4/17/97

IN THE SUPREME COURT OF MISSISSIPPI

NO. 89-R-99001 SCT

IN RE: MISSISSIPPI RULES OF CIVIL PROCEDURE IN ALL

CHANCERY, CIRCUIT AND COUNTY COURTS OF THE STATE

ORDER

This matter has come before the Court sitting en banc upon the Supreme Court Rules Advisory Committee's Petition for the Amendment of Certain Rules and Comments of the Mississippi Rules of Civil Procedure, and the Court having considered the petition, does find that, with the single exception of the proposed addition of a Comment to Rule 23 (Omitted), the amendments to such Rules and Comments should be adopted.

IT IS THEREFORE ORDERED THAT:

(1) The petition, in so far as it proposes the addition of a Comment to M.R.C.P. 23 (Omitted) be and the same is hereby denied;

(2) M.R.C.P. 45 and 30(b)(7) and the accompanying Comment be and are hereby amended as set forth in Exhibit A hereto;

(3) M.R.C.P. 50, 52 and 59 and the Comments to Rules 50, 58 and 59 be and the same are hereby amended as set forth in Exhibit B hereto;

(4) M.R.C.P. 62 and the Comment thereto be and the same is hereby amended as set forth in Exhibit C hereto.

IT IS FURTHER ORDERED that such amendments shall be effective from and after July 1, 1997.

IT IS FURTHER ORDERED that Historical Notes reflecting these amendments be and are hereby adopted as set out in the attached exhibits.

IT IS FURTHER ORDERED that this Court expresses its sincere gratitude to the Supreme Court Rules Advisory Committee for their continuing diligent, scholarly and professional efforts in advising and assisting the Court in the study and improvement of the Rules of Civil Procedure as well as the other rules of the courts in this state.

IT IS FURTHER ORDERED that the Clerk of the Court is directed to spread this Order upon the minutes of the Court and to forthwith forward a certified copy thereof to West Publishing Company for publication in *The Mississippi Rules of Court* and in the advance sheets of the *Southern Reporter (Mississippi Edition).*

SO ORDERED, this, the _____ day of April, 1997.

_____

MICHAEL SULLIVAN, PRESIDING JUSTICE

FOR THE COURT

EXHIBIT A

REVISED RULE 45 AND COMMENT

[delete entire existing rule, and substitute the following:]

RULE 45. SUBPOENA

(a) Form; Issuance.

(1) Every subpoena shall be issued by the clerk under the seal of the court, shall state the name of the court and the title of the action, and shall command each person to whom it is directed to attend and give testimony, or to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified. The clerk shall issue a subpoena signed and sealed, but otherwise in blank, to a party requesting it, who shall fill it in before service. A command to produce evidence or to permit inspection may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately.

(2) Subpoenas for attendance at a trial or hearing, for attendance at a deposition, and for production or inspection shall issue from the court in which the action is pending. In the case of a deposition to be taken in foreign litigation the subpoena shall be issued by a clerk of a court for the county in which the deposition is to be taken.

(b) Place of Examination. A resident of the State of Mississippi may be required to attend an examination only in the county wherein he resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of the court. A non-resident of this state subpoenaed within this state may be required to attend only in the county wherein he is served, or at such other convenient place as is fixed by an order of the court.

(c) Service.

(1) A subpoena may be served by a sheriff, or by his deputy, or by any other person who is not a party and is not less than 18 years of age, and his return endorsed thereon shall be prima facie proof of service, or the person served may acknowledge service in writing on the subpoena. Service of the subpoena shall be executed upon the witness personally. Except when excused by the court upon a showing of indigence, the party causing the subpoena to issue shall tender to a non-party witness at the time of service the fee for one day's attendance plus mileage allowed by law. When the subpoena

is issued on behalf of the State of Mississippi or an officer or agency thereof, fees and mileage need not be tendered in advance.

(2) Proof of service shall be made by filing with the clerk of the court from which the subpoena was issued a statement, certified by the person who made the service, setting forth the date and manner of service, the county in which it was served, and the names of the persons served.

(d) Protection of Persons Subject to Subpoenas.

(1) In General.

(A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it (i) fails to allow reasonable time for compliance; (ii) requires disclosure of privileged or other protected matter and no exception or waiver applies, (iii) designates an improper place for examination, or (iv) subjects a person to undue burden or expense.

(B) If a subpoena (i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or (ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, the court may order appearance or production only upon specified conditions.

(2) Subpoenas for Production or Inspection.

(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or to permit inspection of premises need not appear in person at the place of production or inspection unless commanded by the subpoena to appear for deposition, hearing or trial. Unless for good cause shown the court enlarges or shortens the time, a subpoena for production or inspection shall allow not less than ten days for the person upon whom it is served to comply with the subpoena. A copy of all such subpoenas shall be served immediately upon each party in accordance with Rule 5. A subpoena commanding production or inspection will be subject to the provisions of Rule 26(d).

(B) The person to whom the subpoena is directed may, within ten days after the service thereof or on or before the time specified in the subpoena for compliance, if such time is less than ten days after service, serve upon the party serving the subpoena written objection to inspection or copying of any or all of the designated materials, or to inspection of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the material except pursuant to an order of the court from which the subpoena was issued. The party serving the subpoena may, if objection has been made, move at any time upon notice to the person served for an order to compel the production or inspection.

(C) The court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (i) quash or modify the subpoena if it is unreasonable and oppressive, or (ii) condition the denial of the motion upon the advance by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

(e) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(f) Sanctions. On motion of a party or of the person upon whom a subpoena for the production of books, papers, documents, or tangible things is served and upon a showing that the subpoena power is being exercised in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the party or the person upon whom the subpoena is served, the court in which the action is pending shall order that the subpoena be quashed and may enter such further orders as justice may require to curb abuses of the powers granted under this rule. To this end, the court may impose an appropriate sanction.

(g) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued.

[Amended effective March 13, 19991; July 1, 1997.]

Advisory Committee Historical Note

* * * * *

Effective July 1, 1997 a new Rule 45 was adopted.

Comment

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

Subpoenas are of two types: a subpoena ad testificandum compels the attendance of a witness; a subpoena duces tecum compels the production of documents and things. Both kinds of subpoenas may be issued either for the taking of a deposition or for a trial or hearing; Rule 45 governs the availability and use of both kinds of subpoenas. The rule has no application to subpoenas issued in support of administrative hearings or by administrative agencies; those subpoenas are governed by statute. *See,* e. g., Miss. Code Ann. 5-1-21 (witnesses before legislative bodies); 7-1-49 (examiner of

public accounts); 19-3-51 (county boards of supervisors); 27-3-35 (tax commission); 31-3-13(bc) (state board of public contracts); 43-9-13 (old age assistance investigations); 43-11-11 (investigations of institutions for the aged or inform); 43-13-121(4) (medical commission); 43-33-11 (housing authority); 49-1-43 (game and fish commission wildlife, fisheries and parks board); 49-7-113 (seized hunting and fishing property claims); 49-17-21 (air and water pollution board); 51-3-51 (water commission); 53-1-35 (oil and gas board); 59-21-127 (boat and water safety commission); 61-1-35 (aeronautics commission); 63-1-53 (hearings to suspend driver's license); 63-17-97 (motor vehicle commission); 63-19-29 (motor vehicle sales finance law administrator); 67-1-37 (alcoholic beverage commission); 73-7-27 (cosmetology license revocation or suspension); 73-13-15 (engineer and land surveyor registration board); 73-21-399 (disciplinary proceedings against pharmacists); 73-25-27 (disciplinary proceedings against physicians); 73-29-37 (disciplinary proceedings against polygraph examiners); 73-35-23 (disciplinary proceedings against real estate brokers); 75-35-315 (meat inspections); 75-49-13 (proceedings involving mobile homes); 75-67-223 (hearings on denials of small loan licenses); 75-71-21709 (securities regulations hearings); 77-5-17(4) (board of directors of rural electrification authority); 81-1-2785 (bank examinations); 81-13-1 (hearings on denial of application for license of credit union); 81-13-17 (examination of credit union license applications by department of bank supervision; and 83-5-39(4) (1972) (hearing on charges of unfair business practices by insurance companies).

Rule 45(a) departs from statutory Mississippi subpoena practice by allowing parties to obtain blank subpoenas which they may complete and serve or have served later. *Cf.* Miss.Code Ann. 13-3-93 (subpoenas to be served by sheriff or other officer, and to be completed by clerk before issuance), and 13-3-101 (1972) (subpoenas to be served personally). Rule 45(c) also departs from prior practice by permitting parties to serve subpoenas. This flexible practice, referred to as a "hip-pocket" subpoena practice, should greatly facilitate the legal compulsion of evidence. The hip-pocket subpoena practice, while new in Mississippi state court practice, has been successfully utilized in other jurisdictions for nearly forty years. *See,* e.g., Ala.R.Civ.P. 45; Fed.R.Civ.P. 45; Fla.R.Civ.P. 1.410; Me.R.Civ.P. 45; Mass.R.Civ.P. 45; and Tenn.R.Civ.P.45.

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

In all instances, subpoenas are issued by the clerk under the seal of the court. If the subpoena is for a hearing or trial, the subpoena must be issued by the clerk for the county in which the trial or hearing will be held, but it may be served anywhere in the state. Rule 45(e). If the subpoena is for the taking of a deposition, it must be issued in the county in which the deposition is to be taken. Rule 45(d)(1). 5A *Moore's Federal Practice* 45.03 (1975). Under Rule 45(a)(2), all subpoenas (except in foreign litigation) shall be issued from the court in which the action is pending and may be served anywhere in the State. Subpoenas for depositions in foreign litigation must be issued by a clerk of a court for the county in which the deposition is to be taken. However, a Mississippi resident may be subpoenaed to attend an examination only in a county where he resides, or is employed or transacts

business in person, unless the court fixes another convenient place. A nonresident subpoenaed within the State may be required to attend only in the county where he is served, unless the court fixes another convenient place. Rule 45(b).

Rule 45(c)(1) authorizes that subpoenas may be served by a sheriff, his deputy, or any person not a party over the age of eighteen years; this provision permits attorneys to serve subpoenas. The rule departs from the requirements of MRCP 4(b)(2)(B), Service of Process, by not requiring that the person other than the sheriff or his deputy be authorized by the court to serve the subpoena. The person serving the subpoena shall make a return thereon and return the original to the clerk of the issuing court, where it shall be filed. The proof of service required by paragraph (c)(2) must show, inter alia, the county in which the subpoena was served, in order to ascertain where a nonresident may be required to appear for examination in accordance with Rule 45(b).

MRCPRule 45(c) incorporates a provision new to Mississippi practice in requiringes advance payment of statutory witness fees and mileage; this subsection is complementary to Miss. Code Ann. 25-7-47 through 25-7-59 (1972).

Under Rule 45(d)(1), a subpoena for the attendance of a witness at the taking of a deposition issues out of the court in the county in which the deposition is to be taken, and as of course by the clerk upon proof of service of notice to depose as provided in MRCP 30(a) and 31(a). It is intended that subpoenas be issued by the Clerks of this State for the taking of depositions of witnesses for the purposes of litigation pending in another jurisdiction in the same manner as they are issued under this Rule with respect to litigation pending in this State. A witness' failure to attend such deposition shall be dealt with in accordance with Rule 45(f). A subpoena duces tecum may be issued to produce documentary evidence on the taking of a deposition under MRCP 27(a). Where the action is pending in the same court out of which the subpoena is to issue, it will suffice if proper proof of service of notice to depose is on file in the action. If, on the other hand, the action is pending in County A and the deposition is to be taken in County B, the subpoenaing party should ensure that proof of service of the notice to depose is on file in the action in County A, obtain a certified copy of such proof from the clerk in County A, and then present that certificate to the clerk of County B. *See 5A Moore's Federal Practice* 45.07(1); 9 Wright & Miller, supra 2458.

A subpoena duces tecum is issued upon the request of a party without notice or action by the court. After the subpoena is served, the person to whom it is directed may obtain protection against an unwarranted requirement to produce by proceeding under rule 45(b) and Rule 45(d).

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

On request, a party is entitled to have the clerk issue a subpoena duces tecum in blank, whether for use at the taking of a deposition or for trial. Under rule 45(b) or (d) the subpoena may command the person to whom it is directed to produce the books, papers, documents, or things described therein. Rule 45(d)(2) sets out additional protections available to persons subject to subpoenas for production or inspection. Subsections (b)(2) and (b)(3) (d)(2)(A) are is intended to ensure that there be no confusion as to whether a person not a party in control, custody, or possession of discoverable evidence can be compelled to produce such evidence without being sworn as a witness and deposed, and to require that copies of all subpoenas served be submitted to opposing counsel. Further, a

subpoena shall allow not less than 10 days for production or inspection, unless the court for good cause shown shortens the time. It must be limited to a ten day time period and tThe subpoena must specify with reasonable particularity the subjects to which the desired writings relate. The force of a subpoena for production of documentary evidence generally reaches all documents under the *control* of the person ordered to produce, saving questions of privilege or unreasonableness.

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

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

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

If a party or witness refuses to answer designated questions at a deposition hearing, or if a party fails to produce documents in compliance with a subpoena duces tecum, either the court in which the action is pending, or the court in the county in which the deposition is being taken, or in the case of an order to a witness not a party, the latter court, may also issue an order under Rule 37(a) requiring the questions to be answered or the documents to be produced; if the order is not complied with the court may impose any of the sanctions listed in Rule 37(b)(2). Under Rule 45(d)(1), the court that issued the subpoena may order that the deponent permit inspection and copying of materials produced under a subpoena duces tecum for the taking of the deposition. In large measure, however, the sanctions provided for in Rule 37(b) are in their nature applicable only to parties. It should also be noted that rule 37(d) makes certain sanctions available where a party or an officer or managing agent of party willfully fails to appear before the officer who is to take his deposition, after being served with a proper notice. Since a subpoena need not be served on a party to compel him to attend and give his deposition, or to produce documents or tangible things at the taking of his deposition, service of a notice and request to produce the materials upon a party being sufficient, it is immaterial, for purposes of imposing the sanctions under Rule 37(b) or (d), whether or not a subpoena was served on the party.

Rule 45(b)(e) ,which specifies the duties of persons served with a subpoena, does not require the witness to prepare papers for the adverse party or to compile information contained in the documents referred to, but only to produce designated documents. If the subpoena calls for relevant information which must be compiled or selected from records which are largely irrelevant or privileged, the party compelling production should be required to bear the expense of extracting the relevant material. S*ee*

5A *Moore's Federal Practice,* 45.05(1) (1975); *Ulrich v. Ethyl Gasoline Corp.,* 2 F.R.D. 357 (W.D.Ky.1942).

In addition to the preceding sanctions, tThe court is authorized by Rule 45(gf) to impose an appropriate sanction on a party who is shown to have exercised the subpoena power in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the party or the person upon whom the subpoena is served, which ordinarily will include attorney's fees and costs, and may also include compensation for wages lost be a witness in objecting to the subpoena.award costs and attorney's fees to victims of abuses of the subpoena process.

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

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

RULE 30. DEPOSITIONS UPON ORAL EXAMINATION

* * * * *

(b) Notice of Examination: General Requirements; Special Notice; Non-stenographic Recordings; Production of Documents and Things; Deposition of Organization.

* * * * *

(7) For purposes of this Rule, and Rules 28(a), 37(a)(1), 37(b)(1), and 45(d)(1)(b), a deposition shall be deemed to be taken in the county where the deponent is physically present to answer questions propounded to him.

* * * * *

[Amended effective March 1, 1989; July 1, 1997.]

Advisory Committee Historical Note

* * * * *

Effective July 1, 1997, Rule 30(b)(7) was amended to correct the reference to Rule 45.

_____ So. 2d _____ (West Miss. Cases).

Comment

* * * * *

MRCP 30(b)(7) resolves any ambiguity which might otherwise arise in the case of a telephonic deposition and provides that a deposition is taken in the county where the deponent is physically present to answer questions propounded to him. The court in that county is therefore the appropriate court for purposes of orders pursuant to Rules 37(a)(1), and 37(b)(1), and 45(d), and an officer authorized to administer oaths in that county or by the laws of that place may administer the oath to the deponent as provided in Rule 28(a).

* * * * *

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

EXHIBIT B

AMENDMENTS TO MRCP 50, 52, 59

AND COMMENTS TO RULES 50, 58 AND 59

RULE 50. MOTIONS FOR A DIRECTED VERDICT AND

FOR JUDGMENT NOTWITHSTANDING THE VERDICT

* * * *

(b) Motion for Judgment Notwithstanding the Verdict. Not later than ten days after entry of judgment in accordance with a verdict, a party may move file a motion to have the verdict and any judgment entered thereon set aside; or if a verdict was not returned, a party, within ten days after the jury has been discharged, may move file a motion for judgment. If no verdict was returned the court may direct the entry of judgment or may order a new trial.

(c) Conditional Rulings on Grant of Motion.

* * * * *

(2) The party whose verdict has been set aside on motion for a judgment notwithstanding the verdict may serve file a motion for a new trial pursuant to Rule 59 not later than ten days after entry of the judgment notwithstanding the verdict.

* * * *

[Amended effective July 1, 1994; July 1, 1997.]

Advisory Committee Historical Note

Effective July 1, 1997, Rule 50(b) was amended to clarify that Rule 50(b) motions must be filed not later that ten days after entry of judgment. _____ So. 2d _____ (West Miss. Cases).

Comment

* * * *

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

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

* * * *

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

* * * * *

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

RULE 52. FINDINGS BY THE COURT

* * * *

(b) Amendment. Upon motion of a party made filed not later than ten days after entry of judgment or entry of findings and conclusions, or upon its own initiative during the same ten-day period, the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with accompany a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised regardless of whether the party raising the question has made in court an objection to such findings or has made filed a motion to amend them or a motion for judgment or a motion for a new trial.

[Amended effective, July 1, 1997.]

Advisory Committee Historical Note

Effective July 1, 1997, Rule 52(b) was amended to clarify that a motion to amend the trial court's findings must be filed not later that ten days after entry of judgment. _____ So. 2d _____ (West Miss. Cases).

RULE 58. ENTRY OF JUDGMENT

* * * * *

Comment

* * * * *

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

[Comment amended effective July 1, 1997.]

RULE 59. NEW TRIALS; AMENDMENT OF JUDGMENTS

* * * *

(b) Time for Motion. A motion for a new trial shall be served filed not later than ten days after the entry of judgment.

(c) Time for Serving Affidavits. When a motion for new trial is based upon affidavits they shall be served filed with the motion. The opposing party has ten days after such service within which to serve file opposing affidavits, which period may be extended for an additional period not exceeding up to twenty days either by the court for good cause shown or by the parties' written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. Not later than ten days after entry of judgment the court may on its own initiative order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a timely motion for a new trial ,timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served filed not later than ten days after entry of the judgment.

[Amended effective July 1, 1997.]

Advisory Committee Historical Note

Effective July 1, 1997, Rule 59(b), (c) and (e) were amended to clarify that motions for a new trial and accompanying affidavits, and motions to alter or amend a judgment, must be filed not later that ten days after entry of judgment. _____ So. 2d _____ (West Miss. Cases).

Comment

* * * *

The motion must be made filed within ten days after the entry of judgment (defined as the time of delivery to the clerk for filing; MRCP 58). This is a departure from prior Mississippi practice, *National Cas. Co. v. Calhoun,* 219 Miss. 9, 67 So.2d 908 (1953) (new trial may be ordered any time prior to expiration of court term), and is authorized by MRCP 6(c). This time limit is tolled by the service of the motion on all parties, rather than by the filing of same, see 11 Wright & Miller, Federal Practice and Procedure, Civil 2812 (1972), and tThe ten-day period cannot be enlarged. MRCP 6(b)(2).

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

* * * *

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

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

[Comment amended effective July 1, 1997.]

EXHIBIT C

AMENDMENTS TO RULE 62 AND COMMENT

RULE 62. STAY OF PROCEEDINGS TO ENFORCE A JUDGMENT

(a) Automatic Stay; Exceptions. Except as stated herein or as otherwise provided by statute or by

order of the court for good cause shown, no execution shall be issued upon a judgment nor shall proceedings be taken for its enforcement until the expiration of ten days after the later of its entry or the disposition of a motion for a new trial, whichever last occurs. . . .

(b) Stay on Motion. In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60(b), or of a motion for judgment in accordance with a motion for a directed to set aside a verdict made pursuant to Rule 50(b), or of a motion for amendment to the findings or for additional finding made pursuant to Rule 52(b).

* * * * *

[Amended effective July 1, 1997.]

Advisory Committee Historical Note

Effective July 1, 1997, Rule 62(a) was amended to clarify that the stay of enforcement of a judgment expires ten days after the later of the entry of the judgment or the disposition of a motion for a new trial, and Rule 62(b) was amended to state that a court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion to set aside a verdict made pursuant to Rule 50(b). _____ So. 2d _____ (West Miss. Cases).

Comment

Rule 62(a) provides for automatic stays of judgments, with certain exceptions, until ten days after the later of either the entry of a judgment or until the disposition of a motion for a new trial, whichever last occurs. This stay applies only to judgments as defined in Rule 54(a), and it only prevents enforcement of the judgment; it does not effect the appealability of the judgment nor prevent the time for appeal from running. *See Davidson v. Hunsicker*, 224 Miss. 203, 79 So.2d 839 (1955) (a judgment is not final until the motion for a new trial is overruled; the time period for perfecting an appeal commences on the day after the motion for a new trial is overruled); *but cf.* Miss. Code Ann. 13-3-111 (1972) as amended by 1976 Miss. Laws, ch. 331 (clerks shall issue executions on all judgments and decrees after close of term of court at request and on the cost of the prevailing party).

* * * * *

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

* * * * *

[Comment amended effective July 1, 1997.]