

**PURSUANT TO RULE 27(f) OF THE MISSISSIPPI RULES OF APPELLATE
PROCEDURE, THE SUPREME COURT SEEKS COMMENTS FROM THE BENCH, THE
BAR AND THE PUBLIC ON THE PROPOSED AMENDMENT TO RULE 45 OF THE
MISSISSIPPI RULES OF CIVIL PROCEDURE**

**Comments should be filed with the Clerk of the Supreme Court, Gartin Justice Building, P.O.
Box 117, Jackson, MS 39205, no later than September 7, 2007.**

RULE 45. SUBPOENA

(a) Form; Issuance.

- (1) Every subpoena shall: ~~be issued by the clerk under the seal of the court, shall~~
(A) state the name of the court from which it was issued;
(B) and state the title of the action; ~~;~~
(C) 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; ~~;~~
(D) set forth the text of subdivisions (d) and (e) of this rule; and
(E) include a certificate of service.

~~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.~~

(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.

(3) 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. An attorney, as an officer of the court, may also issue and sign a subpoena in any action pending in a court of this State if the attorney is: (i) admitted to practice in this State or has been admitted *pro hac vice* in the pending action; and is (ii) counsel of record in the pending action. A subpoena issued by an attorney as the officer of the court shall include the attorney's name, address and phone number and shall indicate whether the attorney represents the plaintiff, defendant or third-party defendant.

(4) Once a subpoena has been issued and filled out, a copy of such subpoena shall be immediately served upon each party in accordance with Rule 5, even though the subpoena itself has not yet been served upon the recipient.

(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 promptly 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. A copy of such proof of service shall be immediately served upon all parties in accordance with Rule 5.

(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 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.~~ Absent order of the court, production or inspection shall not be made until ten days have passed from the date of service and this shall be conspicuously noted on the face of the subpoena. 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, 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, 1991; July 1, 1997; July 1, 1998; Effective ____, 2007, Rule 45(a) was amended to permit an attorney admitted to practice in Mississippi, as an officer of the court, to issue subpoenas in a Mississippi case in which he or she is counsel of record. The amendment also authorizes attorneys who have been admitted pro hac vice and who are counsel of record in a Mississippi case to issue subpoenas. The amended rule requires that a copy of all subpoenas be served on all parties as soon as the subpoena form has been filled out even though the subpoena itself has not yet been served on the recipient at that time. Once a subpoena has been served, the serving party is required to promptly file a proof of service with the clerk and immediately serve a copy of the proof of service on all parties. Rule 45(d)(2)(A) was amended to prohibit production or inspection of documents until the tenth day after service of the subpoena on the subpoena recipient. This is meant to give persons other than the subpoena recipient an opportunity to move to quash or modify the subpoena. If the documents or objects are produced before the ten days has passed, the attorney receiving said documents should hold them under seal until the ten day period has expired.]

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.

[Amended effective July 1, 1997.]

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).

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, 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.]