

Serial: 130498

IN THE SUPREME COURT OF MISSISSIPPI
No. 89-R-99027-SCT

FILED

*IN RE: MISSISSIPPI RULES OF
APPELLATE PROCEDURE*

MAR 23 2006

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

ORDER

This matter is before the Court en banc on the motion of the Clerk of the Court for consideration of the amendment of Rule 11(d)(1) and (2) of the Mississippi Rules of Appellate Procedure. The Court finds that the amendment to Rule 11(d)(1) and (2) as set forth in Exhibit "A" hereto will promote the fair and effective administration of justice.

IT IS THEREFORE ORDERED that the motion of the Clerk of the Court is hereby granted. Rule 11(d)(1) and (2) of the Mississippi Rules of Appellate Procedure and the Comment thereto are amended as set forth in Exhibit "A" hereto.

IT IS FURTHER ORDERED that the Clerk of this Court shall spread this order upon the minutes of the Court and that a true certified copy be forwarded forthwith to West Publishing Company for publication in *Southern Reporter Second (Mississippi Edition)* and the *Mississippi Rules of Court*.

SO ORDERED, this the 13th day of March, 2006.



WILLIAM L. WALLER, JR., PRESIDING JUSTICE
FOR THE COURT

TO GRANT: SMITH, C.J., WALLER AND COBB, P.J.J., CARLSON, GRAVES,
DICKINSON AND RANDOLPH, JJ.

TO DENY: EASLEY, J.

NOT PARTICIPATING: DIAZ, J.

EXHIBIT "A" TO ORDER

MISSISSIPPI RULES OF APPELLATE PROCEDURE

RULE 11. COMPLETION AND TRANSMISSION OF THE RECORD

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

(b) Estimation and Payment of Fees.

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

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

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

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

- (1) the amount of work that has been accomplished on the transcript,
- (2) all outstanding transcripts due to this and other courts, including the due dates of filing, and
- (3) verification that the request has been brought to the attention of, and approved by, the trial judge who tried the case.

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

Upon completion of the transcript the reporter shall certify the transcript as an accurate account of the proceedings and file the original and one copy of the transcript with the clerk of the trial court. The reporter shall simultaneously certify and serve notice of the filing on the parties and on the clerk of the Supreme Court. Additionally, the reporter shall prepare an electronic disk of the transcript filed and shall file the electronic disk with the trial court clerk for inclusion in the appellate record. All electronic disks shall be in electronic language capable of transference to other systems, i.e., ASCII, Word Perfect, Ami-PRO, Word, etc. All electronic disks shall be labeled to include the following information:

- (1) style of the case;
- (2) number of disks, i.e., 1 of 2, 2 of 2, etc.; and
- (3) the language format.

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

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

(1) *Clerk's Preparation of Record.* Upon the appellant's compliance with subparagraph (b)(1) and service of the designation required by Rule 10(b)(1), within 30 days, the trial court clerk shall assemble the record as follows:

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

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

- ii. Transcript. The original transcript is prepared by the court reporter pursuant to Rule 11(c). The clerk of the trial court shall not renumber the pages of the original transcript, nor make copies of the original transcript, nor handle the original transcript in any way other than to include in the table of contents of the Clerk's Papers the number of volumes contained in the original transcript and include the original transcript as part of the record to be transmitted to the Supreme Court. The court reporter is responsible for preparing, certifying, and binding the transcript and is responsible for furnishing the transcript fully ready for transmission to the Supreme Court.
- iii. Exhibits. A copy of exhibits designated by the parties shall be assembled in a flat file envelope or a box. If an exhibit is a photograph, the original shall be included and a photocopy retained by the trial court clerk. Video and audio tapes shall be included and a duplicate shall be retained by the trial court clerk. The clerk shall include with the exhibits forwarded to the Supreme Court a list of all exhibits designated by the parties, indicating thereon those retained by the trial court clerk and those submitted to the Supreme Court. Documents of unusual bulk or weight and physical exhibits other than documents, shall not be transmitted by the trial court clerk unless the clerk is directed to do so by a party or by the clerk of the Supreme Court. A party must make advance arrangements with the clerks for the transportation and receipt of exhibits of unusual bulk or weight.

(2) *Transmission of Record*. Upon receipt of the court reporter transcript, the clerk shall then execute a certificate of compliance with this Rule and serve notice of completion on the parties and on the clerk of the Supreme Court. At the end of the time prescribed by Rule 10(b)(5), the clerk shall immediately deliver the record to the Supreme Court.

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

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

[Adopted to govern matters filed on or after January 1, 1995; amended effective May 23, 2002; amended effective June 27, 2002; amended March 23, 2006 to provide that the trial court clerk shall assemble the record at the same time as the court reporter prepares the transcript.]

Advisory Committee Historical Note

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

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

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

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

Comment

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

Rule 11(c) gives to the Supreme Court the authority to rule on certain requests for extension. The Court may empower its clerk to rule on such requests and to grant extensions up to a specified time, e.g., 30 days. The rule prescribes the content of the reporter's request. The rule also provides that the transcript is to conform to the Guidelines for Court Reporters and exhibits are not to be physically incorporated in the transcript, thereby ensuring that all transcripts will be uniform and eliminating the awkward folding and separation of documentary exhibits by page.

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

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

Rule 11(d) requires that the trial court clerk prepare the record on appeal. It eliminates the binding of records in book form and so avoids an unnecessary expense to the parties. Under Rule 11(d), the record as transmitted will consist of (1) the certified copy of docket entries, a photocopy of filed papers designated by the parties, and a cost bill; (2) the original transcript; and (3) an envelope or box containing a copy of designated exhibits accompanied

by the list identifying which exhibits are retained by the clerk and which are submitted to the Supreme Court required by Rule 11(d)(1)(iii). The clerk may mark the certified copy of docket entries with the page numbers corresponding to each entry and so provide the list of documents required by Rule 11(d)(1)(I). Form 6 in the Appendix of Forms is a form for a list of clerk's papers. The form can be used if the docket sheet is illegible or for any other reason a satisfactory list cannot be produced by adding record page numbers to the docket sheet. The rule does not follow the federal practice of appeals entirely on the original record, but retains the requirement of copying original papers and exhibits for use by the Supreme Court. This requirement reduces the bulk of documents to be reviewed by the Court and provides for a duplicate copy of essential records.

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

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

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