the length of time during which the would-be intervenor actually knew or should have known of an interest in the case before petitioning for leave to intervene; (2) the extent of prejudice existing parties to the litigation may suffer as a result of the would-be intervenor's failure to apply for intervention as soon as an interest in the case was actually known or reasonably should have been known; (3) the extent of prejudice the would-be intervenor may suffer if petition for leave to intervene is denied; and (4) the existence of unusual circumstances mitigating for or against deciding the motion is timely. *See Hood ex rel. State Tobacco Litig. v. State*, 958 So. 2d 790, 806 (Miss. 2007). A trial court has discretion to decide whether a motion to intervene is timely and will not be overturned on appeal absent an abuse of discretion.

Rule 25. Substituting parties.

(a) Death.

(1) Substitution if not extinguished. If a party's death does not extinguish a claim, on a motion to do so, the court must order substitution of the proper parties.

(A) The motion for substitution may be filed by a party or the deceased party's successors or representatives. The motion and a notice of hearing must be served on nonparties and parties according to Rules 4 and 5.

(B) The action must be dismissed without prejudice as to the deceased party if the motion for substitution is not filed within 90 days after the death is suggested in the record by serving a statement of the fact of the death as stated in Rule 25(a)(1)(A).

(2) Continuation. After a party's death, if the right to be enforced survives only to or against remaining parties, the action does not abate. The death must be suggested in the record, and the action must proceed in favor of or against the surviving parties.

(b) Legal disability. If a party comes under legal disability, on a motion served as stated in Rule 25(a)(1)(A), the court may allow the action to be continued by or against the party's representative.

(c) Transferring interest. If an interest is transferred, the action may be continued by or against the original party unless on a motion served as stated in Rule 25(a)(1)(A) the court directs the transferee to be substituted or joined in the action.

(d) Death or separation of public officer. When a public officer is a party to an action in an official capacity and dies, resigns, or otherwise ceases to hold the office while the action is pending, the action does not abate, and the officer's successor is automatically substituted as a party. Following the substitution, proceedings must be in the party's name, but a misnomer not affecting the parties' substantial rights must be disregarded. The court may order substitution at any time; failing to do so does not affect substitution.

Advisory Committee Notes

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

531, 536 (Miss. 2013). Although the rule requires the suggestion of death to be served on a nonparty according to Rule 4, it does not indicate which nonparty must be served with the suggestion of death to trigger the 90-day time period. An interested nonparty must be served if the nonparty's rights may be cut off by the 90-day limit. *See Hurst v. SW Miss. Legal Servs.*, 610 So. 2d 374, 386 (1992) (defendant's failure to serve named executrix of deceased plaintiff's estate with suggestion of death rendered it ineffective even though executrix may have had actual notice of suggestion of death); *Knesal*, 113 So. 3d at 537 (defendant–counterplaintiff properly served with suggestion of death could not argue failure to serve plaintiff–counterdefendant's nonparty successors rendered suggestion invalid because: (1) failure to serve did not affect opportunity to file motion to substitute; and (2) service on decedent's successor impossible because no existing estate or personal representative to serve). The rule contains no restriction on who may file and serve the suggestion of death; the decedent's lawyer may file and serve it. *Knesal*, 113 So. 3d at 538.

As general Rule 6(b) provisions apply to motions to substitute, the court may extend the period for substitution if timely requested. Likewise, the court may allow substitution after expiration of the 90-day period on a showing that failing to act earlier resulted from excusable neglect. *See id.* at 539.

If the named plaintiff was deceased when it was filed, the original complaint is null and void, and the real party in interest cannot be substituted as the proper plaintiff because no valid action was ever commenced.

SECTION 5. DISCOVERY

Rule 26. General provisions governing discovery.

(a) Methods. Unless the court orders otherwise under Rule 26(c) or (d), the frequency of discovery methods is unlimited. Parties may obtain discovery by one or more of the following methods:

(1) Deposition by oral examination;
(2) Deposition by written questions;
(3) Written interrogatories;
(4) Production of documents or things;
(5) Permission to enter onto land or other property for inspection and other purposes; and
(6) Requests for admission.

(b) Scope. Unless the court orders otherwise according to these rules, the scope of discovery is as follows:

(1) In General.

(A) A party may obtain discovery regarding a nonprivileged matter:

(i) Relevant to a party's claim or defense; and
(ii) Proportional to the needs of the case.

(B) Whether a nonprivileged matter is proportional to the needs of the case depends on:

(i) The importance of the issues at stake in the action;
(ii) The amount in controversy;
(iii) The parties' relative access to relevant information;
(iv) The parties' resources;
(v) The importance of the discovery in resolving the issues; and
(vi) Whether the burden or expense of the proposed discovery outweighs its likely benefit.

(C) The discovery may include:

(i) The existence, description, nature, custody, condition, and location of books, documents, electronic data, magnetic data, or other tangible things;

(ii) The identity and location of persons having knowledge of a discoverable matter; and

(iii) The identity and location of persons who may be called as witnesses at trial.

(D) Information within this scope of discovery does not need to be admissible in evidence to be discoverable.

(2) Insurance agreement. A party may obtain discovery of an insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment. The information is not by reason of disclosure admissible in evidence at trial. For purposes of Rule 26(b)(2), an application for insurance is not part of an insurance agreement.

(3) Trial preparation: materials.

(A) Documents; tangible things. A party ordinarily may not discover documents and tangible things prepared in anticipation of litigation or for trial by or for another party or party's representative (including that party's attorney, consultant, surety, indemnitor, insurer, or agent). But subject to Rule 26(b)(4), those materials may be discovered if:

(i) Otherwise discoverable under Rule 26(b)(1); and

(ii) The party shows substantial need of the materials to prepare that party's case and is unable without undue hardship to obtain their substantial equivalent by other means.

(B) Protection against disclosure. If a court orders discovery of those materials on the required showing, it must protect against disclosing mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(C) Previous statement. A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. A nonparty may request and obtain without the required showing a statement concerning the action or its subject matter previously

made by that nonparty. If the request is refused, the person may move for a court order, and Rule 37(a)(4) applies to an award of expenses. For purposes of Rule 26(b)(3)(C), a statement previously made is:

(i) A written statement signed or otherwise adopted or approved by the person making it; or

(ii) A contemporaneous stenographic, mechanical, electrical, or other recording or a transcription of one that recites substantially verbatim the person's oral statement.

(4) Trial preparations: experts. A party may obtain discovery of facts known and opinions held by experts otherwise discoverable under Rule 26(b)(1) and acquired or developed in anticipation of litigation or for trial only as follows:

(A) A party may require another one to provide the following information through interrogatories; otherwise, a party must file a motion, and subject to scope restrictions and other rules—including Rule 26(b)(4)(C) concerning appropriate fees and expenses—the court may order additional discovery as it may deem appropriate:

(i) Each person the other party expects to call as an expert witness at trial;

(ii) The subject matter on which the expert is expected to testify;

(iii) The substance of the facts and opinions to which the expert is expected to testify; and

(iv) A summary of the grounds for each opinion.

(B) Experts employed only for trial preparation. A party ordinary may not discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) On a showing of exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result:

(i) The court must require the party seeking discovery to pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) and (b)(4)(B);

(ii) The court may require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred in obtaining facts and opinions from the expert under Rule 26(b)(4)(A); and

(iii) The court must require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred in obtaining facts and opinions from the expert under Rule 26(b)(4)(B).

(5) Electronic data. To obtain discovery of data or information that exists in electronic or magnetic form, the requesting party must specifically request its production and specify the form in which it should be produced.

(A) The responding party must produce:

(i) All electronic or magnetic data;
(ii) That is responsive to the request; and
(iii) That is reasonably available to the responding party in its ordinary course of business.

(B) If the responding party cannot reasonably retrieve the requested data or information or produce it in the requested form, the responding party must state so in an objection complying with these rules.

(i) If the court requires the responding party to comply, it may also order the requesting party to pay reasonable expenses for extraordinary steps required to retrieve and produce the information.

(c) Discovery conference. The court may hold a discovery conference at any time and must do so if a party requests one.

(1) Content; objection. A party's request must certify counsel has conferred or made reasonable efforts to do so concerning matters stated in the request and must include:

(A) A statement of the issues to be tried;
(B) A discovery plan and schedule;
(C) Discovery limitations; and

(D) Other proposed discovery orders.

An objection or addition to the requested items must be served and filed within 10 days after the request is served.

(2) Discovery order. Following the discovery conference, the court must issue an order:

(A) Stating the issues to be tried;
(B) Establishing a discovery plan and schedule;
(C) Containing discovery limitations; and
(D) Deciding other similar matters, including allocating expenses, as necessary for proper case management of discovery.

(3) Rule 16 pretrial conference. Subject to a party's right to move for a prompt discovery conference under Rule 26(c)(1), the court may combine the discovery conference with a Rule 16 pretrial conference.

(4) Sanctions. Unless good cause exists, if a party or attorney fails to cooperate in framing an appropriate discovery plan by agreement, the court may impose sanctions.

(5) Amendment. The court may alter or amend a Rule 26(c) order on a showing of good cause.

(d) Protective order. A party or person from whom discovery is sought may move for a protective order. The motion should be filed with the court where the action is pending or with the court that issued a deposition subpoena.

(1) For good cause show, the court may issue an order justice requires to protect the party or person from annoyance, embarrassment, oppression, undue burden, or undue expense, including one or more of the following:

(A) Forbidding the discovery;
(B) Specifying discovery terms and conditions, including time and place;
(C) Prescribing a discovery method other than the one selected by the requesting party;
(D) Prohibiting inquiry into certain matters or limiting the discovery scope to certain matters;

(E) Designating the persons who may be present while conducting the discovery;
(F) Sealing a deposition to be opened only by court order;
(G) Precluding disclosure of a trade secret or other confidential research, development, or commercial information or specifying the manner in which it is to be disclosed;
(H) Requiring specified documents or information to be filed simultaneously in sealed envelopes to be opened as the court directs; and
(I) An order justice requires to protect the party or witness from annoyance, embarrassment, oppression, undue burden, or undue expense, including that the requesting party pay expenses for a deposition or other discovery.

(2) If it partly or wholly denies the motion, the court—on just terms and conditions—may order that the party or person provide or allow the discovery. Rule 37(a)(4) applies to the award of expenses.

(e) Discovery sequence and timing. Unless the court orders otherwise on a motion for the convenience of parties and witnesses and the interests of justice, discovery methods may be used in any sequence, and the fact a party takes a deposition or conducts other discovery does not operate to delay another party's discovery.

(f) Supplementing responses. A party who has responded to a discovery request with a response that was complete when served does not have a duty to supplement it with information subsequently acquired except:

(1) A party has a duty to supplement a response in a timely manner with respect to a question directly addressed to:

(A) Identifying and locating persons:

(i) Having knowledge of discoverable matters; or
(ii) Who may be called as witnesses at trial; and

(B) Identifying:

(i) Each expert witness expected to testify at trial;
(ii) The subject matter on which the person is expected to testify; and
(iii) The substance of the testimony.

(2) A party has a duty to amend a prior response in a timely manner if failing to do so would be a knowing concealment and:

(A) The party learns the response was incorrect when served; or
(B) The party learns the response is no longer true.

(3) A party has a duty to supplement a response if imposed:

(A) By court order;
(B) By the parties' agreement; or
(C) By new requests to supplement prior responses prior to trial.

[Amended effective 3/1/89; 3/13/91; 4/13/00. Amended effective 5/29/03 to add Rule 26(5) addressing discovery of electronic data.]

Advisory Committee Historical Note

Effective 4/13/00, Rule 26(c) was amended to allow the court on its own motion to convene a discovery conference. 753-54 So. 2d XVII (West Miss. Cas. 2000).

Effective 3/13/91, Rule 26(b)(1)(ii) was amended to delete witnesses' oral testimony from the list of matter that a party might discover. Rule 26(d) was amended to state that the court issuing a deposition subpoena could enter a protective order. 574-76 So. 2d XXIII (West Miss. Cas. 1991).

Effective 3/1/89, Rule 26(b)(1) and Rule 26(f)(1) were amended to include identifying and supplementing prior identifications of those who may be called as witnesses at trial in addition to experts. 536-38 So. 2d XXIV (West Miss. Cas. 1989).

Rule 27. Depositions to perpetuate testimony.

(a) Before action.

(1) Petition. A person seeking to perpetuate testimony about a matter cognizable in a Mississippi court may file a verified petition in circuit or chancery court in the county where an expected adverse party resides. The petition must ask for an order authorizing the petitioner to depose persons named in it to perpetuate their testimony, be titled in the petitioner's name, and show:

(A) The petitioner expects to be a party to an action cognizable in a Mississippi court but cannot at the time bring the action or cause it to be brought;
(B) The subject matter of the expected action and the petitioner's interest in it;
(C) The facts the person wants to establish by the proposed testimony and the reasons to perpetuate it;
(D) The names of persons expected to be adverse parties or a description of them and their addresses if known;
(E) The names and addresses of each deponent; and
(F) The substance of testimony the petitioner expects to elicit from each deponent.

(2) Notice; service. The petitioner must serve each person named in the petition as an expected adverse party with a copy of the petition and notice stating the hearing time and place.

(A) At least 20 days before the hearing date, the notice must be served according to Rule 4.
(B) If an expected adverse party named in the petition cannot be served after due diligence, the court may order service by publication or otherwise.
(C) For persons not served under Rule 4, the court must appoint an attorney to represent them and cross-examine the deponent if a person is not otherwise represented.

(3) Order; examination.

(A) If satisfied perpetuation of the testimony may prevent a failure or delay of justice, the court must:

(i) Designate or describe the deponent;
(ii) Specify the examination subject matter; and

(iii) State whether a deposition will be taken by oral examination or written interrogatories.

(B) A deposition may then be taken according to these rules, and the court may issue a Rule 34 order.

(C) For the purpose of applying these rules to a deposition for perpetuating testimony, each reference to the court where the action is pending refers to the court where the petition seeking the testimony was filed.

(4) Deposition use. A deposition to perpetuate testimony may be used in a subsequent circuit, chancery, or county action involving the same subject matter according to Rule 32(a).

(b) Pending appeal. If a judgment is appealed or before the time to do so expires, the court that rendered it may allow witness depositions to perpetuate their testimony in additional proceedings. The party wanting to perpetuate the testimony may move for leave to take the deposition.

(1) Rule 27(a)(2) notice and service requirements apply as if the action were pending in the court.

(2) The motion must show:

(A) The names and addresses of each deponent;
(B) The substance of testimony the petitioner expects to elicit from each deponent; and
(C) The reasons for perpetuating their testimony.

(3) On finding perpetuation of the testimony is proper to avoid a failure or delay of justice, the court may allow the deposition to be taken and issue a Rule 34 order. The deposition may be taken and used in the same manner and under the same conditions as these rules prescribe for depositions taken in pending actions.

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

Rule 28. Persons before whom depositions may be taken.

(a) Within the United States. Within the United States, a territory, or an insular possession subject to United States jurisdiction, a deposition must be initiated by an oath or affirmation administered to the deponent by:

(1) An officer authorized to administer oaths by federal law or the law in the examination place; or
(2) A person the court where the action is pending appoints to administer oaths and to take testimony.

(b) In a foreign country.

(1) In a foreign country, a deposition may be taken:

(A) On notice before a person authorized to administer oaths by federal law or the law of the examination place;
(B) Before a person commissioned by the court to administer a necessary oath and to take testimony; or
(C) According to a letter rogatory.

(2) On a motion, notice, and just and appropriate terms, a commission or letter rogatory must be issued.

(A) Showing that taking the deposition in another manner would be impracticable or inconvenient is not required to have a commission or letter rogatory issued.
(B) Both a commission and letter rogatory may be issued in proper cases.
(C) A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title.
(D) A letter rogatory may be addressed to "To the Appropriate Authority in (name of country)." Evidence obtained in response to a letter rogatory does not need to be excluded merely because it is not a verbatim transcript, because the testimony was not taken under oath, or because of a similar departure from requirements for depositions taken within the United States under these rules.

(c) Disqualification. A deposition must not be taken before a person who is:

(1) A party's relative, employee, attorney, or counsel;

(2) A relative or employee of a party's attorney or counsel; or
(3) Financially interested in the action.

Rule 29. Stipulations about discovery procedure.

Unless the court orders otherwise, the parties may stipulate in writing:

(a) That a deposition taken before a person, at any time or place, on any notice, and in any manner, may be used like other depositions; and

(b) To modifying procedures in these rules for other discovery methods except that extending time for Rule 33, 34, and 36 discovery responses requires court approval.

Rule 30. Depositions by oral examination.

(a) When a deposition may be taken.

(1) Without leave. A party may depose a party or person by oral examination without leave of court.

(2) With leave. Leave of court granted with or without notice must be obtained only:

(A) If the plaintiff seeks to take a deposition prior to 30 days after a defendant is served with the summons unless:

(i) A defendant has served a deposition notice other discovery; or
(ii) Special notice is given under Rule 30(b)(2).

(B) The deposition of a person confined in prison may be taken only by leave of court on terms it orders.

(3) Subpoena. Witness attendance may be compelled by subpoena.

(b) General and special notice requirements; nonstenographic recording; production of documents and things; deposition of organization.

(1) Notice.

(A) A party wanting to depose a person by oral examination must give reasonable written notice to all parties stating:

(i) The time and place of the deposition;
(ii) The name and address of each deponent if known; and
(iii) If the name is unknown, a general description sufficient to identify the deponent or the particular class or group to which the person belongs.

(B) If the deponent is served with a document subpoena, the materials designated in the subpoena to be produced must be attached to the notice or included in it.

(C) A notice may provide for deposition by telephone.

(D) If necessary to ensure the full right to examination, on a party's motion, the court where the action is pending may require the deposition to be taken in the deponent's presence.

(2) Special notice.

(A) The plaintiff does not have to seek leave of court if the notice:

(i) States that the deponent is about to go out of state and will be unavailable unless deposed within the 30-day period; and
(ii) States facts supporting the statement.

(B) The plaintiff's attorney must sign the notice, and the signature constitutes certification that the statement and supporting facts are true to the best of the attorney's knowledge, information, and belief.

(C) On a showing that Rule 30(b)(2) special notice was served but that after exercising diligence, a party was unable to obtain counsel for representation at the deposition, the deposition may not be used against that party.

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

(4) Nonstenographic recording. The deposition notice required under Rule 30(b)(1) may state testimony will be recorded by nonstenographic means.

(A) A deposition notice stating testimony will be recorded by nonstenographic means must designate the manner in which the deposition will be recorded and preserved.

(B) A court may require stenographic means if necessary to ensure accuracy.

(i) A party's motion to require stenographic means must be addressed to the court where the action in pending.
(ii) A motion by a witness to require stenographic means may be addressed to the court in the jurisdiction where the deposition is taken.

(5) Production of documents and things. Notice to a party deponent may be accompanied by a Rule 34 request for production of documents and tangible things at the deposition. Rule 34 applies to the request.

(6) Deposition of organization. In a deposition notice or subpoena, a party may name as the deponent a governmental agency or a public or private corporation, partnership, or association.

(A) The notice or subpoena must describe with reasonable particularity the matters on which examination is requested.

(B) The named organization must designate one or more officers, directors, managing agents, or other persons who consent to testify on its behalf.

(i) For each designated person, the organization may state the matters on which the person will testify.
(ii) A subpoena must advise a nonparty organization of its duty to designate one or more officers, directors, managing agents, or other persons who consent to testify on its behalf.
(iii) The designated persons must testify as to matters known or reasonably available to the organization.

(C) Rule 30(b)(6) does not preclude taking a deposition by another procedure authorized in these rules.

(7) For purposes of Rules 30, 28(a), 37(a)(1), 37(b)(1), and 45(b), a deposition must be considered to occur in the county where the deponent is physically present to answer questions propounded to him.

(c) Examination and cross-examination; examination record; objections.

(1) Examination; cross-examination. Witness examination and cross-examination may proceed as allowed at trial.

(2) Examination record. Witness testimony must be stenographically recorded or as stated Rule 30(b)(4). If requested by a party, testimony must be transcribed on payment of reasonable charges.

(3) Objections.

(A) Objections at the time of examination to the following must be noted on the record:

(i) Qualifications of the person taking the deposition;
(ii) The manner in which it is taken;
(iii) Evidence presented at it;
(iv) A party's conduct; and
(v) Other objections to the proceedings must be noted on the record.

(B) But the examination still proceeds, and evidence objected to must be taken subject to the objections.

(4) **Participation by written question.** Instead of participating in the oral examination, a party may serve written questions on the party taking the deposition. The party taking the deposition must propound them to the witness and see that the answers are recorded verbatim.

(d) Motion to terminate or limit examination.

(1) During the deposition, a party or deponent may move to terminate or limit the examination.

(A) On a showing the examination is conducted in bad faith or in an unreasonable manner to annoy, embarrass, or oppress the deponent/party, the court where the action is pending may order the officer conducting the examination to cease doing so.
(B) The court may also limit the deposition scope and manner under Rule 26(d).
(C) If the order terminates the examination, it may be resumed only on an order by the court where the action is pending.

(2) If demanded by the objecting party or deponent, the deposition must be suspended for the time necessary to move for an order. Rule 37(a)(4) applies to the award of expenses.

(e) Submission to witness; changes; signing. When testimony taken by stenographic means or nonstenographic means under Rule 30(b)(4) is to be used at a proceeding in the action, the transcription or recording must be submitted to the witness for examination unless otherwise waived by the witness and the parties.

(1) Changes in form or substance the witness wants to make must be entered on the transcription or in a writing accompanying the recording with a statement of the witness' reasons for making them.

(2) The party taking the deposition must promptly serve all parties with notice of the changes and reasons for them.

(3) The transcription or recording must then be affirmed in writing as correct by the witness unless the parties stipulate to waiving affirmation.

(4) If the witness does not affirm that the transcription or recording is correct within 30 days of submission, the reasons for the refusal must be stated under penalty of perjury on the transcription or in an accompanying writing by the party wanting to use transcription or recording.

(5) The transcription or recording may then be used as though affirmed in writing by the witness unless on a motion to suppress under Rule 32(d)(4), the court holds that the reasons for refusing affirmation require the deposition to be partly or wholly rejected.

(f) Certification; exhibits; copies; notice of filing.

(1) Certification. When a deposition is stenographically taken, the stenographer must certify under penalty of perjury on the transcript that the witness was sworn in the stenographer's presence and that the transcript is a true record of the witness' testimony.

(A) When a deposition is recorded by nonstenographic means under Rule 30(b)(4) and transcribed, the transcriber must certify under penalty of perjury on the transcript:

(i) The person heard that the witness was sworn on the recording; and

(ii) The transcript is a correct writing of the recording.

(B) A deposition certified according to this rule must be considered prima facie evidence of the witness' testimony.

(2) Exhibits. On a party's request, documents and things produced for inspection during witness examination must be marked for identification and annexed to the deposition. A party may inspect and copy them.

(A) When the person producing materials wants to retain the originals, the person may substitute copies for the originals or afford each party an opportunity to copy them.

(i) In the event the person producing them retains original materials, they must be marked for identification, and the person must afford each party the subsequent opportunity to compare a copy with the original.

(ii) The party must also retain the original materials for subsequent use in a proceeding in the same action.

(iii) A party may move for an order that the originals be annexed to and returned with the deposition to the court until final disposition of the case.

(3) Copies. On payment of reasonable charges, the stenographer or party taking the deposition under Rule 30(b)(4) must furnish a copy of the deposition to a party or deponent.

(4) Notice of filing. If the deposition is partly or wholly filed with the court, the party doing so must give prompt notice to all other parties.

(g) Failure to attend or to serve subpoena; expenses.

(1) A party failing to attend and proceed with a deposition the party noticed may be ordered to pay reasonable expenses, including reasonable attorney's fees, to another party if that party/party's attorney attends the deposition in person according to the notice.

(2) If a witness does not attend a deposition noticed by a party because the party failed to serve a subpoena on the witness, the party who noticed the deposition may be ordered to pay reasonable expenses, including reasonable attorney's fees, to another party if that party/party's attorney attends the deposition with the expectation the witness will be deposed.

(h) Expenses generally not treated as court costs. No part of deposition expenses other than serving subpoenas must be awarded, assessed, or taxed as court costs.

[Amended effective 3/1/89; 7/1/97.]

Advisory Committee Historical Note

Effective 7/1/97, Rule 30(b)(7) was amended to correct the reference to Rule 45. 689-92 So. 2d XLIX (West Miss. Cas. 1997).

Effective 3/1/89, Rule 30 was amended to abrogate the requirement that the party taking a deposition out of state pay certain expenses of the other party. 536-38 So. 2d XXV (West Miss. Cas. 1989).

[Amended effective 7/1/97.]

Rule 31. Depositions by written questions.

(a) Serving questions; notice. A party may depose a person or party by written questions. Witness attendance may be compelled by subpoena according to law. The deposition of a person confined in prison may be taken only by leave of court on terms it prescribes.

(1) A party wanting to take a deposition by written questions must serve all parties with the questions and a notice stating:

(A) The name and address of the deponent if known;
(B) If the name is unknown, a general description sufficient to identify the deponent or the particular class or group to which the person belongs; and
(C) The address and name or descriptive title of the officer before whom the deposition will be taken.

(2) The deposition of a public or private corporation, partnership, association, or governmental agency may be taken by written questions according to Rule 30(b)(6).

(3) Within 30 days after the notice and written questions are served, a party may serve cross-questions on all parties.

(4) Within 10 days after being served with cross-questions, a party may serve redirect questions on all parties.

(5) Within 10 days after being served with redirect questions, a party may serve re-cross questions on all parties.

(6) For cause shown, the court may enlarge or shorten the time.

(b) Officer to take responses and prepare record.

(1) The deposing party must deliver a copy of the notice and served questions to the officer designated in the notice.
(2) As stated in Rule 30(c), (e), and (f), the designated officer must promptly proceed to take the witness' testimony in response to the questions and to prepare, certify, and file or mail the deposition with the copy of the notice and questions received by the officer.

Rule 32. Deposition use in court proceedings.

(a) Deposition use. If a party was present or represented at a deposition or had reasonable notice of one, all or part of the deposition may be used against that party to the extent admissible under the rules of evidence applied as though the witness were then present and testifying according to the following:

(1) A party may use a deposition for contradicting or impeaching the deponent's testimony as a witness or other purpose allowed by the Mississippi Rules of Evidence.

(2) An adverse party may use the following for any purpose:

(A) A party's deposition; or
(B) Anyone's deposition if when taken, the person:

(i) Was an officer, director, managing agent, or person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party who is a governmental agency or a public or private corporation, partnership, or association.

(3) A party may use the deposition of a party or nonparty witness for any purpose if the court finds:

(A) That the witness is dead;
(B) That the witness is at a distance greater than 100 miles from the trial or hearing location;
(C) That the witness is out of the state unless it appears the party offering the deposition procured the witness' absence;
(D) That the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment;
(E) That the party offering the deposition has been unable to procure the witness' attendance by subpoena;
(F) That the witness is a medical doctor; or
(G) On a motion with notice, that the deposition should be used due to exceptional circumstances, in the interest of justice, and with due regard to the importance of presenting witness testimony orally in open court.

(4) If a party offers only part of a deposition in evidence, an adverse party may require the party to introduce another part which in fairness ought to be considered with the introduced part. A party may also introduce other parts.

(5) Substitution of parties does not affect the right to use depositions previously taken.

(6) When an action in a court has been dismissed, and another action involving the same subject matter is subsequently brought between the same parties, their representatives, or their successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter one as if originally taken for it.

(7) A deposition previously taken may also be used as the Mississippi Rules of Evidence allow.

(b) Objection to admissibility. Subject to Rule 28(b) and 32(d)(3), a party may object at a trial or hearing to receiving in evidence a deposition or part of one for a reason requiring evidence to be excluded if the witness were then present and testifying.

[Amended effective 10/21/99.]

(c) [Abrogated].

(d) Effect of deposition error and irregularity.

(1) Notice. All errors and irregularities in noticing a deposition are waived unless written objection is promptly served on the party noticing a deposition.

(2) Officer disqualification. Objections to taking a deposition because of disqualification of the officer before whom it is to be taken are waived unless asserted:

(A) Before the deposition begins; or
(B) If afterwards, as soon as the disqualification becomes known or could be discovered with reasonable diligence.

(3) Taking of deposition.

(A) An objection to the competency of a witness or to the competency, relevancy, or materiality of testimony is not waived by failing to make it before or during the deposition unless the grounds for the objection might have been obviated or removed if presented at that time.

(B) The following errors and irregularities at oral examination are waived unless objection is timely asserted at the deposition:

(i) The manner in which the deposition is taken;
(ii) The form of questions or answers;
(iii) The oath or affirmation;
(iv) The parties' conduct; and
(v) Errors of a kind which might be obviated, removed, or cured if promptly presented.

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

(4) Deposition completion and return. Errors and irregularities in the manner in which the testimony is transcribed or in which the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or part of it is filed with reasonable promptness after the defect is or with due diligence might have been ascertained.

[Amended effective 1/10/86; 3/1/89.]

Advisory Committee Historical Note

Effective 3/1/89, Rule 32 was amended by providing that the deposition of a medical doctor may be used by a party for any purpose. 536-38 So. 2d XXV (West Miss. Cas. 1989).

Effective 1/10/86, Rule 32 was amended by deleting references to the Mississippi Rules of Evidence; and Rule 32(c) [Effect of Taking or Using Depositions] was abrogated. 478-81 So. 2d XXIII (West Miss. Cas. 1986).

Advisory Committee Notes

Miss. R. Evid. 801(d)(1)(A) defines a prior inconsistent statement given under oath as nonhearsay and applies when a witness testifies at trial in a manner inconsistent with a previous sworn statement. The previous sworn statement, which may have been made during a deposition, is nonhearsay and admissible unless barred by another evidentiary rule. *See Craft v. State*, 656 So. 2d 1156, 1164 (Miss. 1995).

Miss. R. Evid. 804(b)(1) allows an unavailable witness' deposition testimony to be introduced. The deposition could have been taken in the same proceeding where it is offered or a different one. But the party against whom the deposition is offered must have had an opportunity and similar motive to develop the testimony. *See Naylor v. State*, 759 So. 2d 406, 410-11 (Miss. 2000).

If a deposition is offered into evidence at trial, the offering party's attorney is responsible for providing the court with a written transcript. In addition, if deposition audio or video is played for the jury, the offering party must provide the court with a true and correct copy of the audio or video recording. If the entire deposition is not admitted into evidence, both parties' attorneys should ensure the court reporter receives an accurate record indicating the specific deposition portions introduced into evidence. The record should refer to the page and line numbers of the written deposition transcript. The attorneys also should ensure the court reporter complies with the Guidelines for Court Reporters in the Mississippi Rules of Appellate Procedure. *See* Miss. R. App. P. app. 3 (regarding manner in which trial transcripts must be prepared and filed).

Rule 32(a) is inconsistent with Miss. R. Evid. 804(a) because Rule 32(a) authorizes the use of certain witness depositions at trial for any purpose even though not all witnesses are defined as "unavailable" according to Rule 804(a). Under Miss. R. Evid. 804(b), a witness' former testimony is not excluded as hearsay if the witness is unavailable. Under Miss. R. Evid. 1103, a court rule inconsistent with the Mississippi Rules of Evidence is repealed. In general, deposition testimony may be excluded if the witness is not "unavailable" under Miss. R. Evid. 804(a). *See, e.g.., Parmenter v. J & B Enters., Inc.*, 99 So. 3d 207, 219 (Miss. Ct. App. 2012) (affirming exclusion of clinical psychologist's deposition testimony because plaintiff failed to demonstrate witness was unavailable as required by Miss. R. Evid. 804(b)(1)).

Rule 33. Interrogatories to parties.

(a) Procedure. As a matter of right, a party may serve up to 30 written interrogatories on another party. The party to whom interrogatories are directed must answer them. If that party is a governmental agency or public or private corporation, partnership, or association, an officer or agent must answer the interrogatories and provide information available to the party.

(1) Each interrogatory must consist of a single question.
(2) Interrogatories may, without leave of court, be served:

(A) On the plaintiff after the action is commenced; and
(B) On the defendant when the summons and complaint are served or afterwards.

(3) Serving more than 30 interrogatories requires leave of court to be granted on a showing of necessity.

(b) Answers; objections; time.

(1) Answers. To the extent not objected to, each interrogatory must be answered separately; fully; in writing; and under oath.

(2) Signed. Interrogatory answers must be signed by the person making them. Objections to interrogatories must be signed by the attorney making them.

(3) Objections. If a party objects to an interrogatory, the party must state all reasons for an objection and answer to the extent the interrogatory is not objectionable.

(A) All grounds for an objection must be stated with specificity.
(B) A basis not stated in a timely objection is waived unless the court excuses the failure for good cause shown.
(C) If otherwise proper, an interrogatory is not necessarily objectionable merely because an answering it involves an opinion; a contention that relates to fact; or the application of law to fact. But the court may order that a party does not have to answer it until after designated discovery has been completed, a pretrial conference, or other later time.

(4) Time. The responding party must serve answers and objections within 30 days of the date the interrogatories were served. But a defendant may serve them within 45 days after the summons and complaint are served on that defendant.

(5) Sanctions. A party may move for a Rule 37(a) order based on an objection or other failure to answer an interrogatory.

(c) Scope; use at trial.

(1) Scope. An interrogatory may relate to a matter that can be inquired into under Rule 26(b).
(2) Use. An interrogatory answer may be used to the extent allowed by the Mississippi Rules of Evidence.

(d) Option to produce business records. If Rule 33(d)(1) and (d)(2) apply, then a party may answer an interrogatory as stated in Rule 33(d)(3) and (d)(4).

(1) If an interrogatory answer may be derived or ascertained from the following:

(A) The responding party's business records (including electronically stored information);
(B) Examining, auditing, or inspecting them; or
(C) A compilation, abstract, or summary based on them;

(2) And if the burden of deriving or ascertaining the answer is substantially the same for either party;

(3) Then the responding party may answer by:

(A) Specifying the records from which the answer may be derived or ascertained; and
(B) Affording the other party reasonable opportunity to:

(i) Examine, audit, or inspect the records; and
(ii) Make copies, compilations, abstracts, or summaries.

(4) The responding party must also specify the records from which the answer may be derived or ascertained with sufficient detail to allow the other party to identify readily the individual documents from which the answer may be ascertained.

[Amended effective 4/13/00.]

Advisory Committee Historical Note

Effective 4/13/00, Rule 33 was amended to require parties to produce all non-objectionable information and to clearly state the ground for objection to each interrogatory. 753-54 So. 2d XVII (West Miss. Cas. 2000).

Advisory Committee Notes

The 30 interrogatories allowed as a matter of right are computed by counting each distinct question as one of the 30 even if labeled a subpart, subsection, threshold question, or similar designation. Greater lenience for construing several questions as one interrogatory may be appropriate regarding inquiries about witness names or locations; the existence, location, and custodians of documents or physical evidence; and similar areas capable of being explored with non-abusive interrogatories.

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

Rule 34. Producing documents and things; entering land for inspecting and other purposes.

(a) Scope. A party may serve on another party a request within the scope of Rule 26(b):

(1) To produce and allow the requesting party or the party's representative to inspect and copy designated documents or electronically stored information in any medium and from which the respondent can obtain information directly or translate it into a reasonably useable form if necessary, including writings, drawings, graphs, charts, photographs, phonorecords, data, and data compilations;

(2) To inspect, copy, test, or sample designated tangible things in the responding party's possession, custody, or control; or

(3) To allow entry onto designated land or other property in the responding party's possession or control for inspecting, measuring, surveying, photographing, testing, or sampling the property or a designated object or operation on it.

(b) Procedure.

(1) Time. Without leave of court, the request may be served on the plaintiff after the action is commenced and on another party when serving that party with the summons and complaint or afterwards.

(2) Content. The request:

(A) Must state either by individual item or category what is to be inspected;

(B) Must describe each item and category with reasonable particularity;

(C) Must specify a reasonable time, place, and manner for inspecting and related acts; and

(D) May specify the form or forms in which electronically stored information is to be produced.

(3) Response.

(A) Time. The responding party must serve a written answer within 30 days of the date the request was served. But a defendant may serve a written answer within 45 days after the summons and complaint are served on that defendant.

(i) The court may allow a shorter or longer time.

(B) Responding to each item. For each item or category, the response must state that inspection and related activities will be allowed as requested or state an objection and the reasons for it with specificity.

(i) The responding party may state that copies of documents or electronically stored information will be produced instead of allowing inspection.

(ii) Under Rule 34(2)(b)(2)(B)(i), the production must be completed no later than the time specified in the request or another reasonable time specified in the response.

(C) Producing documents, electronically stored information. The responding party must produce documents as kept in the usual course of business or organize and label them to correspond with categories in the request.

(i) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(ii) A party does not need to produce the same electronically stored information in more than one form.

(4) Objection.

(A) An objection must state whether responsive materials are being withheld on the basis of that objection.

(B) A partial objection must specify the objectionable part of the request and allow the remainder to be inspected.

(C) A party may object to the requested form of producing electronically stored information.

(i) If the responding party objects to the requested form or the request did not specify one, the responding party must state what form or forms the party intends to be use.

(D) A responding party may also object under Rule 26(b)(5) to producing electronically stored information that is not reasonably accessible because of undue burden or cost.

(E) The party submitting the request may move for a Rule 37(a) order regarding:

(i) An objection;
(ii) Failure to respond to the request;
(iii) Failure to respond to part of one; or
(iv) Failure to allow inspection as requested.

(c) Nonparty. This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter onto land.

[Amended effective 7/1/13 to address production of electronically stored information.]

Advisory Committee Historical Note

Effective 7/1/13, Miss. R. Civ. P. 34 was amended to specifically authorize a party to request another party to produce electronically stored information. The amendment established the procedure for requesting production of electronically stored information and the procedure for objecting to that type of request.

Rule 35. Physical and mental examination.

(a) Order. If a party's mental or physical condition (including blood group) is in controversy, the court where the action is pending may order the party to submit to physical or mental examination by a suitably licensed or certified examiner. The court has the same authority to order a party to produce for examination a person over whom the party has custody or legal control.

(1) The court may issue the order only on:

(A) A motion for good cause shown; and

(B) Notice to the person to be examined and to all parties specifying:

(i) The time, place, manner, conditions, and scope of the examination; and
(ii) The person or persons who will perform it.

(2) A party or person may not be required to travel an unreasonable distance for an examination.

(3) The requesting party must pay the examiner and advance all necessary expenses to be incurred by the party or person complying with the order.

(b) Examiner's report.

(1) If requested by the party against whom the court issue a Rule 35(a) order or the person examined, the party who moved for the examination must deliver a copy of the examiner's detailed written report stating:

(A) The examiner's findings;
(B) All test results, diagnoses, and conclusions; and
(C) All reports of earlier examinations of the same condition.

(2) After delivering the reports and on request, the party who moved for the examination is entitled to receive from the party against whom the order was issued like reports of all prior or subsequent examinations of the same condition. But a party with custody or legal control of the person examined is not required to do so on a showing that the party is unable to obtain the reports.

(3) On a motion, the court may require a party to deliver a report on just terms. If an examiner fails or refuses to do so, the court may exclude the examiner's testimony if offered at trial.

(4) By requesting and obtaining a report of the court-ordered examination or by deposing the examiner, the examined party waives privilege in that action and others involving the same controversy as to the testimony of every other person who has examined the party or subsequently may do so regarding the same mental or physical condition.

(5) Rule 35(b) applies to examinations made by the parties' agreement unless their agreement expressly states otherwise. But it does not preclude discovery of an examiner's report or deposing the examiner according to the provisions of another rule.

(c) Limited applicability to Title 93 of the Mississippi Code of 1972 Annotated. This rule does not apply to actions under Miss. Code Ann. §§ 93-1-1 to 93-29-23. But the chancery court has discretion to decide the rule does apply.

[Adopted effective 1/16/03.]

Advisory Committee Historical Note

Effective 1/16/03, Rule 35 was adopted to allow a court to order a physical or mental examination of a person for good cause on motion. __So. 2d __(West Miss. Cases _).

Rule 36. Requests for admission.

(a) Scope; procedure.

(1) Scope. For purposes of the pending action only, a party may serve another one with a written request to admit the truth of a matter within the scope of Rule 26(b) relating to:

(A) Statements or opinions of fact; or
(B) Statements or opinions on the application of law to fact, including the genuineness of documents described in the request.

(2) Procedure.

(A) Time. The request may, without leave of court, be served on the plaintiff after the action is commenced and on another party when serving that party with the summons and complaint or afterwards.

(B) Form; copy of documents.

(i) Each matter must be separately stated.
(ii) A request to admit the genuineness of a document must be accompanied by a copy of the document unless produced or otherwise made available for inspection and copying.

(3) Response.

(A) Effect of not responding; time. The matter is admitted unless, within 30 days after the request is served or within a shorter or longer time as the court may allow, the party to whom the request is directed serves the requesting party with a written answer or objection addressed to the matter and signed by the party or party's attorney.

(i) But a defendant may serve answers or objections within 45 days after the summons and complaint are served on that defendant unless the court shortens the time.

(4) Answer. If a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it.

(A) Responding to substance of the request. A denial must fairly respond to the substance of the requested admission.

(B) Qualification; partial denial; specificity. When good faith requires a party to qualify an answer or partially deny a matter, the party must specify the admitted part and qualify or deny the remainder.

(C) Lack of information or knowledge. An answering party may assert lack of information or knowledge as a reason for failing to admit or deny a request only if the party states:

(i) That the party has made reasonable inquiry; and
(ii) That information known or readily obtainable by the party is insufficient to enable the party to do so.

(5) Objection. If a party objects to a request, the reasons for doing so must be stated.

(A) Trial issue. If the responding party considers a matter in a requested admission to present a genuine issue for trial, the party may not object solely on that basis.

(i) Subject to Rule 37(c), the party may deny the matter or state reasons why it cannot be admitted or denied.

(6) Motion for sufficiency.

(A) The requesting party may move to decide the sufficiency of an answer or objection.
(B) Unless the court decides that an objection is justified, it must order the responding party to serve an answer.
(C) If the court decides an answer does not comply with Rule 36 requirements, it may:

(i) Order that the matter is admitted;
(ii) Require an amended answer to be served; or
(iii) Defer its final decision until a pretrial conference or designated time before trial.

(D) Rule 37(a)(4) applies to an award of expenses.

(7) Effect of admission; withdrawing; amending. A matter admitted under this rule is conclusively established unless on a motion, the court allows the admission to be withdrawn or amended.

(A) A party's admission under this rule is for the purpose of the pending action only. It is not an admission for another purpose and may not be used against that party in another proceeding.

(B) Withdrawal; amendment. The court may allow an admission to be withdrawn or amended:

(i) Subject to Rule 16(e) provisions governing amendment of a final pretrial order;
(ii) When presenting an action's merits will be subserved; and
(iii) The party who obtained the admission fails to satisfy the court withdrawal or amendment will prejudice the party in maintaining that party's action or defense on the merits.

Advisory Committee Notes

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

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

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

Because a party generally lacks knowledge of the authenticity or admissibility of an opponent's medical records. a party does not have an obligation to admit the authenticity or admissibility of an opposing party's medical records absent: (1) proper authentication according to Miss. R. Evid. 901 or 902; and (2) proper demonstration they are records of regularly conducted activity under Miss. R. Evid. 803(6). *See Rhoda v. Weathers*, 87 So. 3d 1036 (Miss. 2012).

Rule 37. Failing to cooperate in discovery: sanctions.

(a) Motion for order compelling discovery. On reasonable notice to other parties and all affected persons, a party may move for an order compelling discovery according to this rule.

(1) Appropriate court. A motion for an order compelling discovery may be filed with the court where the action is pending.

(2) Specific motions.

(A) A party seeking discovery may move for an order compelling an answer, designation, production, or inspection if:

(i) A deponent fails to answer a question under Rules 30 or 31;
(ii) A corporation or other entity fails to make a designation under Rules 30(b)(6) or 31(a);
(iii) A party fails to answer an interrogatory under Rule 33; or
(iv) A party fails to produce documents, fails to respond that inspection will be allowed, or fails to allow inspection as requested under Rule 34.

(B) When taking a deposition by oral examination, the proponent of the question may complete or adjourn the examination before moving for an order.

(C) If the court partly or wholly denies the motion, it may issue a Rule 26(d) protective order.

(3) Evasive or incomplete answer. For purposes of Rule 37(a), an evasive or incomplete answer must be treated as a failure to answer.

(4) Award of expenses.

(A) If the motion is granted, after an opportunity to be heard, the court must require the party or deponent whose conduct necessitated the motion; the party or attorney who advised the conduct; or both to pay to the moving party reasonable expenses, including attorney's fees, incurred to obtain the order unless the court finds:

(i) That opposition to the motion was substantially justified; or
(ii) That other circumstances make an expense award unjust.

(B) If the motion is denied, after an opportunity to be heard, the court must require the moving party; the moving party's attorney advising the motion; or both to pay to the opposing party or deponent reasonable expenses, including attorney's fees, incurred to oppose the motion unless the court finds:

(i) That the motion was substantially justified; or
(ii) That other circumstances make an expense award unjust.

(C) If the motion is partly granted and denied, the court may apportion reasonable expenses incurred in obtaining and opposing the motion among the parties and persons in a just manner.

(b) Failing to comply with order.

(1) Court sanctions. If a deponent refuses to be sworn or to answer a question after the court has directed otherwise, the failure may be considered contempt of court.

(2) Sanctions by court where action is pending. If a party or a party's officer, director, managing agent, or other person designated to testify under Rules 30(b)(6) or 31(a) fails to obey an order to provide or allow discovery, including a Rule 37(a) order, the court where the action is pending may issue additional just orders, including:

(A) Establishing matters pertaining to the order or other designated facts for purposes of the action according to the requesting party's claim;
(B) Refusing to allow the disobedient party to support or oppose designated claims or defenses or prohibiting the disobedient party from introducing designated matters in evidence;
(C) Partly or wholly striking pleadings;
(D) Staying proceedings until the order is obeyed;
(E) Partly or wholly dismissing the action or proceeding;
(F) Rendering a default judgment against the disobedient party; or
(G) Instead of an order stated in Rule 37(b)(2)(A) through (F) or in addition to one, an order treating the failure to obey as contempt of court.

(3) Instead of an order stated in Rule 37(b)(2) or in addition to one, the court must require the disobedient party; the attorney advising the party; or both to pay reasonable expenses, including attorney's fees, caused by the failure unless the court finds:

(A) That the failure was substantially justified; or
(B) That other circumstances make an expense award unjust.

(c) Failing to admit; expenses.

(1) If a party fails to admit the genuineness of a document or the truth of a matter as requested under Rule 36, and if the requesting party subsequently proves the document's genuineness or the matter's truth, that party may move the court for an order requiring the other party to pay the party reasonable expenses, including attorney's fees, incurred in doing so.

(2) The court must issue the order unless it finds that:

(A) The request was objectionable under Rule 36(a);
(B) The requested admission was not of substantial importance;
(C) The party failing to admit had reasonable grounds to believe the party might prevail on the matter; or
(D) Other good reason for failing to admit existed.

(d) Failing to attend deposition; serve interrogatory answer; or respond to inspection request.

(1) If a party or a party's officer, director, managing agent, or other person designated under Rules 30(b)(6) or 31(a) to testify fails the following, on a motion, the court where the action is pending may issue a just order regarding the failure, including an order under Rule 37(b)(2)(A) through (G):

(A) To appear before the officer who is to take the party's deposition after being served with proper notice;
(B) To serve answers or objections to Rule 33 interrogatories after the other party properly served the interrogatories; or
(C) To serve a written response to a Rule 34 request for inspection after the other party properly served the request.

(2) Instead of an order or in addition to it, the court must require the disobedient party; the attorney advising the party; or both to pay reasonable expenses, including attorney's fees, caused by the failure unless the court finds:

(A) That the failure was substantially justified; or
(B) That other circumstances make an expense award unjust.

(3) A failure to act under Rule 37(d) may not be excused on the basis the requested discovery is objectionable unless the disobedient party has applied for a Rule 26(d) protective order.

(e) Additional sanctions. In addition to sanctions under Rules 26(d) and Rule 37, the court may impose on a party/party's attorney just sanctions, including reasonable expenses and attorney's fees, if:

(1) A party/party's attorney fails to cooperate in framing an appropriate discovery plan by agreement under Rule 26(c) without good cause; or
(2) Otherwise abuses the discovery process in seeking, making, or resisting discovery.

SECTION 6. TRIALS

Rule 38. Right to a jury trial.

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

(b) Waiver.

(1) A party may waive the right to a jury trial by:

(A) Filing a specific, written stipulation that the right has been waived with the court; and
(B) Requesting that the action be tried by the court.

(2) The court may exercise its discretion to require a jury trial even though a party has filed a waiver stipulation.

Rule 39. Trial by jury or by the court. [Omitted].

Rule 40. Assigning case for trial.

(a) Methods.

(1) A court must place an action on the trial calendar:

(A) Without the parties' request;
(B) On a party's request with notice to other parties; or
(C) In a manner the court considers expedient.

(2) Prior to calling a case for trial and subject to the court's sound discretion, the parties must be afforded ample opportunity to complete discovery.

(b) Notice.

(1) The court must provide written direction to the clerk when a trial docket will be set.

(2) At least five days before the date on which the trial docket will be set, the clerk must notify all attorneys and unrepresented parties with cases on the trial calendar of the time, place, and date the docket will be set.

(3) All cases must be set on the trial docket at least 20 days before the trial date unless the parties agree on a shorter period or a smaller one is available under Rule 55.

(4) When an action is set for trial, the clerk must prepare a trial docket identifying the:

(A) Case to be tried;
(B) Trial date;
(C) Attorneys in the case;
(D) Trial location; and
(E) Attorneys and unrepresented parties present in person or by a designee when the trial docket was set.

(5) Within three days after a case has been placed on the trial docket, the clerk must notify a party who was not present at the docket setting in person or by an attorney of the trial setting.

(A) Notice must be by personal delivery or mail within the three-day period.

(6) Rule 40 does not apply to matters:

(A) In which a defendant is summoned to appear and defend at a certain time and place under Rule 81; or

(B) In which a date, time, and place for trial have been previously set.

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

[Amended effective 7/1/86; 9/1/87; 3/1/89.]

Advisory Committee Historical Note

Effective 3/1/89, Rule 40(a) was amended by abrogating reference to local rules. 536-38 So. 2d XXX (West Miss. Cas. 1989).

Effective 9/1/87, Rule 40 was amended by adding subsection (c) on scheduling trials by agreement of the parties. 508-11 So. 2d XXVIII (West Miss. Cas. 1987).

Effective 7/1/86, Rule 40(b) was amended by substantially rewriting it: (1) to shorten the time period for giving interested attorneys and parties notice of the setting of the trial docket; (2) to provide for at least 20 days between the time of setting a case on the docket and the trial date; (3) to require certain information to be recorded on the docket; and (4) for other purposes. 486-90 So. 2d XXI (West Miss. Cas. 1986).

Advisory Committee Notes

The 20-day waiting period does not apply to court hearings in connection with Rule 55 default judgments.

Rule 41. Dismissing an action.

(a) Voluntary dismissal.

(1) By plaintiff or stipulation.

(A) Subject to Rule 66 or a Mississippi statute, after paying all costs, the plaintiff may dismiss an action without a court order by filing:

(i) A notice of dismissal before the adverse party serves an answer or motion for summary judgment; or
(ii) A stipulation of dismissal signed by all parties who have appeared in the action.

(B) Unless the notice of dismissal or stipulation states otherwise, dismissal is without prejudice.

(2) By court order. Except as stated in Rule 41(a)(1), the plaintiff may not dismiss an action without a court order on terms and conditions the court considers proper.

(A) A counterclaim asserted before the plaintiff serves a Rule 41(a)(2) motion will remain pending if the action is dismissed.
(B) Unless the court order states otherwise, dismissal is without prejudice.

(b) Involuntary dismissal.

(1) A defendant may move to dismiss the action or a claim if the plaintiff fails to:

(A) Prosecute the action;
(B) Comply with these rules; or
(C) Obey a court order.

(2) In a nonjury action tried by the court:

(A) The defendant may move for dismissal:

(i) After the plaintiff has completed presenting evidence;
(ii) Without waiving the defendant's right to offer evidence if the court denies the motion; and

(iii) On the basis the plaintiff has failed to show a right to relief under the facts and the law.

(B) The court may enter a judgment against the plaintiff or defer a final decision until all evidence has been presented.

(i) If the court renders a judgment on the merits against the plaintiff, the court may make Rule 52(a) findings.

(C) A Rule 41(b) dismissal and all other dismissals operate as an adjudication upon the merits unless:

(i) A court order states otherwise;
(ii) Rule 41(b) states otherwise;
(iii) Dismissal is for lack of jurisdiction;
(iv) Dismissal is for improper venue; or
(v) Dismissal is for failure to join a party under Rule 19.

(c) Dismissing a counterclaim, crossclaim, or third-party claim. This rule applies to the dismissal of a counterclaim, crossclaim, or third-party claim.

(1) A claimant's Rule 41(a)(1)(A)(i) voluntary dismissal must be filed before a responsive pleading is served; or
(2) If there is no responsive pleading, before evidence is introduced at a hearing or trial.

(d) Dismissal on clerk's motion.

(1) Notice. In a civil action where no action has occurred on the record in the preceding 12 months, the court clerk must mail notice to the attorneys that the court will dismiss the case for failing to prosecute it unless:

(A) An action is taken on the record within 30 days from the mailing date; or
(B) A motion showing good cause for not dismissing the case is filed with the court.

(2) Effect. Except as stated in Rule 41(d)(1), the court must dismiss the case without prejudice. But the cost of filing a dismissal order with the clerk must not be assessed against either party.

(3) Notice deadline.

(A) In every eligible case, the clerk must mail the Rule 41(d)(1) notice annually no later than 30 days before June 15 and December 15.

(B) The clerk must present all eligible cases annually on or before June 30 and December 31 to the court for action.

(C) Rule 41(d)(1) through (d)(2) does not:

(i) Prohibit the clerk from otherwise mailing notice and dismissing an eligible case under Rule 41(d); or

(ii) Limit the court's power to dismiss an action on a motion or otherwise.

(e) Costs of previously dismissed action. If a plaintiff dismisses an action in a court and files another one based on or including the same claim and against the prior defendant, the court:

(1) May order the plaintiff to pay the costs of the previously dismissed action as it decides to be proper; and

(2) May stay the proceedings until the plaintiff has complied with the order.

Advisory Committee Notes

After the court clerk serves Rule 41(d) notice, a party seeking to avoid dismissal for lack of prosecution must either take some action on the record or file a motion with the court demonstrating good cause for continuing the case. Rule 41(d) does not define what constitutes an action on the record. *See Ill. Cent. R.R. Co. v. Moore*, 99 So. 2d 723, 726 (Miss. 2008) (discussing former "application in writing" and "act of record").

Pleadings, discovery requests, and deposition notices are actions on the record. *See id.* at 728. But simply requesting that the case remain on the court's active docket in an ex parte letter to the court clerk is not a written motion demonstrating good cause. *See id.* at 729-30. Rather than writing a letter to the clerk, a party should file a written motion with the court: (1) that complies with Rule 7(b)(1); (2) that demonstrates good cause; and (3) that is served according to Miss. R. Civ. P. 5. *Id.* at 727-30. *But see Cucos, Inc. v. McDaniel*, 938 So. 2d 238, 247 (Miss. 2006) (finding trial court did not abuse discretion in considering plaintiff's attorney's letter to clerk requesting that case remain on court's active docket as sufficient to prevent dismissal where (1) court held hearing and plaintiff's lawyer represented he was trying to schedule conferences so defense counsel could talk to plaintiff's expert witnesses in effort to facilitate settlement; (2) local practice was to treat the letter as sufficient; and (3) plaintiff was not served with proper copy of dismissal order).

In general, complying with local practice inconsistent with the Mississippi Rules of Civil Procedure without more will be insufficient to prevent dismissal. *See Ill. Cent. R.R. Co.*, 994 So. 2d at 728.

Rule 42. Consolidation; separate trials.

(a) Consolidation. If pending actions involve a common question of law or fact, the court may:

(1) Order a joint hearing or trial of one or more matters at issue in the actions;
(2) Consolidate the action; or
(3) Issue another order concerning the proceedings to avoid unnecessary costs or delay.

(b) Separate trial.

(1) For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of:

(A) A claim, crossclaim, counterclaim, or third-party claim;
(B) A separate issue; or
(C) A number of claims, crossclaims, counterclaims, third-party claims, or issues.

(2) When ordering a separate trial, the court must always preserve the right to a jury trial as stated in Miss. Const. art. 4, § 31.

(c) Counties in single circuit or chancery court district. If actions involving a common question of law or fact are pending in different counties of the same circuit or chancery court district, all matters presented to the judge prior to trial except dispositive motions may be consolidated or coordinated.

(1) If the actions do not involve jury trials, they may be consolidated for all purposes.
(2) All judges must agree to consolidation and on the judge who will preside over the cases for purposes of Rule 42(c).

[Amended 2/20/04 to correct scrivener's error; amended effective 9/25/14.]

Rule 43. Taking testimony.

(a) Form; admissibility. In a trial, witness testimony must be taken orally in open court except as otherwise stated in these rules or the Mississippi Rules of Evidence.

(b) [Abrogated].

(c) [Abrogated].

(d) Affirmation instead of an oath. A solemn affirmation may be accepted instead of an oath required by these rules.

(e) Evidence on a motion. If a motion is based on a non-record fact, the court may hear the matter on affidavits or partly or wholly on oral testimony or depositions.

(f) Interpreter. The court may appoint an interpreter of its choosing; fix reasonable compensation paid out of funds according to law or one or more parties as it directs; and exercise discretion to tax the compensation as costs.

(1) But if an interpreter is required by the Americans with Disabilities Act of 1990, Pub. L. No. 101–336, 104 Stat. 328 (1990), including related provisions, rules, and regulations, compensation and other compliance costs must be paid by the county where the court is located and not taxed as costs.

[Amended effective 1/10/86; amended 6/5/97.]

Advisory Committee Historical Note

Effective 7/1/98, Rule 43(f) was amended regarding compliance with the Americans with Disabilities Act of 1990 § 201, 42 U.S.C. § 12131 (1990) and related provisions.

Effective 1/10/86, Rule 43(a) was amended to provide that testimony may be taken other than in open court under the Mississippi Rules of Evidence and to delete references to the admissibility of evidence; Rule 43(b) [Mode and Order of Interrogation] and Rule 43(c) [Record of Excluded Evidence] were abrogated. 478-481 So. 2d XXVII (West Miss. Cas. 1986).

Advisory Committee Notes

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

Rule 44. Proving an official record.

(a) Authentication.

(1) Domestic.

(A) The following evidences an official record or entry in it when admissible and kept within the United States, a state, district, commonwealth, territory, or territory subject to the United States' administrative or judicial jurisdiction:

(i) An official publication of the record; or
(ii) A copy attested by the officer or officer's deputy with legal custody of the record.

(B) If the official record is kept outside Mississippi, the copy must be accompanied by a certificate under oath of the officer or officer's deputy stating:

(i) The person is the legal custodian of the record; and
(ii) The record is kept according to state law.

(2) Foreign.

(A) The following evidences a foreign official record or entry in it when admissible:

(i) An official publication of the record; or
(ii) A copy attested by a person authorized to do so and accompanied by a final certification.

(B) A Rule 44(a)(2)(A)(ii) final certification must certify the genuineness:

(i) Of the signature and official position of the attesting person; or
(ii) Of a foreign official whose certificate of genuineness relates to the attestation or is in a chain of certificates of genuineness relating to the attestation.

(C) A Rule 44(a)(2)(A)(ii) final certification may be made by:

(i) An embassy or legation secretary;
(ii) A consul general, consul, vice consul, or consular agent of the United States; or
(iii) A diplomatic or consular official of the foreign country assigned or accredited to the United States.

(D) If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may for good cause:

(i) Admit an attested copy without final certification; or
(ii) Allow an attested summary with or without final certification to evidence the foreign official record.

(b) Lack of a record. If authenticated under Rule 44(a)(1) for a domestic record or under Rule 44(a)(2) for a foreign record, a written statement that a diligent search of designated records revealed no record or entry of a specified tenor is admissible as evidence the records do not contain one.

(c) Other proof. A party may prove an official record, an entry, or lack of entry by another method authorized by law.

Advisory Committee Notes

A document authenticated under this rule may still be excluded from evidence if irrelevant, hearsay, or otherwise objectionable. For additional evidentiary rules concerning authentication, see Miss. R. Evid. 901–903.

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

Rule 44(a)(1) deals with two types of official documents: (1) those kept in the state; and (2) those kept out of it. A copy of the document must be attested to only as to (1) and certified under oath as to (2).

Rule 44.1. Determination of foreign law. [Omitted].

Advisory Committee Notes

Under Miss. Code Ann. §13-1-149, courts must take judicial notice of foreign law.

Rule 45. Subpoena.

(a) Form; issuance.

(1) Requirements. Every subpoena must:

(A) Be issued by the clerk under seal of the court;
(B) State the name of the court and the title of the action; and
(C) Command each person to whom it is directed to do the following at a specified time and place:

(i) Attend and testify;
(ii) Produce designated books, documents, electronically stored information, or tangible things in the person's possession, custody, or control and allow them to be inspected and copied; or
(iii) Allow the premises to be inspected.

(2) Combining or separating command to produce or allow inspection; specifying form of electronically stored information.

(A) A command to produce or allow inspection may be joined with one to appear at a trial, hearing, or deposition. Or it may be issued separately.
(B) A subpoena may specify the form or forms for producing electronically stored information.

(3) Issued by clerk. The clerk must issue a signed, sealed, but otherwise blank subpoena to a requesting party. That party must fill it in before service.

(4) Issuing court. The court where the action is pending must issue a subpoena:

(A) To appear at a trial, hearing, or deposition; or
(B) A subpoena to produce or allow inspection.
(C) Foreign litigation.

(i) For discovery in foreign litigation, a court clerk for the county where the discovery is to be taken must issue a subpoena.
(ii) The foreign subpoena must be submitted to the court clerk in the county where discovery is sought to be conducted in this state.

(iii) When a party submits a foreign subpoena to a court clerk in this state, the clerk must promptly issue a subpoena for serving the person stated in the foreign subpoena according to that court's procedure.

(5) A subpoena issued by a court clerk under Rule 45(a)(4)(A) must be issued and served in compliance with Mississippi Rules. In addition, the Rule 45(a)(4)(A)(iii) subpoena must:

(A) Incorporate the terms in the foreign subpoena; and
(B) Contain or be accompanied by the names, addresses, and telephone numbers of all counsel and unrepresented parties in the proceeding to which the subpoena relates.

(6) A motion for a protective order or to enforce, quash, or modify a subpoena issued by a court clerk under Rule 45(a)(4)(A) must comply with Mississippi rules and be submitted to the issuing court in the county where discovery is to be conducted.

(b) Examination place.

(1) Resident. A Mississippi resident may be required to attend a deposition or to produce or allow inspection only:

(A) In the county where the person resides;
(B) In the county where the person is employed or transacts business in person; or
(C) At another convenient place stated in a court order.

(2) Nonresident. A nonresident of Mississippi who is subpoenaed within it may be required to attend only:

(A) In the county where the person is served; or
(B) At another convenient place stated in a court order.

(c) Service.

(1) Who. A subpoena may be served by:
(A) A sheriff;
(B) Sheriff's deputy; or
(C) Other nonparty age 18 or older.

(2) Personal service. A witness must be personally served with a subpoena.

(3) Proof of service. The person who served the subpoena may endorse a return. The endorsed return is prima facie proof of service. Or the person served may acknowledge service in writing on the subpoena.

(A) Proof of service must be filed with the court clerk where the subpoena was issued a statement:

(i) Certified by the person who served the subpoena;
(ii) Stating the date and manner of service;
(iii) The county where it was served;
(iv) The name of the person who was served; and
(v) The name, address, and telephone number of the person who served it.

(4) Attendance fee. Unless the court decides otherwise on a showing of indigence, the party causing the subpoena to issue must pay a nonparty witness the fee for one day's attendance plus mileage as allowed by law at the time the subpoena is served.

(A) But when the subpoena is issued on behalf of Mississippi or a state officer or agency, fees and mileage do not need be paid in advance.

(d) Protecting a person subject to a subpoena.

(1) When required. On a timely motion, the issuing court must quash or modify a subpoena if it:

(A) Fails to allow reasonable time for compliance;
(B) Requires privileged or other protected matter to be disclosed when waiver or another exception does not apply;
(C) Designates an improper place for examination; or
(D) Subjects a person to undue burden or expense.

(2) When allowed. The court may order appearance or production only upon specified conditions if a subpoena:

(A) Requires a trade secret or other confidential research, development, or commercial information to be disclosed; or

(B) Requires an unretained expert's opinion or information:

(i) Not describing specific events or occurrences in dispute; and
(ii) Resulting from the expert's study made not at a party's request.

(3) Subpoena for production or inspection.

(A) No appearance required. Unless also commanded to appear for a deposition, hearing, or trial, a person commanded to produce and allow inspection and copying of designated books, papers, documents, electronically stored information, or tangible things or to allow inspection of premises does need not need to appear in person at the place of production or inspection.

(i) Time for compliance. Unless the court shortens the time for good cause, a subpoena for production or inspection must allow at least 10 days for complying with it.
(ii) Notice. A copy of the subpoena must be served immediately on each party according to Rule 5.
(iii) Protective order. A subpoena commanding production or inspection is subject to Rule 26(d).

(B) Objection. Within 10 days after a subpoena is served or on or before the time specified in the subpoena for compliance if shorter than 10 days after service, a person may serve the party or attorney designated in the subpoena a written objection to inspecting or copying part or all of the designated materials or to inspecting the premises.

(i) If a person objects, the party serving the subpoena must not be entitled to inspect and copy the material unless the issuing court orders otherwise.
(ii) Once a person objects, the party serving the subpoena may move to compel the production or inspection on notice to the person.

(C) Avoiding unreasonableness and expense. On a prompt motion on or before the time specified in the subpoena for compliance, the court may:

(i) Quash or modify the subpoena if it is unreasonable or oppressive; or

(ii) Condition denial of the motion on the party serving the subpoena advancing the reasonable cost of producing the books, papers, documents, or tangible things.

(e) Duties in responding to a subpoena.

(1) Producing documents or electronically stored information.

(A) Documents. A person responding to a subpoena to produce documents must:

(i) Produce them as kept in the usual course of business; or
(ii) Organize and label them to correspond with categories in the demand.

(B) Electronically stored information in unspecified form. If a subpoena does not specify a form for producing electronically stored information, the responding person must produce electronically stored information:

(i) In the form or forms in which it is ordinarily maintained; or
(ii) In a reasonably usable form or forms.

(C) Electronically stored information in multiple forms. The responding person does not need to produce the same electronically stored information in more than one form.

(D) Electronically stored information inaccessible. The responding person does not need to provide discovery of electronically stored information from sources the person identifies as not reasonably accessible because of undue burden or cost.

(i) On a motion to compel discovery, motion for a protective order, or motion to quash, the responding person must show the information is not reasonably accessible because of undue burden or cost.
(ii) If that showing is made, the court may still order discovery from the sources: (1) if the requesting party shows good cause and (2) considering Rule 26(b)(6) limitations. The court may also specify conditions for the discovery, including those listed in Rule 26(b)(5).

(3) Claiming privilege or protection.

(A) Information withheld. When information subject to a subpoena is withheld on a claim that it is privileged or protected as trial-preparation material, the claim must be:

(i) Expressly made; and
(ii) Supported by a description of the nature of the documents, communications, or things not produced sufficient to enable the demanding party to contest the claim.

(B) Information produced. If information produced in response to a subpoena is subject to a claim that it is privileged or protected as trial-preparation material, the producing person may notify the receiving party of the claim and basis for it. Once notified, the receiving party may promptly present the information to the court under seal for deciding whether it is privileged or protected. The producing person must preserve the information until the claim is resolved. In addition, once the producing person notifies the receiving party of the claim, the receiving party must:

(i) Promptly return, sequester, or destroy the specified information and copies;
(ii) Not use or disclose the information until the claim is resolved; and
(iii) Take reasonable steps to retrieve the information if the party disclosed it before being notified.

(f) Sanctions.

(1) Rule 26(f) applies on a motion by a party or person served with a subpoena to produce books, papers, documents, electronically stored information, or tangible things that shows the subpoena power is exercised:

(A) In bad faith; or
(B) In an unreasonable manner to annoy, embarrass, or oppress the party or person.

(2) On a motion as stated in Rule 26(f)(1), the court where the action is pending:

(A) Must quash the subpoena;

(B) May issue additional orders if required by justice to curb an abuse of power granted under this rule; and

(C) May impose an appropriate sanction**.**

(g) Contempt. The court that issued a subpoena may deem the person served with it to be in contempt if the person fails to obey the subpoena without adequate excuse.

[Amended effective 3/13/91; 7/1/97; 7/1/98; amended effective 7/1/09 to provide a procedure for foreign subpoenas. This provision takes effect and is enforced from and after 7/1/09; it applies to requests for discovery in cases pending on 7/1/09; amended effective 7/1/13 to authorize a subpoena for electronically stored information]

Advisory Committee Historical Note

Effective 3/13/91, Rule 45(c) was amended to require the party causing a subpoena to issue to tender to a nonparty witness the fee for one day's attendance plus mileage allowed by law. Rule 45(e) was amended by deleting the provision for tendering the fee for one day's attendance plus the mileage allowed by law to certain witnesses when subpoenaed. Rule 45(d) was amended to require the clerk for the county where the deposition is taken to issue the subpoena when a deposition is to be taken in foreign litigation. 574-76 So. 2d XXIV-XXV (West Miss. Cas. 1991).

Effective 7/1/97 a new Rule 45 was adopted.

Effective 7/1/13, Rule 45 was amended to specifically authorize a subpoena to command the person to whom it is directed to produce and allow inspection and copying of electronically stored information. The same amendment also established a procedure to be used when privileged or trial-preparation material is inadvertently disclosed.

Advisory Committee Notes

A "foreign subpoena" means a subpoena issued under authority of a court of record in a foreign jurisdiction. "Foreign jurisdiction" means a state other than Mississippi. A litigant in a foreign jurisdiction who wants to obtain a subpoena to: (1) depose a Mississippi resident; (2) obtain records within Mississippi; or (3) inspect premises within Mississippi should follow the procedure in the Uniform Interstate Depositions and Discovery Act. *See* Miss. Code Ann. §§ 11-59-1 to -15. *See also* Miss. R. App. P. 46(b)(11)(i) (request to have subpoena issued under this rule exception to requirements for admission of foreign attorney pro hac vice).

Rule 45(c)(1) regarding paying a nonparty statutory witness fees and mileage in advance is complementary to Miss. Code Ann. §§25-7-47 to -59.

Rule 45(d)(2) is intended to ensure there is no confusion as to whether a nonparty with control, custody, or possession of discoverable evidence may be compelled to produce it without being sworn as a witness and deposed. The force of a subpoena for production of documentary evidence generally reaches all documents under the control of the person ordered to produce it except as to questions of privilege or unreasonableness.

Rule 46. Exception unnecessary.

(a) An exception is unnecessary to lay a foundation for review when:

(1) A matter has been called to the court's attention by objection, motion, or otherwise; and

(2) The court has ruled on it.

(b) But failing to object does not prejudice a party who did not have an opportunity to object to a ruling or order at the time it is made.

Rule 47. Jurors.

(a) Examining jurors.

(1) The qualifications of a person called as a juror for trial must be examined under oath or on affirmation.
(2) The court may examine a prospective juror or allow the parties or attorneys to do so.
(3) If the court examines a prospective juror, it must allow the parties or attorneys to supplement the examination with additional inquiry.

(b) Jury selection and service. Jurors must be drawn and selected for jury service according to statutory law.

(c) Challenges. A party may challenge a juror for cause.

(1) 12-person jury. In an action tried before a 12-person jury, each side may exercise four peremptory challenges.
(2) 6-person jury. In an action tried before a 6-person jury, each side may exercise two peremptory challenges.
(3) Multiple parties. Where multiple parties compose one or both sides, the court may allow challenges to be exercised separately or jointly. The court may also allow additional challenges. But in all actions, the number of challenges allowed for each side must be identical.

(d) Alternate Jurors. A trial judge may exercise the discretion to direct that one or two jurors in addition to the regular panel be called and empaneled to sit as alternate jurors.

(1) In the order called, an alternate juror must replace a juror who becomes unable or disqualified to perform duties prior to the time the jury retires to consider its verdict.

(2) An alternate juror must be drawn in the same manner as a regular juror and:

(A) Have the same qualifications;
(B) Be subject to the same examination and challenges for cause;
(C) Take the same oath; and
(D) Have the same functions, powers, facilities, and privileges.

(3) Each party must be allowed one peremptory challenge to alternate jurors in addition to those in Rule 47(c).

(A) The additional peremptory challenges may be used only against an alternate juror.

(B) Other Rule 47(c) peremptory challenges may not be used against an alternate juror.

[Amended effective 6/24/92.]

Advisory Committee Historical Note

Effective 6/24/92, Rule 47 was amended to state that the court may allocate peremptory challenges to a side rather than a party and that in the case of multiple parties on a side, the court may allow peremptory challenges to be exercised jointly or separately and also allow additional peremptory challenges. 598-602 So. 2d XXIII (West Miss. Cas. 1992).

Advisory Committee Notes

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

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

Rule 48. Juries; verdicts.

(a) Circuit and chancery court. A jury in circuit and chancery actions must consist of 12 persons plus alternates according to Rule 47(d). A verdict or finding by nine or more of the jurors must be taken as the jury's verdict or finding.

(b) County court. A jury in an action in county court must consist of six persons plus alternates according to Rule 47(d). A verdict or finding by five or more of the jurors must be taken as the jury's verdict or finding.

Rule 49. Verdict: general; special.

(a) General verdict. Jury determination must be by general verdict unless this rule states otherwise. The remaining provisions of this rule should not be applied in simple cases where the general verdict will serve the ends of justice.

(b) Special verdict.

(1) The court may require a jury to return only a special verdict in the form of a special written finding on each issue of fact. In that event, the court may:

(A) Submit written questions susceptible of categorical or other brief answer to the jury;
(B) Submit written forms of several special findings which might properly be made on the pleadings and evidence; or
(C) Use another method of submitting the issues and requiring written findings on them as it deems most appropriate.

(2) The court must explain and instruct concerning the matter submitted under Rule 49(b)(1) as necessary to enable the jury to make findings on each issue.

(A) When doing so, if the court omits an issue of fact raised by the pleadings or evidence, a party waives the right to a jury trial of the omitted issue unless the party demands that it be submitted to the jury before the jury retires.

(i) If a party fails to do so, the court may make a finding as to the omitted issue; or
(ii) If the court does not make a finding, the court must be deemed to have done so according to the judgment on the special verdict.

(c) General verdict accompanied by answers to interrogatories.

(1) The court may exercise discretion to submit to the jury:

(A) Written interrogatories on one or more fact issues necessary to be decided for a verdict; and
(B) Accompanying instructions for a general verdict.

(2) The court must explain or instruct as necessary to enable the jury both to make answers and to render a general verdict.

(3) When the general verdict and the answers are harmonious, the appropriate judgment on the verdict and answers must be entered.

(4) When the answers are consistent with each other yet one or more is inconsistent with the general verdict:

(A) A judgment may be entered consistent with the answers notwithstanding the general verdict;
(B) The court may return the jury for further consideration of its answers and verdict; or
(C) The court may order a new trial.

(5) When the answers are inconsistent with each other, and when one or more is likewise inconsistent with the general verdict, the court must not enter a judgment and instead:

(A) Return the jury for further consideration of its answers and verdict; or
(B) Order a new trial.

(d) Court to provide attorneys with questions. Procedures in Rule 49(b) or 49(c) must not be utilized unless the court provides all parties' attorneys with a copy of the written questions to be submitted to the jury within a reasonable time before final arguments to the jury.

[Amended effective 3/1/89.]

Advisory Committee Historical Note

Effective 3/1/89, Rule 49 was amended to provide for a general verdict accompanied by answers to interrogatories in jury trials. 536-38 So. 2d XXVI-XXVII (West Miss. Cas. 1989).

Advisory Committee Notes

Rule 49 authorizes three types of verdicts: (1) a general verdict; (2) a special verdict; and (3) a general verdict accompanied by answers to interrogatories. Trial judges have

broad discretion to use special verdicts or general verdicts accompanied by answers to interrogatories. *W.J. Runyon & Son, Inc. v. Davis*, 605 So. 2d 38, 49 (Miss. 1992).

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

A court may also submit a general verdict with written interrogatories about specific fact issues to the jury. If the general verdict and interrogatory answers are consistent, the court must enter a judgment reflecting the verdict and answers. If the interrogatory answers are internally consistent yet one or more answers is inconsistent with the general verdict, the court may: (1) enter judgment based on the answers despite their inconsistency with the general verdict; (2) instruct the jury to further consider its verdict and answers; or (3) order a new trial. When one of the interrogatory answers is inconsistent with another answer and also inconsistent with the general verdict, the court must: (1) instruct the jury to further consider its verdict and answers; or (2) order a new trial.

A special verdict or general verdict with interrogatories directing the jury to separate economic and noneconomic damages is necessary if a defendant is going to seek application of statutory caps on noneconomic damages. *See, e.g.*, *Intown Lessee Assocs., LLC v. Howard*, 67 So. 3d 711, 723-24 (Miss. 2011). Likewise, a special verdict or a general verdict with interrogatories may be useful in a case where the law authorizes fault to be allocated among parties decided to be at fault. A special verdict or a general verdict with answers to interrogatories may also be useful in cases involving novel or uncertain law. If the trial court is reversed on appeal, the special verdict or interrogatory answers may make retrial unnecessary if they contain sufficient factual findings on the relevant issues.

Rule 50. Motions: directed verdict; judgment notwithstanding the verdict.

(a) Motion for directed verdict; when; effect.

(1) When. A party may move for a directed verdict at the close of the evidence offered by an opponent.

(2) Specificity. A motion for a directed verdict must state the specific grounds for it.

(3) Effect.

(A) If a party's motion for a directed verdict is denied, the party may offer evidence without having reserved the right to do so and to the same extent as if the motion had not been filed.

(B) Denying a motion for a directed verdict is not a waiver of a jury trial even though all parties moved for directed verdicts.

(4) Jury assent not required. A court order granting a motion for a directed verdict is effective without the jury's assent.

(b) Motion for judgment notwithstanding the verdict; procedure.

(1) Setting aside verdict and judgment. A party may file a motion to have the verdict and a judgment entered on it set aside not later than 10 days after the judgment is entered.

(2) No verdict returned. If no verdict was returned, a party may file a motion for judgment within 10 days after the jury has been discharged.

(A) If no verdict was returned, the court may direct the entry of judgment or order a new trial.

(c) Conditional ruling when motion is granted.

(1) When granted. If a Rule 50(b) motion for judgment notwithstanding the verdict is granted, the court must also rule on a motion for a new trial by:

(A) Determining whether it should be granted if the judgment is subsequently vacated or reversed; and

(B) Specifying the grounds for granting or denying the motion for a new trial.

(2) No effect on finality of judgment. A court order conditionally granting a motion for a new trial as stated in Rule 50(c)(1) does not affect the finality of the judgment.

(3) Conditionally granting a motion for new trial when judgment is reversed. If the motion for a new trial has been conditionally granted yet the judgment is reversed on appeal, the new trial must proceed unless the appellate court otherwise orders.

(4) Effect of conditionally denying a motion for new trial on subsequent proceedings if judgment reversed. If the motion for a new trial has been conditionally denied, the appellee may assert error on that basis in an appeal.

(A) Subsequent proceedings if judgment reversed. If the judgment is reversed on appeal, subsequent proceedings must be according to the appellate court's order.

(5) Motion for a new trial if verdict set aside. The party whose verdict has been set aside on a motion for a judgment notwithstanding the verdict may file a Rule 59 motion for a new trial not later than 10 days after a judgment notwithstanding the verdict is entered.

(d) Denying motion. If the motion for judgment notwithstanding the verdict is denied, on appeal the prevailing party as appellee may assert grounds for a new trial if the appellate court concludes the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, this rule does not preclude it from determining that the appellee is entitled to a new trial or from directing the trial court to decide whether a new trial must be granted.

[Amended effective 7/1/94; 7/1/97.]

Advisory Committee Historical Note

Effective 7/1/97, Rule 50(b) was amended to clarify that Rule 50(b) motions must be filed not later than 10 days after entry of judgment. 689-92 So. 2d XLIX (West Miss. Cas. 1997).

Effective 7/1/94, Rule 50(b) was amended so that a motion for directed verdict is not a prerequisite to file a motion for judgment notwithstanding the verdict. 632-35 So. 2d XXX-XXXI (West Miss. Cas. 1994).

[Adopted 8/21/96; amended effective 7/1/97.]

Advisory Committee Notes

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

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

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

Rule 51. Jury instructions.

(a) Procedural instructions. At the beginning of a trial and during it, the court may orally:

(1) Give the jury cautionary and other instructions of law relating to trial procedure and jury duty and function; and
(2) Acquaint the jury generally with the nature of the case.

(b) Substantive instructions. Each party may submit six instructions on the substantive law of the case. But the court may allow additional instructions as justice requires. The court may also instruct the jury on its own.

(c) When submitted.

(1) Pretrial hearing. A party must submit proposed instructions to the court at the Rule 16 pretrial hearing.
(2) No pretrial hearing. If no pretrial hearing is conducted, proposed instructions must be delivered to the court and counsel for all parties no later than 24 hours prior to the time the action is scheduled to be tried.

(d) Identification. Instructions will not be identified with a party except as stated in this rule.

(1) Court. The court's substantive instructions must be numbered and prefixed with the letter *C*.
(2) Plaintiff. Plaintiff's instructions must be numbered and prefixed with the letter *P*.
(3) Defendant. Defendant's instructions must be numbered and prefixed with the letter *D*.
(4) Multiparty actions.

(A) In multi-party actions:

(i) Numbers must be used to identify instructions proposed by parties similarly aligned;
(ii) Placed after the alphabetical designation of *P* or *D*; and
(iii) Conform to the sequential listing of parties stated in the complaint.

(e) Objections.

(1) A party may not claim error as to granting or denying an instruction unless the party objects before the instruction is presented to the jury.
(2) Opportunity must be given to object out of the jury's hearing.
(3) All objections:

(A) Must be stated in the record;
(B) Distinctly state the matter objected to; and
(C) The grounds for objecting.

(f) Written instructions. All instructions must be written unless Rule 51(a) states otherwise.

(g) When read; availability. Instructions must be:

(1) Read to the jury at the close of all evidence and prior to oral argument;
(2) Available to counsel to use during argument; and
(3) Carried by the jury into the jury room when retiring to consider its verdict.

Advisory Committee Notes

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

Rule 52. Findings by the court.

(a) Procedure; effect.

(1) In a nonjury action tried on the facts, the court may:

(A) May find the facts specially;
(B) State its conclusions of law separately; and
(C) Must do so on a party's request or when these rules require it.

(2) Effect. A judgment must be entered according to the court's findings and conclusions of law.

(b) Amendment.

(1) When. The court may amend its findings, make additional findings, and amend the judgment on its own or a party's motion filed not later than 10 days after the previous is entered.

(2) Motion for new trial; challenging evidence sufficiency.

(A) The motion may accompany a Rule 59 motion for a new trial.
(B) When the court issues findings of fact in a nonjury action tried by the court, the question of the sufficiency of the evidence to support the findings may be raised subsequently regardless of whether a party objected to the findings in court or filed a motion to amend them, motion for judgment, or motion for a new trial.

[Amended effective, 7/1/97.]

Advisory Committee Historical Note

Effective 7/1/97, Rule 52(b) was amended to clarify that a motion to amend the trial court's findings must be filed not later than 10 days after entry of judgment. 689 So. 2d XLIX (West Miss. Cas. 1997).
[Adopted effective 7/1/97.]

Advisory Committee Notes

Rule 52(a) requires a trial court in a nonjury action to make specific findings of fact and conclusions of law when requested by a party or when required by the Mississippi Rules of Civil Procedure. In the absence of a party's request or a rule requiring them, the trial

court "may" make findings and conclusions. *See Gulf Coast Research Lab. v. Amaraneni*, 722 So. 2d 530, 534-35 (Miss. 1998). The principal purpose of the rule is to provide the appellate court with a record regarding what the trial court did, the facts it found, and the law it applied partly so the appellate court can refrain from deciding issues of fact and others the trial court did not decide. *Tricon Metals & Servs., Inc. v. Topp*, 516 So. 2d 236, 239 (Miss. 1987). "In cases of any significant complexity the word 'may' in Rule 52(a) should be construed to read 'generally should.' In other words, in cases of any complexity, tried upon the facts without a jury, the [c]ourt generally should find the facts specially and state its conclusions of law . . . ." *Id.* In contested complex cases, a trial court's "failure to make findings of ultimate fact and conclusions of law will generally be regarded as an abuse of discretion." *Id.* "[F]indings of fact by the chancellor, together with the legal conclusions drawn from those findings, are required [in cases involving the division of marital assets]." *Ferguson v. Ferguson*, 639 So. 2d 921, 929 (Miss. 1994).

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

A trial court has discretion to adopt a party's proposed findings of fact and conclusions of law. *Rice Researchers, Inc. v. Hiter*, 512 So. 2d 1259, 1266 (Miss. 1987). A trial court's factual findings, even in cases where the trial court adopts verbatim a party's proposed findings of fact, will be reviewed for abuse of discretion. *Bluewater Logistics, LLC v. Williford*, 55 So. 3d 148, 157 (Miss. 2011). *See also* Uniform Chancery Court Rule 4 (regarding findings by the court).

Rule 53. Masters, referees, and commissioners.

(a) Definition; appointment; compensation.

(1) Definition. As used in these rules, the word "master" includes a referee, auditor, examiner, commissioner, and special commissioner.

(2) Appointment.

(A) The court may appoint one or more persons in each county to be masters of the court.

(B) The court where an action is pending may appoint a special master in it.

(3) Compensation. A master must receive reasonable compensation for services rendered as fixed by law or allowed by the court. Reasonable compensation must be taxed as costs and collected in the same manner as clerk fees.

(b) Qualification; exceptions.

(1) Qualification. A master must be an attorney at law and authorized to practice law before all Mississippi courts.

(2) Exceptions.

(A) In extraordinary circumstances where a finding to be issued is of a complex, technical, non-legal nature, a person not an attorney who possesses requisite qualifications of one skilled in the field, area, or subject of the inquiry may be appointed as a master.

(B) A person not an attorney may be appointed as a special commissioner to conduct judicially-ordered sales and partitions of real or personal property.

(c) When. With the parties' written consent, the court may refer an issue of fact or law to a master. Otherwise, a court must issue an order of reference only on a showing some exceptional condition requires it.

(d) Powers.

(1) Order appointing master. An order of reference to a master may:

(A) Specify or limit the master's powers;

(B) Fix the time and place for beginning and closing the hearing and filing the master's report; and

(C) Direct the master:

(i) To report only on particular issues;
(ii) To do or perform particular acts; or
(iii) To receive evidence and report only on it.

(2) Required powers.

(A) Regulating proceedings. Subject to specifications and limitations stated in the reference order, a master has and must exercise the power:

(i) To regulate all proceedings in every hearing before the person; and
(ii) To take all actions and measures necessary or proper for efficiently performing duties according to the reference order.

(B) Examination; reporting; execution. A master must have the power to:

(i) Administer oaths;
(ii) Examine witnesses in cases pending in a court;
(iii) Examine and report on all referred matters; and
(iv) To execute all decrees when directed to do so.

(C) Witnesses. In addition, a master must have the power to direct a subpoena to be issued for a witness to appear and testify in a matter referred to the master or in the pending action.

(i) If a witness fails to appear, the master must proceed by process to compel the witness to attend and give evidence.

(3) Other powers. A master may require evidence to be produced before the person regarding matters embraced in the reference order, including all applicable books, papers, vouchers, documents, and writings.

(e) Proceedings.

(1) Certified copy. The clerk must furnish a master with a certified copy of the reference order. The certified copy must constitute sufficient certification of the master's authority.

(2) First meeting. When the master receives the reference order, unless otherwise stated in it, the master must set a time and place for the first meeting of the parties or attorneys.

(A) Time. The first meeting must be held within 10 days of the reference order.
(B) Notice. The master must notify the parties or attorneys of the time and place for the first meeting.

(3) Master's duty; reasonable diligence. The master has a duty to proceed with reasonable diligence.

(A) On notice to the master and parties, a party may move the court for an order requiring the master to speed the proceedings and to make a report.

(4) Failure to appear. If a party fails to appear at the appointed time and place, the master may proceed ex parte or exercise discretion to adjourn the proceedings until a subsequent date with notice of it to the absent party.

(f) Statements of account. The court may order an accounting. When the master doubts the principles on which an accounting is taken or the propriety of admitting an item of debit or credit claimed by a party, the master may state those points in writing and submit them to the court.

(g) Report.

(1) Contents; filing.

(A) Contents.

(i) A master must prepare a report on matters submitted by the reference order.
(ii) If required to make findings of fact and conclusions of law, the master must state them in the report.

(B) Filing. The master must file the report with the court clerk.

(i) Unless the reference order states otherwise, the master must file a transcript of the proceeding and the original evidence exhibits.
(ii) The clerk must mail notice the report has been filed to all parties.

(2) Acceptance; objections. The court must accept the master's findings of fact unless manifestly wrong.

(A) Within 10 days of being served with notice the report has been filed, a party may serve written objections to it on the other parties.

(B) A motion to the court for action on the report and objections to it must be according to Rule 6(d).

(C) After a hearing, the court may:

(i) Adopt the report;
(ii) Modify it;
(iii) Partly or wholly reject it;
(iv) Receive additional evidence; or
(v) Recommit it with instructions.

(3) Stipulating to findings. The effect of a master's report is the same regardless of whether the parties have consented to the reference. But when the parties stipulate that a master's finding of fact must be final, only a question of law arising out of the report must subsequently be considered.

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

(5) Bond; when required.

(A) The court may require a special commissioner appointed to conduct a sale of property to give bond:

(i) Under penalty and with sufficient sureties as the court approves and directs;
(ii) Payable to Mississippi; and
(iii) Conditioned on the special commissioner paying according to law all money which may come into the person's hands as special commissioner.

(B) The bond must be filed with the court.

(C) For a breach of a bond condition, the court may order execution for the sum due. But the court clerk or sheriff is appointed to make a sale and the order

does not provide for a bond, the official bond of the clerk or the sheriff must be held as security.

[Amended effective 3/1/89; 4/13/00.]

Advisory Committee Historical Note

Effective 4/13/00, Rule 53(c) was amended to give the court discretion to appoint a master on the written consent of the parties without a showing of an exceptional condition. 753-54 So. 2d. XVII (West Miss. Cas. 2000).

Effective 3/1/89, Rule 53 was amended to correct a typographical error. 536-38 So. 2d XXVII (West Miss. Cas. 1989).

SECTION 7. JUDGMENT

Rule 54. Judgment; costs.

(a) Definition. As used in these rules, a "judgment" includes a final decree and an order from which an appeal lies.

(b) Judgment on multiple claims; involving multiple parties.

(1) When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more but fewer than all claims or parties only on an expressed:

(A) Determination there is no just reason for delay; and
(B) Direction for entry of the judgment.

(2) In the absence of the expressed determination and direction, regardless of how it is designated, an order or other form of decision adjudicating fewer than all claims or rights and liabilities of fewer than all parties:

(A) Does not terminate the action as to a claim or party; and
(B) The order or other form of decision is subject to revision before entry of a judgment adjudicating all claims and rights and liabilities of all parties.

(c) Demand for judgment.

(1) Default judgment. A default judgment must not be different from or exceed the amount of that requested in the demand for judgment.

(2) Judgment other than default. A final judgment other than one by default must grant relief to the party in whose favor it is rendered as entitled by the proof and within the court's jurisdiction to award even if not demanded in the party's pleadings. But a final judgment must not be entered for a monetary amount greater than that demanded in the pleadings or amended pleadings.

(d) Costs.

(1) Automatic; exceptions. Unless a statute expressly states otherwise or the court directs differently, costs must be awarded automatically to the prevailing party in all civil actions, including those where the State of Mississippi is a party plaintiff.

(2) Security. If costs are awarded against a party who has given security for costs, the court may order execution against the security.

(3) When taxed. Costs may be taxed by the clerk on one day's notice.

(A) Review. The court may review the clerk's action on a motion served within five days from when the clerk's notice of taxation is received.

Advisory Committee Notes

Although it not specifically described in the rule itself, several different stages lead to the creation of a judgment that is final and appealable. It is important to differentiate the various steps part of this process.

The first distinction is between the adjudication, either by a decision of the court or a verdict of the jury, and the judgment that is entered on it. The terms "decision" and "judgment" are not synonymous under these rules. The decision is the court's opinion comprised of findings of fact and conclusions of law; the rendition of judgment is the pronouncement of that decision and the act giving it legal effect.

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

Rule 54(b) is designed to facilitate the entry of a final judgment on one or more but fewer than all the claims or as to one or more but fewer than all the parties in an action involving multiple claims or multiple parties to enable the non-prevailing party to perfect an appeal as of right of a final judgment. Absent a Rule 54(b) certification, an order in a multiple-party or multiple-claim action that does not dispose of the entire action is interlocutory even it if appears to adjudicate a separable portion of the controversy. Given that separate, piecemeal appeals of interlocutory orders entered in a single action would usually be inefficient, parties may not appeal interlocutory orders as of right. A party may instead: (1) request the trial court to certify an interlocutory order as a final judgment according to Rule 54(b) in order to take an appeal of right under Miss. R. App. P. 4; or (2) petition the Mississippi Supreme Court for permission to appeal an interlocutory order under Miss. R. App. P. 5.

If a party attempts to perfect an appeal as of right according to Miss. R. App. P. 4 as to an order that does not dispose of all claims between the parties, the appeal will be dismissed for lack of jurisdiction unless the order appealed from has been certified properly as a final judgment under Rule 54(b). *See, e.g., Williams v. Delta Reg'l Med. Ctr.*, 740 So. 2d 284 (Miss. 1999).

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

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

Rule 54(c) must be read in conjunction with Rule 8 requiring every pleading asserting a claim to include a demand for the relief to which the pleader believes the party is entitled. As a result, Rule 54(c) applies to a demand for relief, whether filed by defendant or plaintiff or presented by way of an original claim, counterclaim, crossclaim, or third-party claim. A default judgment may not extend to matters outside the issues raised by the pleadings or beyond the scope of the relief demanded; a default judgment awarding relief that is more than or different in kind from what is originally requested is null and void, and a defendant may attack it collaterally in another proceeding.

Three related concepts should be distinguished in considering Rule 54(d): (1) costs; (2) fees; and (3) expenses. "Costs" are charges one party has incurred and is allowed to have an opponent reimburse as part of the judgment in the action. Although "costs" has an everyday meaning synonymous with "expenses," taxable costs under Rule 54(d) are more limited and represent official expenses like court fees that a court will assess against a litigant. Costs almost always amount to less than a successful litigant's total expenses in connection with a lawsuit, and their recovery is nearly always awarded to the successful party.

"Fees" are amounts paid to the court or one of its officers for particular charges generally delineated by statute. Fees commonly include items like filing fees, clerk or

sheriff charges, and witness fees. In most instances, a costs award will include reimbursement for fees paid by the party in whose favor the cost award is issued.

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

Rule 55. Default.

(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as stated in these rules, the clerk must enter the party's default when that fact becomes apparent by affidavit or otherwise.

(b) Judgment. In all cases, a party entitled to a default judgment must move the court for one.

(1) If the party against whom a default judgment is sought has appeared in the action, the party or party's representative must be served with written notice of the motion for judgment at least three days prior to the hearing on it.

(A) But the court may enter a default judgment on the day the case is set for trial without three days' notice.

(B) The court may conduct a jury or nonjury hearing in its discretion or order references it deems necessary and proper if enabling the court to enter judgment or to carry it into effect requires:

(i) An accounting;
(ii) Determining the amount of damages;
(iii) Establishing the truth of an allegation by evidence; or
(iv) Investigating another matter

(c) Setting aside default. On a showing of good cause, the court may set aside an entry of default. And if a default judgment has been entered, the court may likewise set it aside according to Rule 60(b).

(d) Plaintiff, counterclaimant, and crossclaimant. The provisions of this rule apply whether the party entitled to a default judgment is a plaintiff, third-party plaintiff, crossclaimant, or counterclaimant. In all cases a judgment by default is subject to the limitation in Rule 54(c).

(e) Proof required despite default in certain cases. No judgment by default must be entered against a person under a legal disability or a party to a suit for divorce or annulment of marriage unless the claimant establishes a claim or right to relief by evidence. But a divorce for irreconcilable differences may be granted pro confesso according to statute.

Advisory Committee Notes

Because the court must have jurisdiction over the party against whom the judgment is sought before a default judgment can be entered, the party must have been effectively served with process.

Entry of default for failure to plead or otherwise defend is not limited to situations involving a failure to answer a complaint but applies to a pleading listed in Miss. R. Civ. P. 7(a).

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

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

When the prerequisites of Rule 55(a) are satisfied, the clerk must enter a default without court action. The clerk's function, however, is not perfunctory. Before a default can be entered, the clerk must examine filed affidavits and be satisfied that the requirements of Rule 55(a) are met. *See* Miss. R. Civ. P. app. A, Forms 36–38. These elements of default must be shown by affidavit or other competent proof.

The traditional requirement that "one had to file documents in or actually physically appear before a court" in order to make a Rule 55(b) appearance has been relaxed. If a party has filed "an indicia of defense or denial of the allegations of the complaint," the party is entitled to written notice of a motion for default judgment at least three days prior to the motion hearing. *Wheat v. Eakin*, 491 So. 2d 523, 525 (Miss. 1986). "[I]nformal contacts between parties may constitute an appearance." *Holmes v. Holmes*, 628 So. 2d 1361, 1364 (Miss. 1993). The Mississippi Supreme Court has found an appearance when "the defendants either 1) served or sent a document to the plaintiff indicating in writing the defendant's intent to defend, 2) filed a document with the court indicating in writing the defendant's intent to defend, or 3) had counsel communicate to opposing counsel the defendant's intent to defend." *Amer. States Ins. Co. v. Rogillio*, 10 So. 3d 463, 467 (Miss. 2009).

A defendant who has filed an answer to the complaint but who has failed to file a timely answer to an amended complaint has entered an appearance for Rule 55(b) purposes. *See Chassaniol v. Bank of Kilmichael*, 626 So. 2d 127, 130-31 (Miss. 1993). A defendant whose attorney has written the plaintiff's attorney in a divorce case and informed him that the defendant desired to settle the case if possible but intended to defend if no settlement could be reached has entered an appearance for Rule 55(b) purposes. *See Holmes v. Holmes*, 628 So. 2d 1361, 1364 (Miss. 1993). A defendant who has served a motion to set aside the entry of default has entered an appearance for Rule 55(b) purposes. *See King v. Sigrest*, 641 So. 2d 1158, 1162 (Miss. 1994). A defendant cannot, however, enter a Rule 55(b) appearance before the case has been commenced. *See Kumar v. Loper*, 80 So. 3d 808, 814 (Miss. 2012). The defendant bears the burden of proving that an appearance has been filed. *See Dynasteel Corp. v. Aztec Indus., Inc.*, 611 So. 2d 977, 982 (Miss. 1992).

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

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

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

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

money damages, equitable relief, etc.), and must not order money damages in an amount that exceeds the amount sought in the demand for judgment.

If a default has been entered but a default judgment has not, the defending party may move to set aside the entry of default for good cause under Miss. R. Civ. P. 55(c). If a default judgment has been entered, the defendant may move to set aside the default judgment under Miss. R. Civ. P. 60(b). The standard for setting aside an entry of default under Miss. R. Civ. P. 55(c) is more liberal than the standard for doing so under Miss. R. Civ. P. 60(b). *See King v. Sigrest*, 641 So. 2d 1158, 1162 (Miss. 1994).

Rule 56. Summary judgment.

(a) For claimant. After 30 days from when an action is commenced or after the adverse party serves a motion for summary judgment, a party seeking a declaratory judgment or to recover on a claim, counterclaim, or crossclaim may move with or without supporting affidavits for a summary judgment or a partial summary judgment in that party's favor.

(b) For defending party. A party against whom a claim, counterclaim, or crossclaim is asserted or a declaratory judgment is sought may move with or without supporting affidavits for a summary judgment or partial summary judgment in that party's favor.

(c) Motion; proceedings.

(1) Notice. The motion must be served at least 21 days before the hearing date.

(2) Opposing affidavits. The adverse party must serve opposing affidavits with its response to the motion and in any event, not later than 10 days before the hearing.

(3) Summary judgment; partial summary judgment.

(A) Summary judgment or partial summary judgment must be rendered if pleadings, depositions, interrogatory answers, admissions, and affidavits in the record show that no genuine issue as to a material fact exists and that the moving party is entitled to a judgment as a matter of law.

(B) Although a genuine issue as to the amount of damages exists, summary judgment may be rendered on the issue of liability alone and is interlocutory in character.

(d) Case not fully adjudicated on motion.

(1) If on a motion under this rule a trial is necessary because judgment is not rendered on the whole case or for all requested relief, the court must if practicable at the motion hearing ascertain what material facts exist without substantial controversy and what material facts are actually disputed in good faith by examining pleadings and evidence before it and interrogating counsel.

(A) Afterwards, the court must issue an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not disputed, and ordering additional proceedings as are just.

(B) The trial must be conducted according to the order, including that facts specified in it be deemed established.

(e) Affidavit form; additional testimony; defense required.

(1) A supporting or opposing affidavit must:

(A) Must be based on personal knowledge;
(B) State facts as would be admissible in evidence; and
(C) Affirmatively show the affiant is competent to testify to the matter stated in it.

(2) Sworn or certified copies of papers or parts of papers referred to in an affidavit must be attached to the affidavit or served with it.

(3) The court may allow an affidavit to be supplemented or opposed by depositions, interrogatory answers, or other affidavits.

(4) When a motion for summary judgment is filed and supported as stated in this rule, an adverse party may not rest on mere allegations or denials in that party's pleadings.

(A) By affidavit or otherwise under this rule, the party's response must state specific facts showing a genuine issue for trial exists.
(B) If the party's response fails to do so, summary judgment if appropriate must be entered against that party.

(f) Affidavit unavailable. If it appears from the nonmovant's affidavits that for reasons stated the nonmovant cannot present by affidavit facts essential to justify opposition to the motion, the court may:

(1) Deny the motion; or
(2) Order a continuance to allow the nonmovant to obtain affidavits, take depositions, or conduct other discovery; or
(3) Issue an order as is just.

(g) Affidavit in bad faith. If it appears to the court's satisfaction an affidavit is presented under this rule in bad faith or solely for the purpose of delay, the court must order the offending party to pay to the other party's reasonable expenses incurred because the affidavit was filed, including reasonable attorney's fees. The court may also decide an offending party or attorney is guilty of contempt.

(h) Costs, attorney's fees if summary judgment denied. If summary judgment is denied, the court must award to the prevailing party reasonable expenses incurred in attending the motion hearing. The court may award attorney's fees if it finds that the motion is without reasonable cause.

Advisory Committee Notes

It is important to distinguish among: (1) a Rule 56 motion for summary judgment; (2) a Rule 12(b)(6) motion to dismiss for failure to state a claim; and (3) a Rule 12(c) motion for judgment on the pleadings.

When ruling on a Rule 56 motion for summary judgment, the trial court may "pierce the pleadings" and consider extrinsic evidence like affidavits, depositions, interrogatory answers, and admissions.

But when ruling on a Rule 12(b)(6) motion to dismiss for failure to state a claim, the trial court may not "pierce the pleadings" and must only consider the allegations contained in the pleading asserting the claim. Likewise, when ruling on a Rule 12(c) motion on the pleadings, the trial court must only consider the allegations within the pleadings.

If matters outside the pleadings are presented and considered on a Rule 12(b)(6) or (b)(c) motion, the trial court must treat the motion as one for summary judgment and give all parties a reasonable opportunity to respond accordingly. *See* Miss. R. Civ. P. 12(b) and (c); *Huff-Cook, Inc. v. Dale*, 913 So. 2d 988, 992 (Miss. 2005). If the court converts a Rule 12 motion into a Rule 56 motion, it must give parties notice of the conversion and at least 10 days of its intent to conduct a summary judgment hearing on a certain date. *See Dale*, 913 So. 2d at 988. A trial court's failure to give proper notice constitutes reversible error. *See Palmer v. Biloxi Reg'l Med. Ctr., Inc.*, 649 So. 2d 179, 183 (Miss. 1994).

A trial court does not need to make findings of fact when ruling on a motion for summary judgment because "a Rule 56 summary judgment hearing is not a nonjury action so as to trigger Rule 52 applicability." *See Harmon v. Regions Bank*, 961 So. 2d 693, 700 (Miss. 2007). *See also* Uniform Rules of Circuit and County Court Practice. A movant must do more than simply state a meritorious defense.

Under Rule 78, oral hearing on a motion for summary judgment is not necessary where dis

pensed with by court order or rule.

Rule 57. Declaratory judgment.

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

(1) The procedure for obtaining a declaratory judgment must be according to these rules.
(2) The right to a jury trial may be demanded under circumstances and in the manner stated in Rules 38 and 39.
(3) The existence of another adequate remedy does not preclude a judgment for declaratory relief in an action where it is appropriate.
(4) The court may order a speedy hearing of an action for declaratory judgment and may advance it on the calendar. The judgment in an action for declaratory relief may be either affirmative or negative in form and effect.

(b) When available.

(1) A person interested under a deed, will, written contract, or other writing constituting a contract or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may:

(A) Have a question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise decided; and
(B) Obtain a declaration of rights, status, or other legal relations under it.

(2) A contract may be construed either before or after it is breached. If an insurer has denied that a contract covers a party's claim against an insured or indicated it may do so, that party may seek a declaratory judgment construing the contract to cover the claim.

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

(A) Ascertain a class of creditors, devisees, legatees, heirs, next of kin, or others;
(B) Direct the executor, administrator, or trustee to do or abstain from doing a particular act in a fiduciary capacity; or

(C) Decide a question arising in the administration of the estate or trust, including a question of construction of wills and other writings.

(4) The enumeration in Rule 57(b) do not limit or restrict the exercise of the general powers stated in Rule 57(a) in a proceeding where declaratory relief is sought, and a judgment will terminate the controversy or remove an uncertainty.

[Amended effective 7/27/00.]

Advisory Committee Notes

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

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

Rule 58. Entering judgment.

A judgment must be stated on a separate document titled "Judgment." But in the absence of prejudice to a party, a judgment fully adjudicating the claim as to all parties and entered as stated in Miss. R. Civ. P. 79(a) must have the force and finality of a judgment even if not properly titled. A judgment must be effective only when entered as stated in Miss. R. Civ. P. 79(a).

[Amended effective 7/1/01; amended effective 5/27/04 to address finality of improperly titled judgment.]

Advisory Committee Historical Note

Effective 7/1/94, a new Rule 58 was adopted. 632-35 So. 2d XXXII-XXXIII (West Miss. Cases 1994).

[Adopted 8/21/96.]

Advisory Committee Notes

The "entry" of the judgment is the ministerial notation of the judgment by the clerk of the court under Rules 38 and 79(a); however, it is crucial to the effectiveness of the judgment and for measuring time periods to appeal and to file various motions.

Rule 59. New trial; amending a judgment.

(a) Grounds.

(1) A new trial may be granted to a party on all or part of the issues:

(A) In a jury action for a reason a new trial previously has been granted in an action at law in Mississippi courts; and

(B) In a nonjury action for a reason a rehearing previously has been granted in a suit in equity in Mississippi courts.

(2) On a motion for a new trial in a nonjury action, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law, make new findings and conclusions, and order the entry of a new judgment.

(b) Time for motion. A motion for a new trial must be filed not later than 10 days after the entry of judgment.

(c) Affidavit; time. When a motion for new trial is based on an affidavit, it must be filed with the motion. The opposing party has 10 days after service to file opposing affidavits. The 10-day period may be extended for up to 20 days either by the court for good cause or the parties' written stipulation. The court may allow reply affidavits.

(d) By the court.

(1) Not later than 10 days after entry of judgment, the court may order a new trial for a reason for which it might have granted a new trial on a party's motion.

(2) After giving the parties notice and an opportunity to be heard on the matter, the court may grant a timely motion for a new trial for a reason not stated in the motion.

(3) In either case, the court must specify in the order the grounds for it.

(e) Motion to alter or amend a judgment; time. A motion to alter or amend the judgment must be filed not later than 10 days after entry of the judgment.

[Amended effective 7/1/97.]

Advisory Committee Historical Note

Effective 7/1/97, Rule 59(b), (c) and (e) were amended to clarify that motions for a new trial and accompanying affidavits and that motions to alter or amend a judgment must be filed not later than 10 days after entry of judgment. 689 So. 2d XLIX (West Miss. Cases).

Advisory Committee Notes

In a jury trial, the trial court may grant a new trial based on: (1) a prejudicial error by the court in admitting or excluding evidence; (2) an error in jury instructions; (3) prejudicial comments by the judge or attorneys; (4) a finding the verdict is against the great weight of the evidence; (5) a finding the jury's verdict is the result of passion, prejudice, or bias; or (6) grounds on which new trials were granted in actions at law prior to the adoption of these rules. A trial court's ruling on a motion for new trial is reviewed for abuse of discretion.

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

The rule does not authorize a motion for reconsideration after entry of judgment. If a motion is mislabeled as a motion for reconsideration and was filed within 10 days after the entry of judgment, the trial court should treat the motion as a post-trial motion to alter or amend the judgment under Miss. R. Civ. P. 59(e). *Boyles v. Schlumberger Tech. Corp.*, 792 So. 2d 262, 265 (Miss. 2001). A party moving to alter or amend the judgment "must show: (i) an intervening change in controlling law, (ii) availability of new evidence not previously available, or (iii) need to correct a clear error of law to prevent manifest injustice." *See Brooks v. Robertson*, 882 So. 2d 229, 233 (Miss. 2004). A motion to alter or amend the judgment is within the trial court's discretion. When a motion is mislabeled as a motion for reconsideration, does not state that it was brought under Rule 59, and was filed more than 10 days after the entry of the final judgment in the case, the trial court should treat the motion as one for relief from a judgment under Rule 60(b). *See Carlisle v. Allen*, 40 So. 3d 1252, 1260 (Miss. 2010).

A motion for new trial or a motion to alter or amend the judgment under Miss. R. Civ. P. 59 must be filed within 10 days after entry of the judgment. The trial court has no authority or discretion to extend the 10-day time period. Miss. R. Civ. P. 6(b). A timely Rule 59 motion for a new trial or to alter or amend the judgment tolls the time for filing a

notice of appeal; the 30-day time period for filing a notice of appeal runs from the entry of the order disposing of the post-trial motion. Miss. R. App. P. 4(c). If not filed within 10 days after entry of the judgment, a Rule 59 motion for a new trial, to alter or amend the judgment, or for reconsideration does not toll the time period for filing a notice of appeal. Miss. R. App. P. 4(d); *but see Wilburn v. Wilburn*, 991 So. 2d 1185, 1190-191 (Miss. 2008) (court refused to address timeliness of appellant's notice of appeal even though appellant filed a motion to reconsider more than 10 days after entry of judgment and did not file a notice of appeal within 30 days after entry of judgment and noted that the appellee did not object to the untimely motion to reconsider.)

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

Rule 60. Relief from judgment or order.

(a) Clerical mistake. On its own or a party's motion, the court may correct a clerical mistake or error arising from oversight or omission in a judgment, order, or other part of the record after notice if ordered and until the court clerk transmits the record to the appellate court, and the action remains pending in the appellate court. Otherwise, a mistake or error may be corrected only on the appellate court's order.

(b) Mistake, other basis for relief; time for motion.

(1) On a motion and just terms, the court may relieve a party or party's legal representative from a final judgment, order, or proceeding for the following reasons:

(A) An adverse party's fraud, misrepresentation, or other misconduct;
(B) Accident or mistake;
(C) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
(D) The judgment is void;
(E) The judgment has been satisfied, released, or discharged;
(F) A prior judgment on which the judgment is based has been reversed or otherwise vacated;
(G) It is no longer equitable that the judgment should have prospective application; or
(H) Another reason justifying relief from the judgment.

(2) Time. The motion must be filed within a reasonable time. For reasons in Rule 60(b)(1)(A), (B) and (C), the motion must be filed not more than six months after the judgment, order, or proceeding was entered or taken.

(3) Finality. A Rule 60 motion does not affect the finality of a judgment or suspend its operation.

(4) Leave from appellate court. Leave to make the motion does not need to be obtained from the appellate court unless the record has been transmitted and the action remains pending in it.

(5) Independent action. This rule does not limit a court's power to entertain an independent action to relieve a party from a judgment, order, or proceeding or to set aside a judgment for fraud upon the court.

(6) Writs abolished. Writs of coram nobis, coram vobis, audita querela, bills of review, and bills in the nature of a bill of review are abolished. The procedure for obtaining relief from a judgment must be by motion as prescribed in these rules or an independent action and not otherwise.

(c) Reconsideration of transfer order. An order transferring a case to another court will become effective 10 days following the entry date. A motion for reconsideration of the transfer order must be filed prior to the expiration of the 10-day period, and no extensions may be granted.

(1) If a motion for reconsideration is filed, all proceedings will be stayed until the motion is decided. But if the court fails to rule on the motion for reconsideration within 30 days of filing, the motion must be deemed denied.

[Amended effective 7/1/08, to provide for reconsideration of transfer orders entered on or after that date.]

Advisory Committee Notes

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

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

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

A party moving for Rule 60(b)(1)(A) relief based upon fraud, misrepresentation or other misconduct of an adverse party must do so within six months after entry of the judgment and prove the fraud, misrepresentation, or other misconduct by clear and convincing evidence. *See id.* at 221. Relief from a final judgment based on fraud upon the court may

be sought under Rule 60(b)(5). *See In re Estate of Pearson*, 25 So. 3d 392, 395 (Miss. Ct. App. 2009). "[R]elief based on 'fraud upon the court' is reserved for only the most egregious misconduct, and requires a showing of 'an unconscionable plan or scheme which is designed to improperly influence the court in its decision.'" *Id.* (citing *Wilson v. Johns-Manville Sales Corp.*, 873 F.2d 869, 872 (5th Cir. 1989)).

A party moving for Rule 60(b)(1)(B) relief based on an accident or mistake must do so within six months after entry of the judgment. A Rule 60(b)(1)(B) motion will only be granted on a showing of exceptional circumstances. Generally, "neither ignorance nor carelessness on the part of an attorney will provide grounds for relief." *See Stringfellow*, 451 So. 2d at 221. A party may move to set aside a default judgment under Rule 60(b)(1)(B). When ruling on the motion, the trial court may consider: (1) whether the default was caused by excusable neglect or a bona fide technical error; (2) whether the claimant will suffer prejudice if the default judgment is set aside; and (3) whether the defaulting party has a colorable defense to the merits. *See State Highway Comm'n of Miss. v. Hyman*, 592 So. 2d 952, 955 (Miss. 1991). A movant must show the specific facts of the meritorious defenses by affidavit or other sworn form of evidence. *Amer. Cable Corp. v. Trilogy Commc'ns, Inc.*, 754 So. 2d 545 (Miss. 2000).

A party moving for Rule 60(b)(1)(C) relief based on newly discovered evidence must do so within six months after entry of the judgment. To justify relief, the evidence: (1) must have been in existence at the time of trial; (2) could not have been discovered by due diligence prior to the expiration of the 10-day period for filing a Rule 59 motion for new trial; (3) must be material and not cumulative; and (4) must be of a character that will probably produce a different result in the event of a new trial or require a different ruling on summary judgment. *See January v. Barnes*, 621 So. 2d 915, 920 (Miss. 1992).

A party may move to set aside a void judgment under Rule 60(b)(1)(D) more than six months after entry of the judgment if the delay in moving for relief was reasonable. *See Ladner v. Logan*, 857 So. 2d 764, 770 (Miss. 2003). A judgment is void if the trial court lacked jurisdiction over the subject matter or the parties or acted in a manner inconsistent with due process of law. *See Bryant, Inc. v. Walters*, 493 So. 2d 933, 938 (Miss. 1986).

A party may move to set aside the judgment under Rule 60(b)(1)(E), (F), or (G) if the judgment has been satisfied, released or discharged or a prior judgment upon which it is based has been reversed or otherwise vacated. Rule 60(b)(1)(E), (F), or (G), however, "does not authorize relief from a judgment on the ground that the law applied by the court in making its adjudication has been subsequently overruled or declared erroneous in another and unrelated proceeding." *See Regan v. S. Cent. Reg'l Med. Ctr.*, 47 So. 3d 651, 655 (Miss. 2010) (former Rule 60(b)(5)).

A party may move to set aside the judgment under Rule 60(b)(1)(H) if there are "extraordinary and compelling" circumstances justifying relief. When ruling on a Rule 60(b)(1)(H) motion, the trial court may consider the following factors: "(1) [t]hat final judgments should not lightly be disturbed; (2) that the Rule 60(b) motion is not to be used as a substitute for appeal; (3) that the rule should be liberally construed in order to achieve substantial justice; (4) whether the motion was filed within a reasonable time; (5) [omitted factor relevant only to default judgments]; (6) whether if the judgment was rendered after a trial on the merits-the movant had a fair opportunity to present [a] claim or defense; (7) whether there are intervening equities that would make it inequitable to grant relief; and (8) other factors relevant to the justice of the judgment under attack." *See Carpenter v. Berry*, 58 So. 3d 1158, 1162 (Miss. 2011).

The trial court has discretion to grant or deny a Rule 60(b) motion unless the judgment is void—in which case the court is required to set it aside. *See Sartain v. White*, 588 So. 2d 204, 211 (Miss. 1991).

Motions for relief under this rule are filed in the original action rather than as an independent action.

Rule 60 motions for relief from a judgment filed no later than 10 days after entry of judgment toll the time period for filing an appeal. Miss. R. App. P. 4(d). Rule 60 motions filed more than 10 days after entry of judgment do not toll the time period for filing an appeal. A Rule 60(b) motion for relief from a judgment does not automatically stay execution on the judgment. The trial court has discretion to stay execution on the judgment while a Rule 60(b) motion is pending. Miss. R. Civ. P. 62(b).

Rule 61. Harmless error.

(a) Not a basis for error; exception.

(1) Unless refusing to do so appears inconsistent with substantial justice, none of the following is a basis for granting a new trial; setting aside a verdict; or vacating, modifying, or otherwise disturbing a judgment or order:

(A) An error in admitting or excluding evidence;
(B) An error in a ruling or order; or
(C) Anything done or omitted by the court or a party.

(2) At every stage, the court must disregard an error or defect in the proceeding which does not affect a party's substantial rights.

Rule 62. Staying proceeding to enforce a judgment.

(a) Automatic stay; exceptions. Except as stated in this rule, a statute, or court order for good cause shown, no execution may be issued on a judgment, and no enforcement proceedings may be taken until 10 days after it is entered or a motion for a new trial is disposed of—whichever is later.

(1) Injunction; receivership.

(A) But unless the court orders otherwise, an interlocutory or final judgment in an action for an injunction or receivership must not be stayed after it is entered, even if an appeal is taken.

(B) Rule 62(c) governs suspending, modifying, restoring, or granting an injunction if an appeal is taken.

(b) Stay on motion. In its discretion and on proper conditions for the adverse party's security, a court may stay the execution of a judgment or enforcement proceedings pending disposition of the following:

(1) A Rule 59 motion to alter or amend a judgment;
(2) A Rule 60(b) motion for relief from a judgment or order;
(3) A Rule 50(b) motion to set aside a verdict; or
(4) A Rule 52(b) motion to amend or make additional findings.

(c) Injunction pending appeal. On an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction while the judgment is appealed on terms for bond or other proper terms to secure the adverse party's rights. The court's power to issue an order is not terminated by appealing.

(d) Stay on appeal. Unless Rule 62(a) states otherwise, when an appeal is taken, the appellant may obtain a stay if and when authorized by statute or otherwise.

(e) [Omitted].

(f) Stay in favor of Mississippi or a state agency. A court must not require a bond, obligation, or other security from the appellant when granting a stay on an appeal by the State of Mississippi, its officers, or its agencies or on an appeal directed by a department of state government.

(g) Appellate court's power not limited. Rule 62 does not limit the power of an appellate court, judge, or justice to:

(1) Stay proceedings while an appeal is pending;
(2) Suspend, modify, restore, or grant an injunction while an appeal is pending; or
(3) Issue an appropriate order to preserve the status quo or the effectiveness of the judgment to be entered.

(h) Stay involving multiple claims or parties. A court may stay enforcement of a Rule 54(b) final judgment until it enters a subsequent judgment or judgments and may prescribe conditions necessary to secure the benefit of the stayed judgment to the party in whose favor it was entered.

[Amended effective July 1, 1997.]

Advisory Committee Historical Note

Effective 7/1/97, Rule 62(a) was amended to clarify that the stay of enforcement of a judgment expires 10 days after the later of the entry of the judgment or the disposition of a motion for a new trial. Rule 62(b) was amended to state that a court may stay the execution of or proceedings to enforce a judgment pending the disposition of a Rule 50(b) motion to set aside a verdict. 689-92 So. 2d XLIX (West Miss. Cas. 1997).

Advisory Committee Notes

Federal Rule of Civil Procedure 60(e) applies to stays in favor of the United States and is omitted from the Mississippi Rules of Civil Procedure.

Rule 63. Judge's inability to proceed.

(a) During trial. If the presiding judge is unable to proceed with trial, another judge regularly sitting in or assigned under law to the court where the action is pending may proceed with and finish the trial after certifying in the record familiarity with the trial record. But if unable to certify adequate familiarity with the record, the other judge may exercise discretion to grant a new trial.

(b) After verdict or findings. If the presiding judge is unable to perform court duties after a verdict or hearing a nonjury action, then another judge regularly sitting in or assigned under law to the trial court may perform those duties. But if unable to perform those duties, the other judge may exercise discretion grant a new trial.

SECTION 8. PROVISIONAL AND FINAL REMEDIES; SPECIAL PROCEEDINGS

Rule 64. Seizing a person or property.

After commencing an action and during it, every remedy for seizing a person or property to satisfy a potential judgment is available according to law, including attachment, replevin, claim and delivery, sequestration, and other corresponding or equivalent relief regardless of the designation and whether ancillary or obtained by an independent action.
[Amended effective 9/1/87.]

Advisory Committee Historical Note

Effective 9/1/87, Rule 64 was amended by deleting "garnishment" as one of the included prejudgment remedies. 508-11 So. 2d XXIX (West Miss. Cas. 1987).

Rule 65. Injunctions.

(a) Preliminary injunction.

(1) Notice. A preliminary injunction must not be issued without notice to the adverse party.

(2) Consolidating hearing with trial on merits. Before or after a hearing on a motion for preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing. Even when consolidation is not ordered, if admissible at trial, evidence received on a motion for preliminary injunction becomes part of the trial record and does not need to be repeated at trial. Rule 65(a)(2) must be construed and applied to preserve a party's right to a jury trial.

(b) Temporary restraining order; notice; hearing; duration.

(1) Without notice. A temporary restraining order may be granted without notice to the adverse party or attorney if:

(A) It clearly appears from specific facts shown by affidavit or verified complaint that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party or attorney can be heard in opposition; and

(B) The movant's attorney certifies to the court in writing:

(i) Efforts to give notice; and

(ii) Reasons supporting the movant's claim that notice should not be required.

(C) Every temporary restraining order granted without notice must:

(i) State the date and time it is issued;

(ii) Be filed in the clerk's office and entered in the record;

(iii) Define the injury;

(iv) State why the injury is irreparable;

(v) State why the order was granted without notice; and

(vi) Expire after entered by its terms within a time the court specifies not to exceed 10 days.

(D) Exceptions to 10-day limit. The 10-day limit in Rule 65(b)(1)(C)(vi) does not apply in domestic relations cases. It also does not apply if in the

temporary restraining order the court states reasons for extending the 10-day limitation and:

(i) Within the specified time for good cause shown, the court extends the temporary restraining order for a like period; or

(ii) The party against whom the order is directed consents to extending it for a longer period.

(2) Hearing. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction must be set for hearing at the earliest possible time and take precedence over all matters except older ones of the same character.

(A) At the hearing, the party who obtained the temporary restraining order must proceed with the motion for a preliminary injunction or otherwise, the court must dissolve the temporary restraining order.

(3) On notice of two days to a party who obtained a temporary restraining order or less if the court orders a shorter period, the adverse party may appear and move to dissolve or modify the temporary restraining order. If so, the court must proceed to hear and decide the motion as expeditiously as the ends of justice require.

(c) Security. No restraining order or preliminary injunction must issue unless the movant gives security in a sum the court deems proper for paying costs, damages, and reasonable attorney's fees by a party who is found to have been wrongfully enjoined or restrained.

(1) But the following are not required to give security:

(A) The State of Mississippi; or

(B) A state officer or agency.

(2) In addition, a court has discretion in domestic relations actions to waive security.

(3) Rule 65.1 apples to a surety on a bond or undertaking under this rule.

(d) Injunction or restraining order: form; scope.

(1) Restraining order.

(A) Form. An order that grants a restraining order must describe in reasonable detail—not merely refer to the complaint or other document—the act or acts to be restrained.

(B) Scope. A restraining order binds only the following:

(i) A party to the action;
(ii) A party's officer, agent, servant, employee, and attorney; and
(iii) A person who acts in concert or participates with them and who receives actual notice of the order by personal service or otherwise.

(2) Injunction.

(A) Form. An order that grants an injunction must:

(i) State the reasons for issuing it;
(ii) Be specific in terms; and
(iii) Describe in reasonable detail—not merely refer to the complaint or other document—the act or acts to be restrained.

(B) Scope. An injunction binds only the following:

(i) A party to the action;
(ii) A party's officer, agent, servant, employee, and attorney; and
(iii) A person who acts in concert or participates with them and who receives actual notice of the order by personal service or otherwise.

(e) Jurisdiction unaffected. This rule does not change injunctive powers previously vested in circuit and chancery courts.

Advisory Committee Notes

Rule 65 authorizes a party to seek temporary restraining orders (TROs) and preliminary injunctions in civil cases seeking permanent injunctive or other relief. A party may move for a TRO, preliminary injunction, or both and in appropriate circumstances, obtain relief before the merits of the case are resolved.

In general, the purpose of a TRO is to provide temporary and short-term relief until additional action can be taken in the case.

To obtain a TRO without notice to the adverse party, the party seeking relief must show (1) by affidavit or verified complaint (2) that the party will suffer immediate and irreparable injury before the adverse party can be heard in opposition. In addition, that party's attorney must certify to the court in writing (1) the efforts made to give the adverse party notice and (2) the reasons why notice to the adverse party should not be required.

A TRO granted without notice must contain information required by Rule 65(b)(1). In addition, it must expire by its own terms not more than 10 days after entered except in domestic relations cases. The court may extend a TRO for a like period (1) before it expires (2) if the restrained party consents or (3) for good cause shown.

The purpose of a preliminary injunction is to provide injunctive relief until the merits of the case are resolved. Preliminary injunctions cannot be granted without notice.

A party who moves for preliminary injunctive relief according to Rule 65(a) must demonstrate that "(i) there exists a substantial likelihood that the [movant] will prevail on the merits; (ii) the injunction is necessary to prevent irreparable harm; (iii) the threatened injury to the [movant] outweighs the harm an injunction might do to the [opposing party]; and (iv) granting a preliminary injunction is consistent with the public interest." *See Littleton v. McAdams*, 60 So. 3d 169, 171 (Miss. 2011). A motion for preliminary injunction falls within the trial court's discretion. *See City of Durant v. Humphreys County Mem'l Hosp.*, 587 So. 2d 244, 250 (Miss. 1991).

Rule 65(c) requires a movant who seeks a TRO or preliminary injunction to give proper security to pay costs, damages, and reasonable attorneys' fees to the restrained party in the event it is decided that party was wrongfully enjoined or restrained. Security is not required from the State of Mississippi and may be waived in domestic relations cases. Section 11-13-37 of the Mississippi Code of 1972 Annotated codifies an independent statutory basis to award damages and attorneys' fees if an injunction is dissolved.

County courts have some authority to issue injunctive relief. *See* Miss. Code Ann. § 9-9-21 (county court must "have jurisdiction concurrent with the circuit and chancery courts in all matters of law and equity" where the amount in controversy does not exceed $200K exclusive of interest and costs); *see also id.* § 99-9-23 (county judge must "have the power to order the issuance of writs of certiorari, supersedeas, attachments, and other remedial writs in all cases" pending in or within county court's jurisdiction). *But cf. id.* (county judge must "not have original power to issue writs of injunction, or other remedial writs in equity or in law" unless within the county court's jurisdiction as stated in the same provision).

The statutes authorize a county court to issue an injunction in cases falling within the concurrent jurisdiction of chancery and county court. *See*, *e.g.*, *Lee v. Coahoma Opportunities, Inc.*, 485 So. 2d 293, 294 (Miss. 1986) (citing *id.* § 9-9-21(1) (stating "claim for specific performance of a contract of employment plus attendant injunctive relief is well within the jurisdiction of the county court on its equity side"); *Swan v. Hill*, 855 So. 2d 459, 462-63 (Miss. Ct. App. 2003) (holding that the county court had jurisdiction to issue injunctive relief in case involving property rights).

65.1 Security: proceeding against surety.

When these rules require or allow a party to give security, and security is given in form of a bond, stipulation, or other undertaking with one or more sureties, each surety submits to the court's jurisdiction and irrevocably appoints the court clerk as an agent on whom papers affecting liability on the bond or undertaking may be served. The surety's liability may be enforced on motion without the necessity of an independent action. The motion and notice of it as the court orders may be served on the court clerk, who must mail copies to the surety if the addresses is known.

Rule 66. Receiver.

An action where a receiver has been appointed must not be dismissed unless the court orders otherwise. In all other respects, these rules govern an action seeking to appoint a receiver or one by or against a receiver.

Rule 67. Deposit in court.

In an action partly or wholly seeking a money judgment or something else that can be delivered, on notice to all parties and by leave of court, a party may deposit all or part of the sum or thing with the court.

The judge may order money paid into court as a result of a legal proceeding to be deposited at interest in a federally insured bank or savings and loan association authorized to receive public funds to the credit of the court in the action or proceeding where the money was paid. The deposited money plus interest must be paid only on the court clerk's check that is attached to a certified court order for payment and that is made payable to the person stated in the order.

Rule 68. Offer of judgment.

(a) Time.

(A) Offer. At least 15 days before trial, a party defending against a claim may serve an adverse party with an offer to allow judgment on specified terms with accrued costs.

(B) Acceptance. Within 10 days after service, the adverse party may serve written notice that the offer is accepted.

(b) Effect.

(1) Accepted. If the offer is accepted, either party may then file the offer, notice of acceptance, and proof of service. The court must then enter judgment.

(2) Not accepted. If the offer is not accepted, it must be deemed withdrawn.

(A) Evidence of the offer or its withdrawal is not admissible except in a proceeding to decide costs.

(B) If the adverse party obtains a judgment that is not more favorable than the offer, the adverse party must pay costs incurred after the offer was filed.

(C) The fact that an offer is filed but not accepted does not preclude a subsequent offer.

(3) Effect of a liable party's offer. When a verdict, order, or judgment decides one party is liable to another, but the amount or extent of liability remains undecided until additional proceedings, the liable party may make an offer of judgment.

(A) The liable party's offer must have the same effect as an offer filed before trial if served within a reasonable time at least 10 days prior to the hearing to decide the amount or extent of liability.

Rule 69. Execution.

(a) Enforcing a judgment. Statutory procedures govern the following:

(1) Process to enforce a money judgment;
(2) The procedure on execution in a proceeding supplementary to and in aid of a judgment; and
(3) The procedure on execution in a proceeding on and in aid of execution.

(b) Examination by judgment creditor. To aid in satisfying a judgment of at least $100, a judgment creditor may examine the judgment debtor or another person—including the debtor's or person's books, papers, or documents—on a nonprivileged matter relating to the debtor's property.

(1) The judgment creditor may examine the judgment debtor or other person:

(A) In open court according to statute; or
(B) Utilize the discovery procedures stated in Rules 26 through 37.

Rule 70. Judgment for specific act; vesting title.

(a) Specific acts. If a judgment orders a party to convey land, to deliver a deed or other document, or to perform another specific act, and the party fails to comply within the specified time, the court may order the act to be done by some other person it appoints.

(1) The court may order the disobedient party to pay costs of doing so.
(2) The completed act has the same effect as if the disobedient party had done it.

(b) Divesting title. If real or personal property is in Mississippi, instead of ordering a conveyance, the court may enter a judgment divesting a party's title and vesting it in others.

(1) The judgment has the effect of a legally executed conveyance.

(c) Delivering possession. When an order or judgment is for delivering possession, a certified copy of the judgment or order is sufficient authority for the sheriff of the county where the property is located to seize and deliver it to the party entitled to its possession.

(d) Contempt. In proper cases, the court may also find the party in contempt.

Advisory Committee Notes

Rule 70 applies only after a judgment is entered; Rules 6 and 65 apply to prejudgment remedies. Rule 70 applies only if a judgment order a party to convey land, deliver a deed or other document, or to perform other specific acts, and the party fails to comply within the time specified in the judgment.

Rule 71. Process for and against nonparty.

Other than a party's creditor in a divorce proceeding, when the court issues an order in favor of a nonparty, the nonparty may enforce the order by the same process as a party. When an order may be lawfully enforced against a nonparty, the nonparty is liable to the same process for enforcing obedience as a party.

Advisory Committee Notes

A court order may be enforced by a nonparty if the nonparty shares an identity of interest with the prevailing party. For example, in a case concerning title to property, a prevailing party's assignee is entitled to enforce a judgment in the same manner as the party–assignor. Likewise, a judgment may be against a party's successor in interest to a party, but the court must first obtain personal jurisdiction on the successor in interest. *See*, *e.g.*, *Mansour v. Charmax Ind., Inc.*, 680 So. 2d 852, 855 (Miss. 1996) (holding that service of process is requirement to personal jurisdiction before Rule 71 can be applied); *Libutti v. U.S.*, 178 F.3d 114, 124-25 (2d Cir. 1999) (holding that the court must have personal jurisdiction over the nonparty against whom the judgment is enforced).

Rule 71A. Eminent domain. [Reserved].

SECTION 9. APPEALS

Rules 72 to 76. [Omitted].

SECTION 10. COURTS AND CLERKS

Rule 77. Conducting business; clerk's authority; notice of order or judgment.

(a) Court always open. A court must always be considered open for purposes of filing a pleading or other paper; issuing and returning process; and making and directing all interlocutory motions, orders, and rules.

(b) Place for trials and other proceedings.

(1) Trial. Unless a statute provides otherwise, a trial on the merits must be conducted in open court.

(2) Other acts and proceedings. Within the judicial district, outside of it, or at another place in Mississippi, a judge may act and conduct proceedings other than trial in chambers.

(A) The court clerk or other official does not have to be present.

(B) But a hearing outside the district must not be conducted without the consent of all affected parties.

(c) Clerk's office hours; orders.

(1) Clerk's office hours. During business hours, the clerk's office must be open each day except Saturday, Sunday, and a legal holiday, and the clerk or deputy clerk must be present.

(2) Clerk's orders.

(A) The court clerk may:

(i) Issue process;
(ii) Issue process to enforce and execute a judgment;
(iii) Enter a default; and
(iv) Act on another matter that does not require the court's action.

(B) But the court may suspend, alter, or rescind the clerk's action for cause shown.

(d) Notice of order or judgment.

(1) Immediately after entering an order or judgment, the clerk must:

(A) Serve notice of it according to Rule 5 on each party not in default for failing to appear; and
(B) Record service on the docket.

(2) A party may also serve notice that an order or judgment has been entered according to Rule 5.

(3) Unless the Mississippi Rules of Appellate Procedure state otherwise, the clerk's failure to serve notice an order or judgment has been entered does not affect the time to appeal, relieve a party's failure to appeal within the allowed time, or authorize the court to do so.

[Amended effective 7/1/97.]

Advisory Committee Historical Note

Effective 7/1/97, Rule 77(d) was amended to allow parties to serve notice that an order or judgment has been entered. 689-92 So. 2d LXII (West Miss. Cas. 1997.) Effective 2/1/90, Rule 77 was amended by adding Rule 77(d), which requires the court clerk to give notice an order or judgment has been entered to interested parties. 553-56 So. 2d XLII (West Miss. Cas. 1990).

Advisory Committee Notes

Under Rule 77(a), the court must be deemed always open for the purpose of filing papers; issuing and returning process; and making motions and orders. This does not mean that the clerk's office must be physically open at all hours or that paper can be filed by leaving them in a closed or vacant office. Under Rule 5(e)(1), papers may be filed out of business hours by delivering them to the clerk or judge if he or she allows. *See* Miss. Const. art. 3, § 24 (all courts "shall be open").

Rule 77(b) requires a trial on the merits to be conducted in open court; all other acts or proceedings may be done or conducted by a judge in chambers everywhere in the state regardless if the clerk or other court official attends. But no hearing, other than one heard ex parte, will be conducted outside the district without the consent of all affected parties. *See Corporate Mgmt., Inc. v. Greene Rural Health Ctr. Bd. of Trustees*, 47 So. 3d 142, 146 (Miss. 2010).

Rule 77(d) requires the clerk to provide a copy of all orders and judgments to all parties who are not in default for failure to appear immediately when entered.

Under Miss. R. App. P. 4(h), a party who did not receive notice of a judgment or order from the clerk or a party within 21 days of its entry may move the trial court to reopen the time for appeal.

Rule 77(d) gives a prevailing party who wants to ensure that the time for appeal is not reopened under Miss. R. App. P. 4(h) the opportunity to serve notice a judgment or order has been entered on opposing parties according to Rule 5. Although a prevailing party may take the initiative to assure that an adversary receives effective notice, the clerk retains the duty to give notice a judgment or order has been entered.

Rule 78. Motion practice.

(a) Regular schedule.

(1) Each court must establish procedures for conducting business promptly, including for hearing and deciding a motion that requires notice.

(2) But regardless of time or place, the judge—without notice or on notice the court considers reasonable—may issue an order for advancing, conducting, and hearing an action.

(b) Submitting on briefs. To expedite business, the court by rule or order may allow a submitted motion to be decided without an oral hearing on brief written statements of support and opposition.

[Amended effective 3/1/89; amended effective 4/17/03 to allow a court by rule to decide a motion seeking final judgment without oral argument.]

Advisory Committee Historical Note

Effective 3/1/89, Rule 78 was amended by changing its title to "MOTION PRACTICE" and by abrogating provisions for local rules. 536-38 So. 2d XXXI (West Miss. Cas. 1989).

Advisory Committee Notes

Rule 78 does not alter a local rule governing motion practice. But the local rule must be considered in light of Rule 83.

Rule 79. Clerk records.

(a) General docket.

(1) Form; style. The clerk must keep a book known as the "general docket" in the form and style required by law.
(2) Civil action. The clerk must enter each civil action on the docket.
(3) File number. The file number of an action must be recorded on each docket page where an entry is made.
(4) Entry requirements.

(A) Type. The following must be recorded in the general docket on the page assigned to the action and marked with the file number:

(i) Papers filed with the clerk;
(ii) Issued process and returns;
(iii) Appearances;
(iv) Orders;
(v) Verdicts; and
(vi) Judgments.

(B) Content. An entry must be brief but include the nature of each filed paper or issued writ, the substance of each order or judgment, and the returns showing execution of process.

(C) Order; judgment.

(i) The docket must show the date an order or judgment is entered.
(ii) If a formal order is entered, the clerk must insert the order in the case.

(b) Minute book. The clerk must keep a correct copy of every judgment or order known as the "Minute Book."

(c) Index; calendar. Under the court's direction, the clerk:
(1) Must keep a suitable index of the general docket; and
(2) Prepare a calendar of all actions ready for trial.

(d) Other books and records; photocopy.

(1) Other books and records. The clerk must also keep other books and records as required by statute or these rules.

(2) Photocopy. The documents required to be kept under this rule may be recorded by means of an exact-copy photocopy process.

(e) Removing case file. The case file must not be removed from the clerk's office except on the clerk's or court's permission.

Advisory Committee Historical Note [Rule 79]

Effective 4/1/02, the Comment to Rule 79(a) was amended to underscore that docket entries must accurately reflect the actual date of entry. 813-15 So. 2d LXXXVIII (West Miss. Cas. 2002).

Advisory Committee Notes

Rule 79(a) specifies that a docket entry must reflect the date on which it is made in the general docket. Since several important time periods and deadlines are calculated from the date of the entry of a judgment and order, these entries must accurately reflect the actual date of the entries rather than another date like when the judge signs it. *See, e.g.*, Miss. R. Civ. P. 58 (mandating that judgment is effective only when entered under Rule 79(a)); *see also* Miss. R. Civ. P. 59 (requiring motion to alter or amend judgment be filed within 10 days after entry of judgment).

Rule 80. Stenographic report or transcript as evidence. [Omitted].

Advisory Committee Notes

Mississippi has statutory provisions for the appointment, oath, nature and term of office, bond, removal from office, and duties and responsibilities of court reporters. *See* Miss. Code Ann. §§ 9-13-1 to -63; *id.* §§ 9-13-101 to -123; and Miss. R. App. P. app. 3.

Rule 81. Rule applicability.

(a) General applicability.

(1) These rules apply to all civil proceedings. But they are subject to limited applicability in the following actions generally governed by statutory procedures:

(A) A proceeding pertaining to writ of habeas corpus;
(B) A proceeding pertaining to disciplining an attorney;
(C) A proceeding under the Youth Court Law, Miss. Code Ann. §§ 43-21-101 to -127;
(D) A proceeding pertaining to an election contest;
(E) A proceeding pertaining to bond validation;
(F) A proceeding pertaining to adjudication, commitment, and release of narcotics and alcohol addicts and persons in need of mental treatment;
(G) An eminent-domain proceeding;
(H) Title 91 of the Mississippi Code of 1972 Annotated;
(I) Title 93 of the Mississippi Code of 1972 Annotated;
(J) Creating and maintaining a drainage and water management district;
(K) Creating and changing a municipal boundary;
(L) A proceeding brought under the following:

(i) Miss. Code Ann. § 9-5-103;
(ii) Miss. Code Ann. § 11-1-23, -29, -31, -33, -35, -43, -45, -47, -49;
(iii) Miss. Code Ann. § 11-5-151 to -167; and
(iv) Miss. Code Ann. § 11-17-33.

(2) To the extent they may conflict with these rules, statutory procedures specifically for a proceeding stated above in Rule 81(a)(1) must remain in effect and control. But otherwise these rules apply.

(b) Summary proceeding. In an ex parte matter where notice is not required, a proceeding must be as summary as pertinent statutes contemplate.

(c) Publishing summons or notice. When a statute requires a summons or notice to be published, service according with methods in Rule 4 will satisfy statutory requirements.

(d) Procedure in certain actions and matters. The special procedural rules in Rule 81(d) must apply to the actions and matters stated in Rule 81(d)(1) and (d)(2) control to the extent they conflict with another rules provision.

(1) 30 days. The following actions and matters must be triable 30 days after the first publication where process is by publication or otherwise 30 days after completing service of process in a manner other than by publication:

(A) Adoption;
(B) Correcting a birth certificate;
(C) Altering a name;
(D) Terminating parental rights;
(E) Paternity;
(F) Legitimation;
(G) Uniform reciprocal enforcement of support;
(H) Determining heirship;
(I) Partition;
(J) Probating a will in solemn form;
(K) Caveat against probating a will;
(L) Will contest;
(M) Will construction;
(N) A child-custody action;
(O) A child-support action; and
(P) Establishing grandparents' visitation.

(2) 30 or 7 days. The following actions and matters must be triable 30 days after the first publication where process is by publication or 7 days after completing service of process in a manner other than by publication:

(A) Removing disabilities of minority;
(B) Temporary relief in a matter for divorce, separate maintenance, child custody, or child support;
(C) Modifying or enforcing a custody, support, or alimony judgment;
(D) Contempt; and
(E) An estate matter or minor's business requiring notice where the time period is not stated in a statute or Rule 81(d)(1).

(3) Not confessed. A complaint or petition filed in an action or matter stated in Rule 81(d)(1) or (d)(2) must not be taken as confessed.

(4) Answer.

(A) Not required. An answer must not be required in an action or matter stated in Rule 81(d)(1) or (d)(2).

(B) Optional. But a defendant or respondent may file an answer or other pleading.

(C) Court order. Or the court may require an answer if necessary to develop the issues properly.

(i) Failure to answer. A party who fails to file a court-ordered answer must not be allowed to present evidence on that party's behalf.

(5) Summons; time and place; continuance

(A) Summons. On filing an action or matter Rule 81(d)(1) or (2), a summons must issue that commands the defendant or respondent to appear and defend at a time in term time or vacation and a place at which it must be heard.

(B) Time and place. The time and place must be set by special order, general order, or court rule.

(C) Continuance.

(i) No additional summons. If the action or matter is not heard on the hearing date, it may by court order signed on that day be continued to a later day without additional summons on the defendant or respondent.

(ii) Clerk's authority. By order or rule, the court may authorize its clerk to set the action or matter for original hearing and to continue it on a later date.

(6) Rule 5(b) notice must be sufficient as to a temporary hearing in a pending action for divorce, separate maintenance, custody, or support if the defendant has been summoned to answer the original complaint.

(e) Proceedings modified. Forms of relief formerly obtained under the following must be obtained by a motion or action:

(1) Writ of fieri facias;
(2) Scire facias;
(3) Mandamus;

(4) Error coram nobis;
(5) Error coram vobis;
(6) Sequestration;
(7) Prohibition;
(8) Quo warranto;
(9) Writ in the nature of quo warranto; and
(10) All other writs.

(f) Statutory terminology. In applying these rules to an applicable proceeding, statutory terminology that also applies must if inconsistent with these rules be interpreted to mean an analogous device or procedure proper under these rules. For example:

(1) *Bill of complaint*, *bill in equity*, *bill*, or *declaration* means a *complaint* in these rules;
(2) *Plea in abatement* means *motion*;
(3) *Demurrer* means *motion to strike* in Rule 12(f);
(4) *Plea* means *motion* or *answer* as appropriate under these rules;
(5) *Plea of set-off* or *set-off* means a permissible counterclaim;
(6) *Plea of recoupment* or *recoupment* refers to a compulsory counterclaim;
(7) *Crossbill* refers to a counterclaim or crossclaim as appropriate under these rules;
(8) *Revivor*, *revive*, or r*evived* in reference to an action refers to substitution in Rule 25;
(9) *Decree pro confesso* means a default judgment in Rule 55; and
(10) *Decree* means a judgment as defined in Rule 54.

(g) No specific procedure. When no procedure is specifically stated, the court must proceed in a lawful manner not inconsistent with the Mississippi Constitution; these rules; or an applicable statute.

[Amended effective 6/24/92; 4/13/00.]

Advisory Committee Historical Note

Effective 4/13/00, Rule 81(d)(5) was amended to make a continuance effective on a signed rather than entered order. 753-54 So. 2d XVII) (West Miss. Cas. 2000.)

Effective 6/24/92, Rule 81(h) was deleted. 598-02 So. 2d XXIII-XXIV (West Miss. Cas. 1992).

Effective 1/1/86, Rule 81(a) was amended by adding subsections (10)–(12); Rule 81(b) was amended by deleting examples and a provision that no answers are required in ex parte matters; Rule 81(d) was rewritten to provide for proceedings in a number of specified actions and to abrogate its treatment of domestic relations matters. 470, 473 So. 2d XVI-XVIII (West Miss. Cas. 1986).

Advisory Committee Notes

Rule 81 complements Rule 1 by specifying which civil actions are partially or not governed by the Mississippi Rules of Civil Procedure.

Rule 81(a) lists 12 categories of civil actions which are not governed entirely by the Mississippi Rules of Civil Procedure. In each one, there are statutory provisions detailing certain procedures to be utilized. *See generally* Miss. Code Ann. §§ 11-43-1, *et seq.* (habeas corpus); 73-3-301, *et seq.* (disciplining attorneys); 43-21-1, *et seq.* (youth court proceeding); 23-15-911 *et seq.* (election contest); 31-13-1, *et seq.* (bond validation); 41-21-61, *et seq.* (person with mental illness or intellectual disability); 41-30-1, *et seq.* (adjudication, commitment, and release of alcohol and drug addicts); 11-27-1, *et seq.* (eminent domain); 91-1-1, *et seq.* (trusts and estates); 93-1-1, *et seq.* (domestic relations); 51-29-1, *et seq.* and 51-31-1, *et seq.* (creating and maintaining drainage and water management district); 21-1-1, *et seq.* (creating and changing municipal boundaries); and those proceedings identified in category (L) by code title: 9-5-103 (bonds of receivers, assignees, executors may be reduced or cancelled if excessive or for sufficient cause); 11-1-23 (court or judge may require new security); 11-1-29 (proceedings on death of surety on bonds, etc.); 11-1-31 (death of parties on bonds having force of judgment where—citation in anticipation of judgment); 11-1-35 (death of parties on bonds having force of judgment when citation issued and returnable); 11-1-43 to -49 (seizure of perishable commodities by legal process); 11-5-151 to -167 (receivers in chancery); and 11-17-33 (receivers appointed for nonresident or unknown owners of mineral interests).

But in an instance in the 12 categories where controlling statutes are silent as to procedure, the Mississippi Rules of Civil Procedure govern.

As to ex parte matters, Rule 81(b) intends to preserve among other things the summary manner in which many of the following matters are handled: testamentary, administration, minors' or wards' business; and cases of idiocy, lunacy, and persons of unsound mind. *See* Miss. Code Ann. § 11-5-49 (1972).

Rule 81(c) pertains to an action or matter where a statute requires summons or notice by publication. In those instances, Rule 4 publication satisfies the statutory requirements.

Rule 81(d) recognizes that certain actions and matters require special procedural rules, including: (1) a matter where the State of Mississippi has an interest in the outcome; (2) a matter whose nature should not subject a defendant or respondent who fails to answer to a default judgment; and (3) a matter that should not be interpreted as confessed even in the absence of a defendant's or respondent's appearance. Most of the enumerated matters are peculiar to chancery court. Rule 81(d) divides them into two categories based on the recognition that because of their simplicity or need for speedy resolution, some matters should be triable after short notice to the defendant or respondent. Yet because of their complexity, others should afford the defendant or respondent more time for trial preparation.

Under Rule 81(d)(3), the pleading initiating the action should be commenced by complaint or petition only and not confessed. Initiating a Rule 81(d) action by "motion" is not intended.

Rule 81(d)(5) recognizes that since no answer is required of a defendant or respondent, then the issued summons must inform the defendant or respondent of the time and place to appear and defend. If the matter is not heard on the date originally set for hearing, the court may sign an order on that day continuing the matter to a later date. In addition, the rule also allows a court to adopt a rule or issue an order authorizing its clerk to set an action or matter for an original hearing and to continue the hearing for a later date. A local rule should be filed with the Mississippi Supreme Court as Rule 83 requires.

According to Rule 81(d)(6), as to a temporary hearing in a pending action for divorce, separate maintenance, child custody, or child support, Rule 5(b) notice will be sufficient if the defendant or respondent has already been summoned to answer.

SECTION 11. GENERAL PROVISIONS

Rule 82. Jurisdiction; venue.

(a) Jurisdiction unaffected. These rules must not be construed to extend or limit the jurisdiction of a Mississippi court.

(b) Venue. Unless this rule states otherwise, applicable statutes control venue of an action.

(c) Venue; multiple claims or parties.

(1) Where. If several claims or parties have been properly joined, the suit may be brought in a county where one of the claims properly could have been brought.

(2) Joinder. When an action has been commenced in a proper county, additional claims and parties may be joined under Rules 13, 14, 22 and 24 as ancillary without regard to whether that county would be a proper venue for an independent action on the claims or against the parties.

(d) Improper venue.

(1) Transfer rather than dismiss. When an action is filed in the wrong county, instead of dismissing the action, the court on timely motion must transfer it to the court where it properly might have been filed.

(2) Case proceeds. The case must proceed as though originally filed in the court where it is transferred.

(3) Transfer expense. The expenses of transferring the case must be taxed to the plaintiff.

(4) More than one court. If the action properly might have been filed in more than one court, the plaintiff must have the right to select the court to which the action will be transferred.

(e) Forum nonconveniens. If an action is filed in an appropriate venue, and no statute designates or limits venue, then for the parties' and witnesses' convenience or in the interest of justice, the court may transfer an action or a claim to a court where the action properly might have been filed, and the case must proceed as though originally filed in that court.

[Amended effective 2/20/04, to add Section 82(e) allowing transfer for forum nonconveniens for cases filed after the effective date.]

Advisory Committee Notes

Under Rule 82(c), if venue is proper for one plaintiff's claim, and if the plaintiff has been properly joined with other plaintiffs, venue is proper for all plaintiffs' claims. Section 11-11-3(2) of the Mississippi Code of 1972 Annotated, however, states that "[i]n any civil action where more than one (1) plaintiff is joined, each plaintiff shall independently establish proper venue; it is not sufficient that venue is proper for another plaintiff joined in the civil action." Under Rule 82(b), unless the rule states otherwise, venue in all actions must be according to statute. Therefore, a conflict exists between the rule and the statute.

Under the rule, venue is proper in cases involving multiple plaintiffs who are properly joined if venue is proper for a single plaintiff's claim; yet under the statute, in a case involving multiple plaintiffs, venue must be proper for each plaintiff's claim. No conflict exists in cases involving multiple defendants. *See Penn Nat'l Gaming, Inc. v. Ratliff*, 954 So. 2d 427, 432 (Miss. 2007) (venue properly established against one defendant generally proper against all defendants). In cases involving a medical-malpractice defendant and another defendant, however, venue established by Section 11-11-3 of the Mississippi Code of 1972 Annotated is only appropriate in the county where the alleged malpractice occurred. *See Adams v. Baptist Mem'l Hosp.-DeSoto, Inc.*, 965 So. 2d 652, 57-58 (Miss. 2007).

Rule 82(e) authorizes a motion to transfer venue to another Mississippi court having proper venue based on forum nonconveniens. In addition, Section 11-11-3 of the Mississippi Code Annotated of 1972 authorizes transfer to another Mississippi forum that is more convenient and dismissal of the case if a more convenient forum is available in another state. A trial court ruling on a motion to dismiss filed under the statute must decide whether, given "the interest of justice" and "the convenience of the parties and witnesses," "a claim or action would be more properly heard in a forum outside this state or in a different county of proper venue within this state." Miss. Code. Ann. § 11-11-3(4)(a). The trial court may consider the factors stated in Section 11-11-3(4)(a) of the Mississippi Code Annotated of 1972.

Rule 83. Local court rules.

(a) Permissibility.

(1) Judicial conference. The conference of circuit, chancery, and county court judges may issue uniform rules and amendments concerning practice in their respective courts not inconsistent with these rules.

(2) Judicial majority. Likewise, a court by action of a majority of the judges may issue local rules and amendments concerning practice in their respective courts not inconsistent with these rules.

(A) No majority. In the event there is no majority, the senior judge must have an additional vote.

(b) Procedure for approving.

(1) Requirements. All local rules and uniform rules adopted before being effective must be filed in the Mississippi Supreme Court for approval. The following must be filed with a motion for approval in an electronically formatted medium (e.g., USB flash drive or CD-ROM):

(A) A copy of the motion; and

(B) The proposed rules.

(2) Receipt. After a proposed rule is received before it is approved, the Mississippi Supreme Court may submit it to the Mississippi Supreme Court Advisory Committee on Rules for advice as to whether the proposed rule is consistent or in conflict with these rules or other rules the Mississippi Supreme Court has adopted.

(c) Publication. All local and uniform rules approved by the Mississippi Supreme Court must be submitted for publication in the Southern Reporter (Mississippi cases).

[Amended effective 3/1/89; 11/29/89; 2/1/90; 3/13/91; 12/16/91; amended 3/10/94, effective retroactively from and after 1/1/93; amended 10/13/95, effective from and after 4/14/94; amended effective 7/1/10.]

Advisory Committee Historical Note

Rule 83 was amended 3/10/94, effective retroactively from and after 1/1/93, by deleting the word “hereinafter” in Rule 83(b) following the words, “uniform rules”; by deleting Rule

83(c) in its entirety; and by renumbering 83(d) as 83(c). 632-35 So. 2d XXIII-XXIV (West Miss. Cases 1994).

[Adopted 8/21/96.]

Advisory Committee Notes

Practitioners may access local rules that have been approved by the Mississippi Supreme Court on its website.

Rule 84. Forms 1, 2, 3, and 4.

Under Rule 4(b)(3)(A), a summons served by a process server must substantially conform to Form 1. Under Rule 4(b)(3)(B), a summons served by the sheriff must substantially conform to Form 2. Under Rule 4(c)(3)(A)(ii), a notice and acknowledgment must substantially conform to Form 3. And under Rule 4(c)(4)(A), a summons by publication must substantially conform to Form 4. The Appendix contains Forms 1, 2, 3, and 4.

Advisory Committee Notes

Former Rule 84 referred to "forms contained in the Appendix of Forms [that] are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate." Prior to December 2015 amendments, Federal Rule of Civil Procedure 84 referred to "forms in the Appendix [that] suffice under these rules and illustrate the simplicity and brevity that these rules contemplate." The amended Federal Rule of Civil Procedure 84 abrogated the Appendix of Forms. The Committee Note recognized the following: (1) that the purpose for providing illustrations—although useful when the rules were adopted—had been fulfilled; (2) that many alternative sources for forms existed; and (3) that the forms were no longer necessary.

Unlike its federal counterpart, Rule 84 of the Mississippi Rules of Civil Procedure does not abrogate all forms. Rule 84 does not abrogate forms mentioned in Rule 4: Form 1 (formerly Form 1A); Form 2 (formerly Form 1AA); Form 3 (formerly Form 1-B); and Form 4 (formerly Form 1-C). These forms, however, have been updated. In contrast, December 2015 amendments to the Federal Rules of Civil Procedure moved similar forms to the end of Federal Rule of Civil Procedure 4.

Yet like its federal counterpart, Mississippi Rule of Civil Procedure 84 recognizes that the purpose of providing illustrations has been fulfilled. In addition, Rule 84 recognizes that alternative sources for the forms exist and that they are no longer necessary.

Rule 85. Title; citation.

These rules are known as the “Mississippi Rules of Civil Procedure” and may be cited as: Miss. R. Civ. P. or M.R.C.P (e.g., Miss. R. Civ. P. 85 or M.R.C.P. 85).

APPENDIX: FORMS 1, 2, 3 AND 4

See Rules 4 and 84 for more information about Forms 1, 2, 3, and 4. These forms are illustrations only.

Form 1. Process server (front).

IN THE *(Insert court)* COURT OF *(Insert county)* COUNTY, MISSISSIPPI

A.B., Plaintiff(s)

v. Civil Action No. *(Insert case number)*

C.D., Defendant(s)

SUMMONS

THE STATE OF MISSISSIPPI
TO: (*Insert the name and address of the person to be served*)

NOTICE TO DEFENDANT(S)

THE COMPLAINT WHICH IS ATTACHED TO THIS SUMMONS IS IMPORTANT, AND YOU MUST TAKE IMMEDIATE ACTION TO PROTECT YOUR RIGHTS.

You are required to mail or hand deliver a copy of a written response to the Complaint to (*Insert attorney's name)*, the attorney for the Plaintiff(s), whose post office address is (*Insert post office address)* and whose street address is *(Insert street address)*. Your response must be mailed or delivered within 30 days from the date of delivery of this summons and complaint or a judgment by default will be entered against you for the money or other things demanded in the complaint.

You must also file your original response with the Clerk of this Court within a reasonable time afterward.

Issued under my hand and court seal, the (*Insert date)* of *(Insert year)*.

(Insert clerk's signature)
Clerk of *(Insert county)* County, Mississippi

(Affix seal)

Form 1. Process server (back).

PROOF OF SERVICE—SUMMONS

[*Use separate proof of service for each person served*]

_____

(Insert name of person or entity served)

I, (*Insert process server's name)*, the process server identified below, served the summons and complaint on *(Insert name of person or entity served)* in the following manner (process server must check proper space and provide all requested information):

[] FIRST CLASS MAIL AND ACKNOWLEDGEMENT SERVICE. By mailing—first class mail, postage prepaid and on the date stated in the attached Notice—to *(Insert name)* copies of the: (1) notice; (2) acknowledgement; and (3) self-addressed return envelope, postage prepaid. (*Attach completed acknowledgement of receipt from Form 3).*

[] PERSONAL SERVICE. On the (*Insert date)* of *(Insert year)*, I personally delivered copies to *(Insert name)* where I found that person(s) in *(Insert county)* County of the State of *(Insert state)*.

[] RESIDENCE SERVICE. After exercising reasonable diligence I was unable to deliver copies to *(Insert name)* within *(Insert county)* County of the State of *(Insert state)*. I served the summons and complaint on the (*Insert date)* of *(Insert year)*, at the usual place of abode of *(Insert name)* by leaving a true copy of the summons and complaint with *(Insert name)*, who is the *(Insert wife, husband, son, daughter, or other person)*, a family member of *(Insert name)* above age 16 and willing to receive the summons and complaint. And afterwards on the (*Insert date)* of *(Insert year)*, I mailed (first class, postage prepaid) copies to*(Insert name)* at his/her usual place of abode where the copies were left.

[] CERTIFIED MAIL SERVICE. By mailing to an address outside Mississippi (first class, postage prepaid, return receipt) copies to *(Insert name*). (*Attach signed return receipt or the return envelope marked "Refused."*)

At the time of service I was at least 18 years of age and not a party to this action.

Fee for service: $ *(Insert amount of fee)*

Process server must list below: [*Please print or type*]

_____

(Insert name)

_____

(Insert social security number)

_____

(Insert address)

_____

(Insert telephone number)

State of *(Insert state)*.
County of *(Insert county)*.

(Insert name) personally appeared before me, a notary public in the above jurisdiction and whose signature follows, and after being duly sworn, states on oath that the matters and facts in the previous "Proof of Service—Summons" are true and correct as stated in it.

_____
(Insert process server's signature)

Sworn to and subscribed before me the (*Insert date)* of *(Insert year)*,

_____
(Insert process notary public's signature)

(*Affix seal)*
My commission expires: *(Insert date)*
[Adopted effective 3/1/85; amended effective 5/2/85; amended 3/17/95.]

Form 2. Sheriff (front).

IN THE *(Insert court)* COURT OF *(Insert county)* COUNTY, MISSISSIPPI

A.B., Plaintiff(s)

v. Civil Action No. *(Insert case number)*

C.D., Defendant(s)

SUMMONS

THE STATE OF MISSISSIPPI
TO: (*Insert the name and address of the person to be served*)

NOTICE TO DEFENDANT(S)

THE COMPLAINT WHICH IS ATTACHED TO THIS SUMMONS IS IMPORTANT, AND YOU MUST TAKE IMMEDIATE ACTION TO PROTECT YOUR RIGHTS.

You are required to mail or hand deliver a copy of a written response to the Complaint to (*Insert attorney's name)*, the attorney for the Plaintiff(s), whose post office address is (*Insert post office address)* and whose street address is *(Insert street address)*. Your response must be mailed or delivered within 30 days from the date of delivery of this summons and complaint or a judgment by default will be entered against you for the money or other things demanded in the complaint.

You must also file your original response with the Clerk of this Court within a reasonable time afterward.

Issued under my hand and court seal, the (*Insert date)* of *(Insert year)*.

(Insert clerk's signature)
Clerk of *(Insert county)* County, Mississippi

(Affix seal)

Form 2. Sheriff (back**).**

RECEIVED the (*Insert date)* of *(Insert year)*.

(Insert sheriff's signature)
Sheriff of *(Insert county)* County, Mississippi

SHERIFF'S RETURN

State of *(Insert state)*.
County of *(Insert county)*.

[] I personally delivered copies of the summons and complaint on the (*Insert date)* of *(Insert year)*, to: *(Insert name)*.

[] After exercising reasonable diligence I was unable to deliver copies of the summons and complaint to *(Insert name)* within *(Insert county)* County, Mississippi. I served the summons and complaint on the (*Insert date)* of *(Insert year)*, at the usual place of abode of *(Insert name)* by leaving a true copy of the summons and complaint with *(Insert name)*, who is the *(Insert wife, husband, son, daughter, or other person)*, a family member of *(Insert name)* above age 16 and willing to receive the summons and complaint. And afterwards on the (*Insert date)* of *(Insert year)*, I mailed (first class, postage prepaid) copies to*(Insert name)* at his/her usual place of abode where the copies were left.

[] I was unable to serve the summons and complaint.

This (*Insert date)* of *(Insert year)*.

Sheriff of *(Insert county)*, Mississippi.

(Insert deputy sheriff's signature)
Deputy Sheriff

[Note: All summons issued to the sheriff must be returned within 30 days from the day the summons was received by the sheriff under Mississippi Rule of Civil Procedure 4(c)(2)].
[Adopted effective 3/1/85; amended effective 2/1/90.]

Form 3. Notice and acknowledgment for service by mail (front).

IN THE *(Insert court)* COURT OF *(Insert county)* COUNTY, MISSISSIPPI

A.B., Plaintiff(s)

v. Civil Action No. *(Insert case number)*

C.D., Defendant(s)

NOTICE

TO: (*Insert the name and address of the person to be served*)

The enclosed summons and complaint are served according to Rule 4(c)(3) of the Mississippi Rules of Civil Procedure.

You must sign and date the acknowledgment at the bottom of this page. If you are served on behalf of a corporation, unincorporated association (including a partnership), or other entity, you must indicate under your signature your relationship to that entity. If you are served on behalf of another person and authorized to receive process, you must indicate that authority under your signature.

If you do not complete and return the form to the sender within 20 days of the date of mailing shown below, you (or the party on whose behalf you are being served) may be required to pay expenses incurred in serving a summons and complaint.

If you do complete and return this form, you (or the party on whose behalf you are being served) must respond to the complaint within 30 days of the date of your signature. If you fail to do so, judgment by default will be entered against you for the relief demanded in the complaint.

I declare that this Notice and Acknowledgement of Receipt of Summons and Complaint was mailed on (*Insert date)* of *(Insert year)*.

(Insert signature)

Form 3. Notice and acknowledgment for service by mail (back).

THIS ACKNOWLEDGMENT OF RECEIPT OF SUMMONS AND COMPLAINT MUST BE COMPLETED

I acknowledge that I have received a copy of the summons and complaint in the above matter in the State of *(Insert state)*.

_____
(Insert signature)

_____
(Insert relationship to entity/authority to receive service of process)

_____
(Insert date of signature)

State of *(Insert state)*.
County of *(Insert county)*.

(Insert name) personally appeared before me, a notary public in the above jurisdiction and whose signature follows, who solemnly and truly declared and affirmed before me that the matters and facts in the previous "Acknowledgment of Receipt of Summons and Complaint" are true and correct as stated in it.

_____
(Insert process server's signature)

Affirmed to and subscribed before me the (*Insert date)* of *(Insert year)*,

_____
(Insert process notary public's signature)

(*Affix seal)*

My commission expires: *(Insert date)*

[Adopted effective 3/1/85; amended effective 5/2/85; amended 3/17/95.]

Form 4. Summons by publication.

IN THE *(Insert court)* COURT OF *(Insert county)* COUNTY, MISSISSIPPI

A.B., Plaintiff(s)

v. Civil Action No. *(Insert case number)*

C.D., Defendant(s)

SUMMONS

THE STATE OF MISSISSIPPI
TO: (*Insert the name and address of the person to be served*)

You have been made a Defendant in the suit filed in this Court by *(Insert name of all Plaintiffs)*, Plaintiff(s), seeking *(Insert a brief description of the relief being sought)*. Defendants other than you in this action are *(insert names of all defendants other than the person or persons who are the subject of this summons)*.

You are required to mail or hand deliver a copy of a written response to the Complaint to (*Insert attorney's name)*, the attorney for the Plaintiff(s), whose post office address is (*Insert post office address)* and whose street address is *(Insert street address)*.

YOUR RESPONSE MUST BE MAILED OR DELIVERED NOT LATER THAN 30 DAYS AFTER (*INSERT DATE)* OF *(INSERT YEAR)*, WHICH IS THE DATE OF THE FIRST PUBLICATION OF THIS SUMMONS. IF YOUR RESPONSE IS NOT MAILED OR DELIVERED AS STATED, A JUDGMENT BY DEFAULT WILL BE ENTERED AGAINST YOU FOR THE MONEY OR OTHER RELIEF DEMANDED IN THE COMPLAINT.

You must also file your original response with the Clerk of this Court within a reasonable time afterward.

Issued under my hand and court seal, the (*Insert date)* of *(Insert year)*.

(Insert clerk's signature)
Clerk of *(Insert county)* County, Mississippi

(Affix seal)

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

APPENDIX B. AFFECTED STATUTES [Deleted in its entirety].

[Effective 6/24/92].

APPENDIX C. TIME TABLE FOR PROCEEDINGS UNDER THE MISSISSIPPI RULES OF CIVIL PROCEDURE [Deleted in its entirety].

[Effective 6/24/92].