

Serial: 179878

IN THE SUPREME COURT OF MISSISSIPPI

No. 89-R-99001-SCT

IN RE: THE RULES OF CIVIL PROCEDURE

ORDER

This matter is before the Court en banc on the Motion to Amend Rules 34 and 45 of the Mississippi Rules of Civil Procedure filed by the Advisory Committee on Rules. After due consideration, the Court finds that the motion should be granted.

IT IS THEREFORE ORDERED that the Motion to Amend Rules 34 and 45 of the Mississippi Rules of Civil Procedure filed by the Advisory Committee on Rules is hereby granted. Rules 34 and 45 are amended as set forth in Exhibit "A" hereto. The amendments are effective July 1, 2013.

IT IS FURTHER ORDERED that the Clerk of this Court shall spread this Order upon the minutes of the Court and shall forward a true certified copy hereof to West Publishing Company for publication in the next edition of the *Mississippi Rules of Court* and in the *Southern Reporter, Third Series, (Mississippi Edition)*.

SO ORDERED, this the 22nd day of October, 2012.

/s/ George C. Carlson, Jr.

GEORGE C. CARLSON, JR., PRESIDING JUSTICE

TO GRANT: WALLER, C.J., CARLSON AND DICKINSON, P.J.J., RANDOLPH, LAMAR, KITCHENS, CHANDLER AND PIERCE, JJ.

NOT PARTICIPATING: KING, J.

Exhibit A

Rule 34. Production of Documents and Things and Entry Upon 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 his behalf, to inspect and copy, any designated documents or electronically stored information (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably useable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which 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 describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The request may specify the form or forms in which electronically stored information is to be produced.

The party upon whom the request is served shall serve a written response within thirty days after the service of the request, except that a defendant may serve a response within forty-five 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, 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. The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form - or if no form was specified in the request - the responding party must state the form or forms it intends to use. Pursuant to Rule 26(b)(5), a responding party may also object to production of electronically stored information that is not reasonably accessible because of undue burden or cost. 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.

When producing documents, the producing party 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 that call for their production. If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms. A party need not produce the same electronically stored information in more than one form.

(c) Persons Not Parties. This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

[Amended effective July 1, 2013, to address production of electronically stored information.]

Advisory Committee Historical Note

Effective July 1, 2013, MRCP 34 was amended to specifically authorize a party to request any other party to produce electronically stored information. The amendment established the procedure for requesting production of electronically stored information and the procedure for objecting to such a request.

Comment

~~MRCP 34(a) and (c) are identical to Miss.Code Ann. § 13-1-234(a) and (c) (1972). Subdivision (b) of the rule differs from subdivision (b) of the statute in that the words "and complaint" are added after the word "summons" in the first sentences of the first and second paragraphs, and a new third paragraph is added to the rule. The former addition conforms to MRCP 4(a)(2) (copy of complaint to be served with summons), the latter tracks the recommendation of the Special Committee for the Study of Discovery, Abuse, Section of Litigation, A.B.A., Report, at 21-23 (1977).~~

~~The new paragraph, prescribing the manner of document production, MRCP 34(b) is intended to deter deliberate attempts by a producing party to burden discovery with volume or disarray or deliberately mixing critical documents with others in an effort to obscure significance.~~

Generally, the most convenient and least burdensome method of producing documents would entail production in the order in which the documents are actually kept in the usual course of business, so that there is an internal logic reflecting business use. If this method is not elected, then the producing party may organize his paper production in accordance with the categories specified in the request.

See also Pyle, Ott, Rumfelt, Mississippi Rules of Discovery, 46 Miss.L.J. 681, 764-83 (1975).

[Comment amended effective July 1, 2013.]

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, 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. 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 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 may specify the form or forms in which electronically stored information is to be produced.

(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.

(3) In the case of discovery to be taken in foreign litigation, the subpoena shall be issued by a clerk of a court for the county in which the discovery is to be taken. The foreign subpoena shall be submitted to the clerk of court in the county in which discovery is sought to be conducted in this state. When a party submits a foreign subpoena to a clerk of court in this state, the clerk, in accordance with that court's procedure, shall promptly issue a subpoena for service upon the person to which the foreign subpoena is directed.

The subpoena under subsection (3) must incorporate the terms used in the foreign subpoena and it must contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and any party not represented by counsel. A subpoena issued by a clerk of court under subsection (3) must otherwise be issued and served in compliance with the rules of this state. An application to the court for a protective order or to enforce, quash or modify a subpoena issued by a clerk of court under subsection (3) must comply with the rules of this state and be submitted to the issuing court in the county in which discovery is to be conducted.

(b) Place of Examination. A resident of the State of Mississippi may be required to attend a deposition, production or inspection 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, the names of the persons served, and the name, address and telephone number of the person making the service.

(d) Protection of Persons Subject to Subpoenas.

(1) In General.

(A) On timely motion, the court from 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, electronically stored information, 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 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 or 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, electronically stored information, or tangible things.

(e) Duties in Responding to Subpoena.

(1) Producing Documents or Electronically Stored Information.

(+) (A) Documents.

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.

(B) Form for Producing Electronically Stored Information Not Specified.

If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) Electronically Stored Information Produced in Only One Form.

The person responding need not produce the same electronically stored information in more than one form.

(D) Inaccessible Electronically Stored Information.

The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery, motion for a protective order, or motion to quash, the person responding 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)(5). The court may specify conditions for the discovery, including those listed in Rule 26(b)(5).

(2) Claiming Privilege or Protection

(A) Information Withheld.

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.

(B) Information Produced.

If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person 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; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(f) Sanctions. On motion of a party or of the person upon whom a subpoena for the production of books, papers, documents, electronically stored information, 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, 1991; July 1, 1997; July 1, 1998; amended effective July 1, 2009 to provide a procedure for foreign subpoenas; amended effective July 1, 2013 to authorize a subpoena for electronically stored information.]

Advisory Committee Historical Note

Effective March 13, 1991, Rule 45(c) was amended to require the party causing a subpoena to issue to tender to a non-party witness the fee for one day's attendance plus mileage allowed by law. Rule 45(e) was amended by deleting the provision for tendering the fee for one day's attendance plus the mileage allowed by law to certain witnesses when subpoenaed. Rule 45(d) was amended to provide that when a deposition is to be taken on foreign litigation the subpoena shall be issued by the clerk for the county in which the deposition is to be taken. 574-576 So. 2d XXIV-XXV (West Miss. Cas. 1991).

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

Effective July 1, 2013, Rule 45 was amended to specifically authorize a subpoena to command the person to whom it is directed to produce and permit inspection and copying of electronically stored information. The same amendment also established a procedure to be used when privileged or trial-preparation material is inadvertently disclosed.

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, 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(c) (state board of public contracts); § 43-9-13 (old age assistance investigations); § 43-11-11 (investigations of institutions for the aged or infirm); § 43-13-121 (medicaid commission); § 43-33-11 (housing authority); § 49-1-43 (wildlife, fisheries and parks board); § 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); § 73-21-99 (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); § 75-71-709 (securities regulations hearings); § 77-5-17(4) (board of directors of rural electrification authority); § 81-1-85 (bank examinations); § 81-13-1 (hearings on denial of application for license of credit union); § 81-13-17 (examinations 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)(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. Under Rule 45(a)(2), all subpoenas (except those pertaining to 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).

A "foreign subpoena" means a subpoena issued under authority of a court of record of a foreign jurisdiction. "Foreign jurisdiction" means a state other than this state. See the exclusion in Rule 46(b)(11)(i) of the Rules of Appellate Procedure Admission of Foreign Attorneys Pro Hac Vice. 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 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). Rule 45(c) requires advance payment of statutory witness fees and mileage; this subsection is complementary to Miss. Code Ann. §§ 25-7-47 through 25-7-59 (1972).

Rule 45(d)(1) sets out the grounds for objecting to any type of subpoena. Rule 45(d)(2) sets out additional protections available to persons subject to subpoenas for production or inspection. Subsection (d)(2)(A) 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. Further, a subpoena shall allow not less than 10 days for production or inspection, unless the court for good cause shown shortens the time. The 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 a copy of the subpoena on the other parties may be grounds for extending the time for compliance with the subpoena. 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). Paragraph 45(d)(2)(C), provides that upon motion the court may (1) quash or modify the subpoena if it is unreasonable or 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, electronically stored information or tangible things. A subpoena duces tecum is subject to a motion, as just described, and is also subject to the provision for protective orders in Rule 26(c). Rule 45(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. See 5A Moore's Federal Practice, 45.05(1) (1975); *Ulrich v. Ethyl Gasoline Corp.*, 2 F.R.D. 357 (W.D.Ky.1942). The court is authorized by Rule 45(f) 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 by a witness in objecting to the subpoena. Disobedience of a subpoena without adequate excuse may be punished as a contempt of the court. MRCP 45(g). 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; July 1, 1998; July 1, 2009; July 1, 2013.]