Alabama Rules of Civil Procedure

V. DEPOSITIONS AND DISCOVERY

Rule 34.

Production of documents and things and entry up land for inspection and other purposes.

(a) *Scope*. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect, copy, test, or sample any designated documents or electronically stored information (including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect, copy, test, or sample any designated tangible things that constitute or contain matters within the scope of Rule 26(b) and that are in the possession, custody, or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) *Procedure.* The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category and shall describe each item and category with reasonable particularity. The request may specify the form or forms in which electronically stored information is to be produced. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within thirty (30) days after the service of the request, except that a defendant may serve a response within forty-five (45) days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested unless the request is objected to, including an objection to the requested form or forms for producing electronically stored information, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. If objection is made to the requested form or forms for producing electronically stored information – or if

no form was specified in the request – the responding party must state the form or forms it intends to use. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

A party who produces hard copies of documents for inspection that are not electronically stored 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 request.

Regarding the discovery of electronically stored information:

(i) if a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable; and

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

(c) *Persons not parties.* A person not a party to the action may be compelled to produce documents, electronically stored information, and things or to submit to an inspection as provided in Rule 45.

(dc) *District court rule.* Rule 34 applies in the district courts in those instances where production and inspections are permitted by Rule 26(dc).

[Amended 1-4-82, eff 3-1-82; Amended eff. 10-1-95; Amended eff. 11-18-2009.]

Committee Comments on 1973 Adoption

This rule supplants Tit. 7, §§ 426, 487-490, Code of Ala. Subparagraph (a) states the objects within the reach of the Rule and includes entry upon land in addition to tangible things. No showing of good cause need be made. Of course, objections based upon departure from the scope of Rule 26(b) may be made. Note the use of the word “respondent” in Rule 34(a). Under former Alabama practice, the word respondent has a significant meaning in Equity. The use of the term “Respondent” in this Rule is not to be confused with the old Equity definition. As used herein, it simply means the party against whom discovery is sought.

Subdivision (b) states the requirement that the request elaborate upon the manner, time and place for the discovery. Thirty days is permitted for answer or

objection unless the action has been recently filed, in which event the response is due no later than 45 days from service of the complaint. The party against whom an objection is interposed must move under Rule 37(a) if he desires to pursue the matter.

Although under F.R. 34 discovery by way of production may be had from a nonparty by subpoena duces tecum, suppose the nonparty has possession of land or a heavy piece of equipment, neither one of which can be examined in response to a request to bring certain things to a deposition. Also consider the problem posed by the necessity of examination of the books and records of a nonparty prior to the taking of his deposition or the necessity for an examination of the books and records of a nonparty in order to determine whether a deposition would be beneficial. Federal Rule 34 is limited in its scope to parties although the advantages of extending its reach to nonparties is apparent. Nevertheless, jurisdictional and venue problems make this solution quite complex. See Wright & Miller, *Federal Practice and Procedure, Civil*, § 2209 (1970). The federal solution was preservation of resort to the ancient equitable bill of discovery at Rule 34(c), F.R.C.P. Since Alabama practice under these rules is unfettered by peculiar federal jurisdiction and venue problems, Rule 34 has been drawn so as to apply to persons not parties as well as parties. This eliminates time consuming resort to an independent action. Note, however, that the notice to a nonparty under Rule 34 must be served like a subpoena and must expressly provide for payment of reasonable expenses.

Committee Comments to Rule 34 as Amended
Effective March 1, 1982

There had developed a pattern for abuse of Rule 34 with regard to production from non-parties in some circuits. Specifically, the Rule 5 mandate for service of a copy of a subpoena directed to a non-party on all other parties to the litigation was being disregarded. The Advisory Committee initially gave thought to revision of Rule 34 which would make stronger reference to the obligation to serve a copy of the request upon persons not parties upon all other parties to the litigation. At about the time the Committee was involved in its study of Rule 34, the Supreme Court of Florida promulgated some new rules governing production of documents and things without deposition. See *The Florida Bar*, 391 So.2d 165 (Fla.1980). Borrowing some aspects of that Florida rule, the Committee came forward with the proposed revision of Rule 34(b). There was no intent upon the part of the Committee to make any revision with reference to the present practice for production of documents from parties. The modification deals with the subpoena to a non-party. In that regard, the procedure contemplates the service of a notice of intent to obtain production followed by the subsequent issuance of a subpoena to the non-party after the time for objections to the notice of intent has run. The time limits within which the machinery must function are, in the long

run, shorter than had previously existed under old Rule 34(b) and, in all events, are subject to even further reduction in a proper case in the discretion of the Court.

Disregard of the obligation to serve copies of pleadings, motions and other papers on all parties as required by Rule 5 is a clear abuse of these rules. Counsel should give careful attention to compliance so that, in the context of production of documents from non-parties, each other party to the lawsuit will know when such discovery is being sought and will have a clear idea of the timetable for response to such discovery. It is suggested that failure to give such notice to other parties could form the basis for disallowance of the admissibility of any documents subpoenaed from a non-party in disregard of the obligation to give notice to other parties to the litigation.

The revision of Rule 34 has necessitated an amendment to Rule 37(a)(2) and comments in connection with that amendment are set forth at Rule 37.

Committee Comments to October 1, 1995,
Amendment to Rule 34

The amendment adopts F.R.Civ.P. 34. Under the former rule, provision was made for obtaining production or inspection from persons not parties. At the time the former rule was drafted, there was no comparable procedure under federal practice. With the advent of revised F.R.Civ.P. 45, the functions have been transferred to Ala.R.Civ.P. 45 for the sake of uniformity. The revised Rule 34 deals only with production and inspection from parties.

Committee Comments to Amendment to Rule 34
Effective November 18, 2009

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 amendment to subdivision (a) of Rule 34 places ESI on an equal footing with hard copies of documents and recognizes that the producing party may, under certain circumstances, be required to translate ESI into a reasonably usable form, as is further addressed in subdivision (b).

The amendment also recognizes that the requesting party may, under appropriate circumstances, be allowed to test or sample the material sought.

However, the court should address confidentiality and privacy issues in determining whether to allow such testing or sampling and the conditions or restrictions under which such testing or sampling is to proceed if allowed.

The amendment to subdivision (b) allows, but does not require, the requesting party to designate the form in which ESI should be provided. If the responding party objects to producing ESI in the form requested (or if the requesting party does not specify a form), the responding party must identify the form in which it intends to produce ESI. Moreover, if the requesting party does not specify a form, the responding party must produce ESI in the form in which it is ordinarily maintained or in a form that is reasonably usable.

The responding party's designation of form in which it will produce ESI should precede the production of ESI. Otherwise, the responding party runs the risk it may later be required to produce ESI in a proper form. Of course, if the parties are unable to agree to the form of production, motion practice is available to resolve the issue.

As with the other ESI amendments to these Rules, the Federal Rules of Civil Procedure Advisory Committee Notes to Rule 34 are helpful in understanding the need for and interpretation of the changes to Ala. R. Civ. P. 34(b):

> "The amendment to Rule 34(b) permits the requesting party to designate the form or forms in which it wants electronically stored information produced. The form of production is more important to the exchange of electronically stored information than of hard-copy materials, although a party might specify hard copy as the requested form. Specification of the desired form or forms may facilitate the orderly, efficient, and cost-effective discovery of electronically stored information. The rule recognizes that different forms of production may be appropriate for different types of electronically stored information. Using current technology, for example, a party might be called upon to produce word processing documents, e-mail messages, electronic spreadsheets, different image or sound files, and material from databases. Requiring that such diverse types of electronically stored information all be produced in the same form could prove impossible, and even if possible could increase the cost and burdens of producing and using the information. The rule therefore provides that the requesting party may ask for different forms of production for different types of electronically stored information.
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> "The rule does not require that the requesting party choose a form or forms of production. The requesting party may not have a preference. In some cases, the requesting party may not know

what form the producing party uses to maintain its electronically stored information, although Rule 26(f)(3) [Ala. R. Civ. P. 26(f)] is amended to call for discussion of the form of production in the parties' prediscovery conference.

"The responding party also is involved in determining the form of production. In the written response to the production request that Rule 34 requires, the responding party must state the form it intends to use for producing electronically stored information if the requesting party does not specify a form or if the responding party objects to a form that the requesting party specifies. Stating the intended form before the production occurs may permit the parties to identify and seek to resolve disputes before the expense and work of the production occurs. A party that responds to a discovery request by simply producing electronically stored information in a form of its choice, without identifying that form in advance of the production in the response required by Rule 34(b), runs a risk that the requesting party can show that the produced form is not reasonably usable and that it is entitled to production of some or all of the information in an additional form. Additional time might be required to permit a responding party to assess the appropriate form or forms of production.

"If the requesting party is not satisfied with the form stated by the responding party, or if the responding party has objected to the form specified by the requesting party, the parties must meet and confer under Rule 37(a)(2)(B) [Ala. R. Civ. P. 37(a)(2)] in an effort to resolve the matter before the requesting party can file a motion to compel. If they cannot agree and the court resolves the dispute, the court is not limited to the forms initially chosen by the requesting party, stated by the responding party, or specified in this rule for situations in which there is no court order or party agreement.

"If the form of production is not specified by party agreement or court order, the responding party must produce electronically stored information either in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable. Rule 34(a) requires that, if necessary, a responding party 'translate' information it produces into a 'reasonably usable' form. Under some circumstances, the responding party may need to provide some reasonable amount of technical support, information on application software, or other reasonable assistance to enable the requesting party to use the information. The rule does not require a party to produce electronically stored information in the form in which it is ordinarily maintained, as long as it is produced in a reasonably

usable form. But the option to produce in a reasonably usable form does not mean that a responding party is free to convert electronically stored information from the form in which it is ordinarily maintained to a different form that makes it more difficult or burdensome for the requesting party to use the information efficiently in the litigation. If the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature.

"Some electronically stored information may be ordinarily maintained in a form that is not reasonably usable by any party. One example is 'legacy' data that can be used only by superseded systems. The questions whether a producing party should be required to convert such information to a more usable form, or should be required to produce it at all, should be addressed under Rule 26(b)(2)(B) [Ala. R. Civ. P. 26(b)(2)(A)].

"Whether or not the requesting party specified the form of production, Rule 34(b) provides that the same electronically stored information ordinarily need be produced in only one form."

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.