

89-R-99001

FILED

FEB 07 2020

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

IN RE: AMENDMENT OF M.R.C.P. 5

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

MOTION TO AMEND M.R.C.P. 5

Comes now the Supreme Court Advisory Committee on Rules, pursuant to M.R.A.P. 27(f), and moves the Mississippi Supreme Court to amend M.R.C.P. 5 as follows:

Rule 5. Service and Filing of Pleadings and Other Papers

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

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

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

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(c) **Service: Numerous Defendants.** In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants, and that any cross-claim, counter-claim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

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

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

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

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

Advisory Committee Historical Note

Effective _____, Rule 5(d) was amended to clarify that although discovery papers used with respect to pretrial proceedings must be filed in the record, discovery papers used at trial need not be filed in the record prior to their use at trial. XX So. 3d XX (Miss. 20).

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

Advisory Committee Notes

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

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

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

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

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

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

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

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

The proposed amendment clarifies that although discovery papers used during pretrial proceedings must be filed in the record, discovery papers used during trial need not be made a part of record prior to their use at trial. The motion to amend M.R.C.P. 5 was approved by the Committee on April 6, 2018.

The Supreme Court Advisory Committee on Rules therefore moves that the above proposed amendment to M.R.C.P. 5 be considered by the Mississippi Supreme Court.

SO MOVED, this the 7 day of February, 2020.

SUPREME COURT ADVISORY COMMITTEE ON RULES



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