

## Alabama Rules of Civil Procedure

### VI. TRIALS

#### Rule 45.

#### Subpoena.

(a) *Form; issuance.*

(1) Every subpoena shall

(A) state the name of the court from which it is issued; and

(B) state the title of the action, the name of the court in which it is pending, and its civil action number; and

(C) command each person to whom it is directed to attend and give testimony or to produce and permit inspection, copying, testing, or sampling of designated books, documents, electronically stored information, 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; and

(D) set forth the text of subdivisions (c) and (d) of this rule.

A command to produce evidence or to permit inspection, copying, testing, or sampling may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(2) A subpoena commanding attendance at a trial or hearing and a subpoena commanding attendance at a deposition shall issue from the court in which the action is pending.

(3) The clerk shall issue a subpoena to a party requesting it, except that a subpoena for production, inspection, copying, testing, or sampling separate from a subpoena commanding the attendance of a person shall issue from the court in which the action is pending pursuant to the additional requirements set forth below:

(A) Notice of Intent to Serve Subpoena for Production or Inspection. The party seeking issuance of a subpoena for production, inspection, copying, testing, or sampling shall serve a notice to every other party of the intent to serve such subpoena upon the expiration of fifteen (15) days from the service of the notice, and the proposed subpoena shall be

attached to the notice. The court may allow a shorter or longer time. Such notice may be served without leave of court upon the expiration of forty-five (45) days after service of the summons and complaint or other mode of service under Rule 4–Rule 4.4 upon any defendant, except that leave is not required within the forty-five- (45-) day period if a defendant has previously sought discovery.

(B) Objection to Issuance of Subpoena for Production or Inspection. Any person or party may serve an objection to the issuance of a subpoena for production, inspection, copying, testing, or sampling within ten (10) days of the service of said notice and in such event the subpoena shall not issue. The party serving the notice may move for an order under Rule 37(a) with respect to such objection. If no objection is timely served, the clerk shall cause the subpoena to be issued upon the expiration of fifteen (15) days from the service of the notice or upon the expiration of such other time as may have been allowed by the court.

(C) Content of Subpoena for Production or Inspection. The subpoena shall be directed to a person at a stated address, and, if the name of the person is not known, the subpoena shall give a general description sufficient to identify the person or the particular class or group to which the person belongs. The subpoena shall set forth the items to be produced, inspected, copied, tested, or sampled, either by individual item or by category, and describe each item and category with reasonable particularity. The subpoena shall specify a reasonable time to comply of no less than fifteen (15) days after service unless the court orders otherwise and the manner of making the inspection, production, copying, testing, sampling, and performing the related acts. Such activities with reference to documents, including electronically stored information, or tangible things shall take place where the documents or tangible things are regularly kept or at some other reasonable place designated by the recipient. The subpoena may give the recipient an option to deliver or mail legible copies of documents or things to the party serving the subpoena, but the recipient may condition the preparation of copies on the payment in advance of the reasonable cost of making such copies. Any other party shall have the right to be present at the time of compliance with the subpoena. The subpoena shall advise the recipient of the right to object at any time prior to the date set forth in the subpoena for compliance therewith.

(D) Availability of Copies of Documents. If the party serving the subpoena obtains copies of documents, including electronically stored information, or things, that party shall make available a duplicate of such copies at the request of any other party upon the payment of the reasonable cost of making such copies.

(b) *Service.*

(1) A subpoena may be served by the sheriff, a deputy sheriff, or by any other person who is not a party and is not less than eighteen (18) years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person or by leaving a copy at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein and, if the person's attendance at a place more than 100 miles from the person's residence is commanded, by tendering to that person the fees for one day's attendance and an amount to reimburse the mileage allowed by law. Prior notice of intent to secure the issuance of a subpoena to command production of documents and things or inspection of premises before trial under the procedure set forth in subparagraph (a)(3) of this rule shall be served on each party in the manner prescribed by Rule 5(b).

(2) Subject to the provisions of clause (ii) of subparagraph (c)(3)(A) of this rule, a subpoena may be served at any place within the state.

(3) Proof of service when necessary shall be made by filing with the clerk of the court by which the subpoena is issued a statement of the date and manner of service and of the names of the persons served, certified by the person who made the service.

(c) *Protection of persons subject to subpoenas.*

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court from which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney fee.

(2)(A) A person commanded to produce and permit inspection, copying, testing, or sampling of designated electronically stored information, books, papers, documents, or tangible things or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing, or trial.

(B) Subject to subdivision (d)(2) of this rule, a person commanded to produce and permit inspection, copying, testing, or sampling at any time before the time specified for compliance may serve upon the party or attorney designated in the subpoena written objection to producing any of or all the designated materials or to inspection of the premises or to producing electronically stored information in the form or forms requested. "Serve" as used herein means mailing to the party or attorney. If objection is made, the party serving the subpoena shall not be entitled to inspect, copy, test, or sample the

materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production, inspection, copying, testing, or sampling. Such an order to compel shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection, copying, testing, or sampling commanded.

(3)(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 a resident of this state who is not a party or an officer of a party to travel to a place more than one hundred (100) miles from the place where that person resides, is employed, or regularly transacts business in person, or requires a nonresident of this state who is not a party or an officer of a party to travel to a place within this state more than one hundred (100) miles from the place of service or, where separate from the place of service, more than one hundred (100) miles from the place where that person is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(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, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena

is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) *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.

(3) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in a form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable.

(4) A person responding to a subpoena need not produce the same electronically stored information in more than one form.

(5) A person responding to a subpoena need not provide discovery of electronically stored information from sources the person identifies to the requesting party as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(B). The court may specify conditions regarding the production of the discovery.

(6) If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the person or party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. Any party or the producing person may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The person who produced the information must preserve the information until the claim is resolved.

(e) *Contempt*. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued. An adequate cause for failure to obey exists when a subpoena purports to require a nonparty to attend or produce at a place not within the limits provided by clause (ii) of subparagraph (c)(3)(A).

(dc) *District court rule*. Rule 45 applies in the district courts.

[Amended eff. 10-1-95; Amended 11-4-2009, eff. 2-1-2010.]

### **Committee Comments On 1973 Adoption**

The rule remedies the somewhat disorganized codification found in present Alabama subpoena law, and brings together in one place the rules for subpoenas of all types, providing one method of issuance, service and enforcement. The present Alabama rule preventing the use of a deposition subpoena duces tecum as to a non-party (*Ex parte Thackston*, 275 Ala. 424, 155 So.2d 526 (1963)), is no longer a problem. Unlike the Federal Rule, Rule 45(a) does not permit the issuance of “in blank” subpoenas.

Alabama law has not required a subpoena to be under seal of the court; the requirement of a seal in subdivision (a) of Federal Rule 46 has not been included in this rule.

Subdivision (c) differs in some respects from the corresponding federal rule. Compare Tit. 7, §§ 197, Code 1940, and § 12-21-180(c), Code of Ala. Of course, Rule 45(e) permits service of a subpoena for attendance at a hearing or trial anywhere in the state. In order to prevent abuse, Rule 45(c) provides for the tendering of an attendance fee and mileage by the party causing the subpoena to be issued when the witness resides more than 150 miles from the place of the hearing or trial.

Rule 45(d)(2) is based on the corresponding Nevada rule, and on N.J.R.R. 4:46-4(b). Compare Minn.R.C.P. 45.04(2), by which a nonresident can be required to attend the taking of a deposition anywhere within the state.

Under a statute to be superseded by these rules, Code of Ala., § 12-21-180(b), a witness residing more than one hundred miles from the place of trial cannot be subpoenaed save on an affidavit by the party or attorney calling him that personal attendance of the witness is necessary to a proper decision of the cause. See also Ky.R.C.P. 45.05(2), (3). No such limitation is contained in Rule 45(c) which allows subpoenas to run throughout the state. It will still be possible

to use the deposition of a witness who resides more than 100 miles from the place of trial. Rule 32(a)(3)(B). The rules leave it to the good judgment of the attorney whether to use the deposition or subpoena the witness, and end the needless formality of an affidavit. Compare Rule 11.

The duties entrusted to the clerk by this rule may also be performed by the register in chancery. See Rule 81(d).

### **Committee Comments to October 1, 1995, Amendment to Rule 45**

Subdivision (a). The amendment incorporates portions of recent revisions to F.R.Civ.P. 45(a). It does not authorize an attorney to issue a subpoena as an officer of the court as does F.R.Civ.P. 45(a). It authorizes the use of a subpoena to compel production of evidence independent of a deposition. Former Ala.R.Civ.P. 34 covered this subject. It preserves former Rule 34 for a forty-five-(45-) day ban on discovery through subpoenas seeking evidence from a person not a party separate from a deposition. It carries forward the procedure of former Ala.R.Civ.P. 34 for filing and service of a notice of intent to issue subpoena and the requirement that a copy of the notice be served on all other parties. It maintains the option under former Ala.R.Civ.P. 34 for response by mailing and the obligation of the party obtaining the discovery to make copies available to other parties at a reasonable cost.

Subdivision (b). The amendment incorporates portions of recent revisions to F.R.Civ.P. 45(b). It reduces the distance that triggers a duty to tender expenses from one hundred fifty (150) miles to one hundred (100) miles. It requires prior notice of intent to secure the issuance of a subpoena to command production or inspection to be served on parties in the manner prescribed in Rule 5(b).

Subdivision (c). The amendment incorporates portions of recent revisions to F.R.Civ.P. 45(c). The limitations in former Ala.R.Civ.P. 45 on requiring attendance of a resident at a deposition to the county of residence and to within forty (40) miles of service for nonresidents are replaced with a limit of one hundred (100) miles from the residence, place of employment, or regular situs for transacting business for residents and one hundred (100) miles from the place of service for nonresidents. This change reflects the reality of the relatively small size of Alabama's sixty-seven counties and the availability of efficient means of transportation. A similar change was made in federal practice in 1985. See former F.R.Civ.P. 45(d)(2). This revision differs from current federal practice in that it retains the place of service as one of the benchmarks for computing the limit of travel for nonresidents. For example, an individual who had a place of

residence in New Orleans, Louisiana, but who regularly spent weekends at an Alabama vacation home, would not be covered by F.R.Civ.P. 45(c)(3)(A)(ii) but is covered by Ala.R.Civ.P. 45(c)(3)(A)(ii). Where attendance at trial more than one hundred (100) miles from the places described in Rule 45(c)(3)(A)(ii) is required by the subpoena, the witness may seek relief from hardship before attendance. Rule 45(c)(3)(B)(iii). Under the prior rule, this protection was unavailable although tender of statutory fees was required if the witness was required to travel more than one hundred fifty (150) miles. See former Rule 45(c). Tender of statutory fees is now required where travel exceeds one hundred (100) miles. See Rule 45(b)(1).

Subdivision (d). The amendment incorporates recent revisions to F.R.Civ.P. 45(d).

Subdivision (e). The amendment incorporates recent revisions to F.R.Civ.P. 45(e).

### **Committee Comments to Amendment to Rule 45 Effective February 1, 2010**

See the Committee Comments to Amendment to Rule 26 Effective February 1, 2010, for general information concerning the comprehensive changes to Rules 16, 26, 33(c), 34, 37, and 45, which govern discovery of electronically stored information ("ESI").

The changes to Rule 45 are intended to accommodate the discovery of ESI from persons who are not parties on the same terms and conditions as discovery of ESI from persons who are parties. However, there is substantial difference between a party and an unrepresented person. The latter is likely unaware of his or her rights, such as the right to object to producing ESI in the form specified in the subpoena, his or her obligations to produce in the form in which it is ordinarily maintained or a form that is reasonably usable, his or her right to identify sources of ESI that are not reasonably accessible in lieu of producing the material, and the procedures to be followed if privileged or protected information is inadvertently produced.

Accordingly, the parties are reminded of their responsibility under subdivision (c) of Rule 34 to avoid imposing undue burden or expense on persons who are not parties, and the court is encouraged to enforce this obligation. Moreover, Form 51A has been revised to help ensure that persons who are not parties are not put to undue burden or expense.

**Note from the reporter of decisions:** The order amending, effective February 1, 2010, Rule 16, Rule 26, Rule 33(c), Rule 34, Rule 45, and Form 51A,

and adopting effective February 1, 2010, Rule 37(g) and the Committee Comments to Amendment to Rule 16 Effective February 1, 2010, the Committee Comments to Amendment to Rule 26 Effective February 1, 2010, the Committee Comments to Amendment to Rule 33(c) Effective February 1, 2010, the Committee Comments to Amendment to Rule 34 Effective February 1, 2010, the Committee Comments to Adoption of Rule 37(g) Effective February 1, 2010, and the Committee Comments to Amendment to Rule 45 Effective February 1, 2010, is published in that volume of *Alabama Reporter* that contains Alabama cases from \_\_\_ So. 3d.