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The Sedona Conference

Commentary on Rule 45 Subpoenas to Non-Parties, Second Edition

A Project of The Sedona Conference
Working Group on Electronic Document
Retention & Production (WG1)

August 2020
Second Public Comment Version
Submit comments by September 25, 2020, to
comments@sedonaconference.org

Editor's Note

In January of this year, we released the *Commentary on Rule 45 Subpoenas to Non-Parties, Second Edition, Public Comment Version*. In March, we received a number of comments, principally dealing with Section III, "The Possession, Custody, and Control Framework and its Impact on Rule 45 Obligations." That section proposed a two-step process, first determining if a party had possession, custody, or control of the documents or ESI, and then "the parties or the court" may determine whether a non-party subpoena is appropriate. What the drafters considered to be an analytical approach, those submitting comments read as requiring court approval before a non-party subpoena could issue. That is not what was intended. Accordingly, the Drafting Team and Steering Committee undertook to revise Section III to better explain what was intended.

As the Introduction to Section III now makes clear, "Where a party has possession, custody, or control of documents or ESI, that party should have the burden of producing its own information (via Rule 34), rather than requiring the requesting party to seek it through a subpoena to the custodial non-party. Similarly, a requesting party should seek documents or ESI from the party that controls the information through a Rule 34 request before issuing a Rule 45 subpoena to the custodial non-party. Accordingly, this *Commentary* recommends that before any requests for documents or ESI from a custodial non-party are issued or enforced, the threshold analysis should be whether a party to the litigation has possession, custody, or control of the documents or ESI."

While minor changes were made elsewhere (e.g., in the Introduction we note that the scope of this *Commentary,* like the 2008 original version, is limited to the use of subpoenas to obtain discovery, not to compel the appearance of a witness for deposition or trial), the purpose of this second comment period is to allow further review of Section III. The paragraphs within the section that were significantly revised, as well as two revisions in Section VI (Practice Pointers), have been shaded for easier identification. Comments should be submitted to comments@sedonaconference.org and are due in 30 days, that is, by September 25, 2020. Comments that were previously submitted should not be submitted again.

The Sedona Conference Commentary on Rule 45 Subpoenas to Non-Parties, Second Edition

A Project of The Sedona Conference Working Group on Electronic Document Retention and Production (WG1)

AUGUST 2020 SECOND PUBLIC COMMENT VERSION

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Preface

Welcome to the 2020 second public comment version of The Sedona Conference *Commentary on Rule 45 Subpoenas to Non-Parties, Second Edition*, a project of the Sedona Conference Working Group on Electronic Document Retention and Production (WG1). This second public comment period is for the purpose of reviewing significant changes made to Section III of the *Commentary* following comments received during the initial public comment period.

This is one of a series of Working Group commentaries published by The Sedona Conference, a 501(c)(3) research and educational institute dedicated to the advanced study of law and policy in the areas of antitrust law, complex litigation, and intellectual property rights. The mission of The Sedona Conference is to move the law forward in a reasoned and just way.

In 2008, The Sedona Conference published its first edition of the *Commentary on Non-Party Production & Rule 45 Subpoenas*. This Second Edition, now titled the *Commentary on Rule 45 Subpoenas to Non-Parties*, accounts for the 2013 amendments to Rule 45, the December 2015 amendments to other discovery rules, publication of *The Sedona Principles, Third Edition*, and significant case law development since 2008.

The Sedona Conference acknowledges the efforts of Drafting Team Leaders Tessa K. Jacob and Eric Schwarz, who were invaluable in driving this project forward. We also thank Drafting Team members John Baker, Bryan Bleichner, Anthony Diana, Arthur Fahlbusch, Katelyn Flynn, Nathaniel Giddings, Ross Gotler, Beth Leland, Glenn Melcher, Sandra Metallo-Barragan, Joshua Schoonauer, Ronnie Spiegel, Kelly Warner, Deric Yoakley, as well as The Honorable David Horan, for their efforts and commitments in time and attention to this project. Finally, we thank Andrea D'Ambra, Peter Pepiton, and The Honorable Andrew J. Peck (ret.) for their guidance and input as the WG1 Steering Committee Liaisons to the drafting team. Ms. Jacob and Judge Peck served as the Editors-in-Chief guiding this *Commentary* to publication.

Please note that this version of The Sedona Conference Commentary on Rule 45 Subpoenas to Non-Parties, Second Edition is open for public comment through September 25, 2020, specifically to allow further review of Section III. After the deadline for public comment has passed, the drafting team will review the public comments and determine what edits are appropriate for the final version. Please submit comments by email to comments@sedonaconference.org.

We encourage your active engagement in the dialogue. Membership in The Sedona Conference Working Group Series is open to all. The Series includes WG1 and several other Working Groups in the areas of international electronic information management, discovery, and disclosure; patent damages and patent litigation best practices; data security and privacy liability; trade secrets; and other "tipping point" issues in the law. The Sedona Conference hopes and anticipates that the output of its Working Groups will evolve into authoritative statements of law, both as it is and as it should be.

Information on membership and a description of current Working Group activities is available at https://thesedonaconference.org/wgs.

Craig Weinlein
Executive Director
The Sedona Conference
August 2020

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I. INTRODUCTION

Developments since the 2008 edition of The Sedona Conference *Commentary on Non-Party Production and Rule 45 Subpoenas*[1] have led to significant revisions and additions now included in this *Second Edition*. Federal Rule of Civil Procedure 45 (Rule 45)[2] was revised substantially in 2013. The 2015 amendments to the Federal Rules of Civil Procedure also impact Rule 45. The rise of cloud computing has put appreciable amounts of party data into the hands of non-parties.

Like the 2008 edition, the scope of the current *Commentary* is limited to the use of Rule 45 subpoenas to obtain discovery from a non-party custodian of documents or electronically stored information (ESI). The *Commentary* does not address the use of Rule 45 subpoenas to (1) compel any person to appear and give testimony at a trial, hearing, or deposition, or (2) compel any person to appear and bring documents or ESI to a trial, hearing, or deposition.

Section II of this *Commentary* briefly explains the major revisions to Rule 45 made by the 2013 Rules amendments, as well as the effect of the 2015 Rules amendments.

Section III of this *Commentary* proposes an approach for analyzing whether a party has possession, custody, or control of information that may make a non-party subpoena inappropriate. In other words, if the non-party has possession or custody of ESI but a party retains control, the *Commentary* recommends that the information should be obtained from the party under Rule 34, not from the non-party under Rule 45.

Section IV of this *Commentary* deals with preservation. A letter or similar request for the preservation of evidence generally does not create a non-party preservation obligation. In most cases, receipt of a properly served subpoena only obligates a non-party to take reasonable steps to produce the requested materials and does not obligate the non-party to initiate a formal legal hold process. Rather, the non-party's obligation is to ensure that the requested information is not destroyed during the compliance period. However, once a non-party has complied with a subpoena by producing responsive documents and ESI, the non-party has no duty to preserve them. Because Rule 45(d)(2)(B)(ii) places no time limit for a party to move to compel production of information sought by a subpoena, this *Commentary* encourages a non-party to provide a specific date after which it will no longer retain the documents or ESI that it objects to producing. Such a step thereby places the requesting party on notice of the date by which the requesting party needs to determine the completeness of the production and make a motion to compel.

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1 *See generally* 9 SEDONA CONF. J. 197 (2008).

2 As used in this *Commentary*, the term "Rule(s)" refers to the Federal Rule(s) of Civil Procedure, unless otherwise specified.

The longest section of this *Commentary*, Section V, deals with the related concepts of sanctions under Rule 45(d)(1), cost shifting under Rule 45(d)(2)(B)(ii), and quashing or limiting the scope of a subpoena under Rule 45(d)(3). Section V analyzes the now extensive case law under each of these approaches. This *Commentary* focuses on case law discussing the importance of properly objecting within the required 14 days in order to benefit from the rule's mandatory cost-shifting component. There is also detailed discussion on what constitutes undue burden under the various subsections of Rule 45, including when and how courts have relieved non-parties of their obligations under a subpoena due to undue burden under these subsections.

Finally, Section VI sets forth recommended "Practice Pointers" for both parties and non-parties dealing with a Rule 45 subpoena.

II. RULE CHANGES AND THEIR IMPACT ON NON-PARTY DISCOVERY

A. Introduction

Since publication of the 2008 edition of this *Commentary*, there have been several revisions to the Federal Rules of Civil Procedure and Federal Rules of Evidence. In 2013, Rule 45 was substantially revised with the intent of decreasing disputes and streamlining the practice of non-party discovery. The 2015 amendments to the Federal Rules of Civil Procedure did not alter Rule 45, but revisions to other rules—such as the scope of discovery under Rule 26—relate to non-party subpoena practice. The enactment of Federal Rule of Evidence 502, governing the production of privileged or work-product protected material, also has implications for the issuance of and response to subpoenas.

B. Rule Changes

1. 2013 Amendments to Rule 45

The Advisory Committee Notes to the 2013 amendments to Rule 45 state that the revisions were intended to "clarify and simplify the rule." The following revisions were implemented to accomplish this intent.

a. Subpoenas Issued from Court in Which Action Is Pending

Pursuant to revised Rule 45(a)(2), all subpoenas, whether for documents, deposition, or trial testimony, must be issued from the court in which the action is pending. This revision addressed confusion resulting from the prior Rule's differentiation based on the purpose of the subpoena. In addition to the clerk of the issuing court, an attorney who is authorized to practice in the issuing court, including an attorney admitted *pro hac vice*, may issue the subpoena (Rule 45(a)(3)).

b. Nationwide Service of Subpoenas

Pursuant to revised Rule 45(b)(2), subpoenas may be served at any place in the United States. Previously, the location for service was limited to the district or state where the issuing court was located, with some exceptions based on distance outside the district. These distinctions were eliminated in favor of simplicity. This revision is consistent with the requirement that all subpoenas be issued from the court in which the action is pending.

c. Service on Opposing Parties Prior to Service on Recipients

Pursuant to Rule 45(a)(4), for subpoenas seeking the production of documents or ESI, a notice and a copy of the subpoena must be served on each party prior to serving the subpoena on the person or entity subject to the subpoena (subpoena recipient or recipient). The 2013 Advisory Committee Notes state that this requirement was emphasized and enhanced to require providing other parties with a copy of the subpoena due to "frequent fail[ure] to give the required notice to the other parties." The amendment is "intended to achieve the original purpose of enabling the other parties to

object or to serve a subpoena for additional materials."[3] The amended rule does not specify how far in advance the notice and copy of the subpoena must be served on the opposing party.

d. Geographic Limitations to Place of Compliance

Revised Rule 45(c) "simplifies" where compliance with a subpoena can be required and abandons the prior version's focus on location of service. Under revised Rule 45(c), the court may require documents or ESI to be produced within 100 miles of where the recipient resides, is employed, or regularly conducts business in person. For testimony at trial, hearing, or deposition, the court may require the recipient to appear in person within 100 miles of where the recipient resides, is employed, or regularly conducts business in person. However, this 100-mile travel limit is expanded to anywhere within the state where the recipient resides, is employed, or regularly conducts business in person, if the recipient: (1) is a party or party officer, or (2) is commanded to attend a trial unless doing so would cause the recipient to incur "substantial expense."

e. Jurisdiction to Enforce or Quash Subpoenas

Revised Rule 45(d) requires that the court for the district where compliance of the subpoena is required (not necessarily the court from which the subpoena was issued) must ensure that the party issuing the subpoena took reasonable steps to avoid imposing undue burden or expense on the person subject to the subpoena.[4] This same court is given the responsibility to enforce, quash, or modify the subpoena.

A party's motion to enforce a subpoena or a non-party motion to quash or modify the subpoena should be filed as a separate action in the court for the district where compliance is required. This action will be assigned a "miscellaneous" case number.

f. Transfer of Disputes Related to Subpoenas

Rule 45(f) is a new section that allows the court where compliance is required to transfer a subpoena dispute to the court where the action is pending (a) if the subpoena recipient consents, or (b) upon a finding of "exceptional circumstances," for which the party seeking the transfer has the burden of showing such circumstances exist.[5]

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3 FED. R. CIV. P. 45 advisory committee's note to 2013 amendment.

4 *See, e.g.*, Merch. Consulting Grp., Inc. v. Beckpat, LLC, No. 17-11405, 2018 WL 4510269, at *3 (D. Mass. July 11, 2018) (discussing that the court or district "where compliance is required" is determined by the location or "place" for compliance identified on the subpoena); Raap v. Brier & Thorn, Inc., No. 17-MC-3001, 2017 WL 2462823, at *3 (C.D. Ill. July 7, 2017) ("[T]he better approach is to tie the place of compliance to the location of the subpoenaed person or entity.").

5 *See* Warkins v. Piercy, No. 4:16-MC-00324, 2016 WL 3683010, at *2 (E.D. Mo. July 12, 2016) (quoting FED. R. CIV. P. 45 advisory committee's note to 2013 amendment) (noting that the court's primary concern should be to avoid burdens on local non-parties, and it should not be assumed that the issuing court is in a superior position to resolve

2. 2015 Amendments to the Federal Rules of Civil Procedure

Although the 2015 amendments to the Federal Rules of Civil Procedure did not make changes to Rule 45 itself, several revised provisions impact subpoenas.

a. Rule 1

Rule 1 was amended to include that the rules are to be "employed by the court and the parties" to "secure the just, speedy, and inexpensive determination of every action and proceeding." The 2015 Advisory Committee Notes emphasize that the parties share the court's obligation to "construe and administer" the rules, thus creating an expectation for all parties to apply the rules in a manner that makes litigation efficient. While the amendment refers to "the parties," the spirit of Rule 1 should be applied to a party's dealings with non-party subpoena recipients.[6] Cooperation is helpful in reducing disputes and saving costs.

b. Rule 26

Rule 26 was modified in two material ways that impact the scope of discovery. These revisions are applicable to all discovery, including the issuance of and response to subpoenas.

First, the drafters emphasized the concept of proportionality, which was already part of Rule 26(b)(2)(c), by moving the factors into the section regarding scope of discovery. In revised Rule 26(b)(1), the factors to be considered when assessing proportionality are the same as those which have been included in the rule for years, with the addition of the explicit instruction that courts consider "the parties' relative access to relevant information." The elevation of the proportionality factors reinforces obligations of the parties to consider these factors when propounding and responding to discovery requests. The few courts that have considered this issue in the context of Rule 45 subpoenas have found that Rule 26's proportionality factors are applicable to Rule 45 subpoenas.[7]

Second, Rule 26 was amended to exclude the phrase "reasonably calculated to lead to the discovery of admissible evidence," requiring only that "materials need not be admissible in order to be discoverable," because the "reasonably calculated" language was misused to extend the scope of discovery. The 2015 Advisory Committee Notes to amended Rule 26 stress the role of the parties and, if necessary, the court in ensuring the principles of effective and cooperative case management are followed.

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subpoena-related motions); *see also* Lima LS PLC v. Nassau Reinsurance Grp. Holdings, L.P., 160 F. Supp. 3d 574, 579–80 (S.D.N.Y. 2015) (noting that Rule 45 permits transfer but does not require it).

6 *See also* The Sedona Conference, *The Sedona Conference Cooperation Proclamation*, 10 SEDONA CONF. J. 331 (2009).

7 *See generally* MetroPCS v. Thomas, 327 F.R.D. 600 (N.D. Tex. 2018) (applying Rule 26's proportionality factors to assess whether a non-party subpoena issued pursuant to Rule 45 sought information within the proper scope of discovery); Walker v. H & M Henner & Mauritz, LP, 16 Civ. 3818, 2016 WL 4742334 (S.D.N.Y. Sept. 12, 2016) (quashing subpoenas to non-party witnesses for failure to meet proportionality requirements).

c. Rule 34

The 2015 amendments to Rule 34 focus on requiring particularity in the objections asserted by a party responding to a Rule 34 request for production. The Rule requires the responding party to "state with specificity the grounds for objecting to a request" and clearly note if documents or ESI are being withheld on the basis of an objection. The 2015 Advisory Committee Notes state the amendments are "aimed at the potential to impose unreasonable burdens by objections to requests to produce," and the cases interpreting this change underscore the focus on whether the parties are complying with the spirit of the rule.[8]

There is uncertainty regarding whether these revisions to Rule 34 are applicable to subpoenas issued pursuant to Rule 45. Rule 45 contemplates the recipient objecting to the request, but the drafters did not include additional language regarding requirements for those objections. Most courts have held that Rule 34 requirements regarding reasonable particularity and objections apply with equal force to a non-party's responses to Rule 45 subpoenas.[9] It may be beneficial for requesting parties to state their requests with specificity and for the responding non-party to object with specificity.

d. Rule 37(e)

The 2015 amendments significantly changed Rule 37(e) regarding when a party may be sanctioned for the failure to preserve information. The 2015 Advisory Committee Notes explain that Rule 37 now "authorizes and specifies measures a court may employ if information that should have been preserved is lost, and specifies the findings necessary to justify these measures." Rule 37(e) on its face does not apply to non-party subpoena recipients because all of its provisions specifically refer to a "party."

Instead, Rule 45(g) provides that "[t]he court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it."[10]

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8 *See* The Sedona Conference, *Federal Rule of Civil Procedure 34(b)(2) Primer: Practice Pointers for Responding to Discovery Requests*, 19 SEDONA CONF. J. 447 (2018).

9 *See, e.g.*, Nasufi v. King Cable, Inc., No. 3:15-cv-3273, 2017 WL 3334110, at *4 (N.D. Tex. Aug. 4, 2017) ("[N]on-party's Rule 45(d)(2)(B) objections to discovery requests in a subpoena are subject to the same prohibition on general or boiler-plate or unsupported objections and requirements that the objections must be made with specificity and that the responding party must explain and support its objections."); Am. Fed'n of Musicians of the U.S. & Can. v. Skodam Films, LLC, 313 F.R.D. 39, 46 (N.D. Tex. 2015) ("[J]ust as Rule 34(b)(1)'s reasonable particularity requirement should apply with no less force to a subpoena's document requests to a non-party, a non-party's Rule 45(d)(2)(B) objections to those requests should be subject to the same requirements facing a party objecting to discovery under Rule 34.").

10 *See, e.g.*, Jalayer v. Stigliano, No. CV102285, 2016 WL 5477600, at *3 (E.D.N.Y. Sept. 29, 2016) (discussing how moving for sanctions against non-party subpoena recipient under Rule 37 was improper and instead finding that Rule 45(g) was the appropriate avenue for seeking such relief).

3. Federal Rule of Evidence 502

Federal Rule of Evidence (Fed. R. Evid.) 502, effective September 2008, was enacted subsequent to the April 2008 edition of this *Commentary*. Fed. R. Evid. 502 addresses the production of documents or ESI protected by the attorney-client privilege or work-product doctrine.

Fed. R. Evid. 502 was enacted for two primary purposes. First, it was intended to address inconsistent case law regarding the effect of a production of protected material. The Advisory Committee Notes state the rule was intended to "provide a predictable, uniform set of standards under which parties can determine the consequences of a disclosure of a communication or information covered by the attorney-client privilege or work-product protection." Second, the rule was intended to respond to the "widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive."

Many litigants now request Fed. R. Evid. 502(d) non-waiver orders to ensure that the production of privileged materials will not result in the waiver of attorney-client privilege or work product. Subpoena recipients should request a copy of the Fed. R. Evid. 502(d) order entered in the case and ensure that the language of the order applies to non-party productions as well. If such an order has not been entered or the non-party feels that the order does not provide adequate protection, the non-party should seek to have one entered.[11]

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[11] *See generally* The Sedona Conference, *Commentary of the Protection of Privileged ESI*, 17 SEDONA CONF. J. 95 (2016); *see also* The Sedona Conference, *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 SEDONA CONF. J. 1, 147 (2018) [hereinafter *The Sedona Principles, Third Edition*].

III. THE POSSESSION, CUSTODY, AND CONTROL FRAMEWORK AND ITS IMPACT ON RULE 45 OBLIGATIONS

A. Introduction

While Rule 45 does not require the parties to confer with each other or with a non-party prior to serving a subpoena, this *Commentary* recommends certain practices to reduce the burden and expense of litigation to parties and non-parties.

Whether a non-party subpoena or a Rule 34 document request should be used is dependent on the concept of possession, custody, or control. Particularly with ESI, a party may have legal control even when the ESI itself is in the possession or custody of a non-party. This *Commentary* will refer to such a non-party as a "custodial non-party." Where a party has possession, custody, or control of documents or ESI, that party should have the burden of producing its own information (via Rule 34) rather than requiring the requesting party to seek it through a subpoena to the custodial non-party. Similarly, a requesting party should seek documents or ESI from the party that controls the information through a Rule 34 request before issuing a Rule 45 subpoena to the custodial non-party. Accordingly, this *Commentary* recommends that before any requests for documents or ESI from a custodial non-party are issued or enforced, the threshold analysis should be whether a party to the litigation has possession, custody, or control of the documents or ESI.

Importantly and generally, where a party to the litigation has control over the requested documents and ESI that are in the possession or custody of a non-party, document requests to a party, rather than subpoenas to a custodial non-party, are the appropriate method to obtain discovery of those documents and ESI. In such a situation, the party's interests in as well as rights and obligations regarding the requested documents and ESI—including retention, production costs, and management of the risks associated with privilege, privacy, data security, and confidentiality—are determinative of the obligations imposed upon and protections afforded to that party and non-party. This *Commentary* discusses this concept further in section III.B.

It might be beneficial for the parties to discuss, at the Rule 26(f) conference or other appropriate point, whether a party believes a non-party has documents or ESI responsive to the requesting party's discovery requests, and whether the responding party asserts that it does or does not have possession, custody, or control of such documents or ESI. The parties should work to reach stipulations concerning authenticity and admissibility to avoid the need to subpoena a non-party custodian to prove up documents or ESI. If after receipt of a notice of a subpoena to a custodial non-party the party is willing to produce all or some of the requested information, it should notify the non-party and the party issuing the subpoena.

In addition, where a non-party is related to a party to the litigation and the party to the litigation does not have possession, custody, or control of the requested information, the non-party may share such interests in as well as rights and obligations regarding the requested documents and ESI. This *Commentary* discusses this further in section III.C.2 below. Where a non-party has sole possession,

custody, or control and does not share any interest in the litigation, the non-party is afforded the full protections of Rule 45, including cost-shifting mechanisms or quashing or modifying of the subpoena. This *Commentary* discusses this further in section III.C.1 below.

B. Rule 45 Rights and Obligations Where a Party Has Possession, Custody, or Control

Prior to the issuance or enforcement of a non-party subpoena, there initially should be an analysis of whether any party to the litigation has possession, custody, or control of the requested documents or ESI. When defining "possession, custody, or control,"[12] this *Commentary* follows The Sedona Conference's prior publication on this issue, the *Commentary on Rule 34 and Rule 45 "Possession, Custody, or Control,"* advocating that the Legal Right Standard is the proper standard for defining control. Put another way, if a party has: "(1) actual possession of Documents and ESI; or (2) the legal right to obtain Documents and ESI," then a party should be deemed to have "possession, custody, or control" of those documents and ESI.[13]

If a party to the litigation has possession, custody, or control of the requested documents or ESI, generally it is unnecessary to issue a non-party subpoena. It is a well-established principle that the burdens of discovery should fall on the parties to the litigation instead of on any non-party.[14] A party to the litigation may also be best positioned and have an incentive to properly address and manage issues concerning privilege, data privacy, and confidentiality, while a non-party often has no capabil-

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12 Courts have applied inconsistent and varying standards to construe the meaning of "possession, custody, or control." *See* The Sedona Conference, *Commentary on Rule 34 and Rule 45 "Possession, Custody, or Control,"* 17 SEDONA CONF. J. 467, 483–98 (2016) (surveying the applicable case law and observing that it provides three broad interpretations of "control": the Legal Right Standard, the Legal Right Plus Notification Standard, and the Practical Ability Standard). These standards largely fall within three broad categories. The Legal Right Standard evaluates a party's possession, custody, or control based on its legal right to obtain the documents or ESI in question. The Legal Right Plus Notification Standard builds on the Legal Right Standard by further obligating a party that does not have a legal right to the documents or ESI to notify the requesting party of the identities of non-parties that have possession, custody, or control of the documents or ESI requested. The Practical Ability Standard evaluates possession, custody, or control based on whether the party has the practical ability to obtain the documents or ESI, regardless of whether it has the legal right to do so. The two-step analysis proposed by this *Commentary* can be applied in jurisdictions using any of these standards. Practitioners should be familiar with the standard that applies in the relevant jurisdiction and should review the *Commentary on Rule 34 and Rule 45 "Possession, Custody, or Control*." Note that in courts using the Legal Right Plus Notification Standard, the party needs to inform opposing parties of non-parties that possess requested documents or ESI. Additionally, where a party controls information or documents in the hands of a non-party, the party has an independent obligation to "preserve, collect, search, and produce the Documents and ESI in the hands" of a non-party, "even though the producing party does not actually possess or have actual custody of the Documents and ESI at issue." *See Commentary on Rule 34 and Rule 45 "Possession, Custody, or Control,"* 17 Sedona Conf. J. at 483.

13 *See id.* at 529.

14 *See* discussion in Sections IV & V, *infra*.

ity nor incentive to do so. The Rule 45 subpoena process is not intended to circumvent the requirements and protections of Rule 34.[15] Similarly, where discoverable information is not in the possession, custody, or control of a party, Rule 34 does not prevent a party from obtaining discoverable information from a non-party through Rule 45. Should the requesting party have any doubt as to whether the responding party has possession, custody, or control, the requesting party should confer, in good faith, with the responding party to determine if it has possession, custody, or control and could produce the requested documents or ESI without a non-party subpoena.[16] If the responding party states that it lacks possession, custody, or control of the requested documents or ESI, or portions thereof, or does not respond to such an inquiry within a reasonable time, the requesting party may seek to have a court determine whether the responding party has possession, custody, or control of the documents or ESI, or issue a non-party subpoena, or both.

1. Requesting Discovery When a Party to the Litigation Has Control Over ESI or Documents in a Non-Party's Custody or Possession

The evolving nature of data management solutions has resulted in many organizations outsourcing the storage of ESI to third-party service providers, sometimes with or without contractual language ensuring the organization a legal right to the information. Therefore, circumstances where non-parties hold documents or ESI over which a party to the litigation has control (i.e., a legal right to obtain the requested documents or ESI from the non-party) have become increasingly common with the rise of cloud computing services.[17] This ESI storage revolution has profound implications on confidentiality, privacy, and privilege, which are fundamental considerations in the discovery process. In such situations, the obligations and burdens to produce those documents and ESI, as well as the associated rights and protections regarding those documents and ESI, should be borne or exercised by the party to the litigation—rather than the custodial non-party.

Therefore, the request for documents and ESI should be made pursuant to Rule 34, not Rule 45, and directed to the party to the litigation in the first instance. In other words, although the custodial non-party has actual possession or custody of the requested ESI and documents, the party that *controls* the ESI and documents should be responsible for responding to the request, which may include coordination with the custodial non-party. This custodial non-party should be protected from responding to a subpoena where the primary rights and obligations associated with the requested documents and ESI lie with the party to the litigation. Arguments that the party does not have the ability to obtain the documents and ESI in the custody of a custodial non-party may be tenuous, as the party—by definition—has a legal right to obtain its own documents and ESI.[18] Where there is a lack

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15 *See* Section II.B.2.c., *supra.*

16 *See The Sedona Conference Cooperation Proclamation*, *supra* note 6; *see also* FED. R. CIV. P. 26(f).

17 *Commentary on Rule 34 and Rule 45 "Possession, Custody, or Control,"* *supra* note 13, at 521.

18 *See* Brown v. Tellermate Holdings Ltd., No. 2:11-cv-1122, 2014 WL 2987051, at *3–5 (S.D. Ohio July 1, 2014), *aff'd in part*, 2015 WL 4742686, at *2 (S.D. Ohio Aug. 11, 2015) (rejecting defendants' suggestion that it did not have

of cooperation by the custodial non-party, a Rule 45 subpoena may appropriately be considered. (The requesting party should not have to wait, beyond a reasonable time, until any dispute between the responding party and the custodial non-party is resolved.) This is distinguishable from the context described below, where a party to the litigation does not have control of the requested documents or ESI, and the only mechanism for obtaining the documents or ESI is from the non-party by way of a subpoena.

This framework is consistent with the Stored Communications Act,[19] which imposes specific limitations regarding subpoenas that seek the contents of communications served on providers of remote computing services and electronic communication services. Under the Stored Communications Act, electronic communication service providers[20] are prohibited from divulging the contents of communications that are in "electronic storage"[21] by that service, and remote computing service providers[22] may not divulge communications that are carried or maintained on that service (absent the customer's consent).[23]

> *Illustration 1:* A loan servicing systems provider that hosts ESI for a financial institution is subpoenaed by the defaulting loan party in a lawsuit with the financial institution. The requested ESI about the loan is not in the actual possession of the financial institution, but pursuant to existing contractual rights, the financial institution has the legal right to obtain that ESI from the loan servicing systems provider. The financial institution, and not the loan

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possession, custody, or control of relevant information reflecting plaintiffs' sales activities held by defendants' enterprise cloud provider, Salesforce.com).

19 The Stored Communications Act was enacted in 1986 under Title II of the Electronic Communications Privacy Act., 18 U.S.C §§ 2701 *et seq*.

20 Electronic communication service "means any service which provides to users thereof the ability to send or receive wire or electronic communications." 18 U.S.C. § 2510(15) (2002).

21 Electronic storage means: "(A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and (B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication." *Id.* § 2510(17).

22 Remote computing service means "the provision to the public of computer storage of processing services by means of an electronic communications system." *Id.* § 2711(2).

23 However, the Stored Communications Act does not provide third parties with absolute immunity to Rule 45 subpoenas. *See, e.g.,* UN4 Prods., Inc. v. Doe-173.68.177.95, No. 17-CV-3278, 2017 WL 2589328 (E.D.N.Y. June 14, 2017) (permitting Rule 45 subpoenas on internet service providers to discover the true name, postal address, and email address of each subscriber associated with identified internet protocol (IP) addresses, asserting "ISP subscribers have a minimal expectation of privacy in the sharing of copyrighted material" (quoting Malibu Media, LLC v. John Does 1-11, No. 12 Civ. 3810, 2013 WL 3732839 (S.D.N.Y. July 16, 2013))).

The Stored Communications Act does allow disclosure under some circumstances. For example, a provider may disclose a customer record or other subscriber information with the lawful consent of the customer or subscriber. 18 U.S.C. § 2702(c)(2) (2018).

servicing systems provider that hosts the ESI, should provide that ESI to the defaulting party via Rule 34.

Illustration 2: An online human resources (HR) and payroll solutions provider that hosts HR and payroll information for a manufacturing company is subpoenaed for HR information in an employment class action against the manufacturing company. The requested documents and ESI are not in the actual possession of the manufacturing company, but the manufacturing company has a contractual legal right to obtain those documents and ESI from the online HR and payroll solutions provider. The manufacturing company, and not the online HR and payroll solutions provider, should provide the documents and ESI to the plaintiffs via Rule 34.

In addition, non-party service providers or vendors in possession of information may have their own terms of service and use, contractual obligations, or policies that govern the level of protection they afford to the documents or ESI being held. Depending upon the nature of those provisions, the party whose data is retained by the non-party may be in a better position than the non-party to address those issues, as well as the confidentiality and privilege of the party's information. Where there is a dispute between the service provider (or vendor) and the responding party (such as, for example, over nonpayment of fees), that should not delay the requesting party's ability to serve or enforce a non-party subpoena against the service provider (or vendor).

However, a Rule 45 subpoena directed to a custodial non-party may be necessary in certain limited circumstances even where a party has a legal right to obtain the documents. Instances may include where: (i) a party to litigation has engaged in misconduct and failed to produce or destroyed certain documents or ESI; (ii) the non-party is likely to have nonduplicative documents or ESI in its sole possession, custody, or control that do not fall within the legal right of the party; or (iii) there are extenuating circumstances that necessitate timely compliance with a document request or a need to authenticate documents (e.g., temporary restraining order, preliminary injunction). For instance, following discovery sanctions, obtaining requested documents, or ESI directly from the custodial non-party instead of the sanctioned party may be reasonable. On the other hand, the position of this *Commentary* is that a Rule 45 subpoena should not be used simply to validate that the party to the litigation properly produced all documents or ESI that are also in the possession of the custodial non-party.[24]

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[24] While the case law is not uniform, many courts agree with this view, holding that parties should not use Rule 45 subpoenas as a means to evade the requirements of Rule 34, and instead should only resort to non-party subpoenas in the exceptional circumstances outlined above where the responding party has possession, custody, or control of the requested information. *See, e.g.*, McCall v. State Farm Mut. Auto. Ins. Co., No. 216CV01058JADGWF, 2017 WL 3174914, at *6 (D. Nev. July 26, 2017) ("Although most courts hold that a subpoena duces tecum may be served on another party, it cannot be used to circumvent Rule 34 or the other discovery rules . . . The court also has an obligation to protect non-parties from being burdened with subpoenas for documents that can more easily and inexpensively be obtained from the opposing party."); Layman v. Junior Players Golf Acad., 314 F.R.D. 379, 385 (D.S.C. 2016) ("[R]esort to Rule 45 should not be allowed when it circumvents the requirements and protections of Rule 34

Illustration 1: A law firm that represented the defendant in the negotiation of a contract is subpoenaed by the plaintiff in a breach of contract case to produce the relevant non-privileged transaction documents, including drafts. Based on the engagement agreement between the defendant and the law firm, the documents are under the defendant's control. The plaintiff should obtain the requested documents directly from the defendant via Rule 34.

Illustration 2: A law firm that represented the defendant in the negotiation of a contract is subpoenaed by the plaintiff to produce relevant internal and external non-privileged communications regarding the contract negotiations. Based on the engagement agreement, such

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for the production of documents belonging to a party . . . . If documents are available from a party, it has been thought preferable to have them obtained pursuant to Rule 34 rather than subpoenaing them from a nonparty witness.") (internal citations and quotation marks omitted); DeGeer v. Gillis, 755 F.Supp.2d 909, 924 (N.D. Ill. 2010) ("Although the [third party] Cravath law firm has possession and custody of the database, [party] Huron does not contend that it lacks a legal right to obtain its documents from Cravath. . . . Huron documents in Cravath's possession are subject to Huron's control and thus, not exempt from Defendants' subpoena to Huron."); Stokes v. Xerox Corp., No. 05-CV-71683-DT, 2006 WL 6686584, at *3 (E.D. Mich. Oct. 5, 2006) ("Accordingly, the Court finds that the majority view is that a party should not be permitted to circumvent the requirements and protections of Rule 34 by proceeding under Rule 45 for the production of documents belonging to a party."); Morrow v. Air Ride Techs., Inc., No. 05-113, 2006 U.S. 99651 WL 559288, at *2 (S.D. Ind. Mar. 6, 2006) (despite claims of no response from party to discovery requests, absent motion to compel production, court "is reluctant to allow the Plaintiffs to jettison the burden of production on a non-party").

However, while some decisions contain language that appears contradictory to the cases cited immediately above, a close reading of these cases shows they generally align with the position taken in this *Commentary* that absent some evidence of misconduct in party discovery, subpoenas should not be used to get documents from a non-party that are more easily obtained from a party in the case. *See, e.g.*, Trustees of Boston Univ. v. Everlight Electronics Co., No. 12-cv-11935-PBS, 2014 WL 12792497 at *3 (D. Mass. Sept. 10, 2014) (quashing the subpoena as overly burdensome on a non-party when the information could be obtained from the party, while noting "[T]here is no absolute rule prohibiting a party from seeking to obtain the same documents from a non-party as can be obtained from a party. 'In many cases, tell-tale differences may appear between [the document collections]; and in many cases when a party obtains what should be the same set of documents from two different sources a critical fact in the litigation turns out to be that one set omitted a document that was in the other set.'") (quoting Coffeyville Resources Refining & Mktg., LLC v. Liberty Surplus Ins. Corp., No. 4:08MC00017, 2008 WL 4853620 at *2 (E.D. Ark. Nov. 6, 2008)); *In re* Mushroom Direct Purchaser Antitrust Litigation, No. 06-620, 2012 WL 298480, at *4 (E.D. Pa. Jan. 31, 2012) ("This is not a case where plaintiffs have made no attempt to obtain the requested information from other sources. . . . A plaintiff seeking to discover information from a third-party is not required to compel defendants to produce potentially overlapping information before seeking any third-party discovery. This is particularly true where, as here, the defendant with potentially overlapping information has already produced documents in response to the overlapping discovery requests. . . . Further, it is likely that [the non-party] possesses relevant documents that [Defendant] does not."); Med Tech., Inc. v. Breg, Inc., No. 10-MC-00100, 2010 WL 3734719, at *4 (E.D. Pa. Sept. 21, 2010) (rejecting non-party argument that subpoena was cumulative of party discovery where the party had already responded to discovery without producing the documents sought from the non-party); Davis v. City of Springfield, No. 04-3168, 2009 WL 910204, at *4 (C.D. Ill. Apr. 1, 2009), *aff'd sub nom.* Davis v. City of Springfield, No. 04-3168, 2009 WL 1161619 (C.D. Ill. Apr. 28, 2009) (quashing the subpoena because the information could be obtained more easily from the party in the case, while stating "Certainly, Rule 45(c) does not require [a party] to exhaust other means of securing information before seeking it from [a non-party]; however, the Court will consider the availability of the information from other sources in balancing the relative hardships.").

documents and ESI are not under the party's "possession, custody, or control." In this example, the plaintiff should obtain the requested documents and ESI from the law firm via Rule 45.

C. Rule 45 Rights and Obligations Where a Party Does Not Have Possession, Custody, or Control

Parties that do not have "control" over documents and ESI in the possession or custody of a non-party may still have significant interests at stake concerning the production of those documents and ESI and should generally be included in the management of the scope of such productions and limitations thereto. They also potentially bear some or all of the burden of production under certain circumstances.[25] This section explores procedures that should be considered to protect a party's interests in documents or ESI of which it has no possession, custody, or control, as well as the protections afforded to the non-party.

1. Subpoenaing a Non-Party with Sole Possession, Custody, and Control

Some non-parties have sole possession, custody, or control of requested documents or ESI—i.e., a party to the litigation has no control over these documents or ESI. In such situations, requesting parties should issue non-party subpoenas. However, these non-parties should be afforded protections under Rule 45, including cost shifting, or quashing or modifying the subpoena as appropriate.[26]

Illustration 1: An internet search company is subpoenaed by a plaintiff in a defamation case for search results relating to any statements made by the defendant about the plaintiff during a specific time period. The internet search company has no interest in the litigation and has sole possession, custody, or control of the requested documents and ESI. A non-party subpoena should be used, and the protections and cost-shifting mechanisms under Rule 45 should be fully available to the internet search company. To the extent cost shifting is appropriate, the court may allocate those costs to the plaintiff.

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25 The analysis is slightly different where the non-party is related to a party to the litigation. *See* Section III.C.2., *infra.*

26 *See* United States v. Columbia Broad. Sys., Inc., 666 F.2d 364, 371–72 (9th Cir. 1982) ("Nonparty witnesses are powerless to control the scope of litigation and discovery, and should not be forced to subsidize an unreasonable share of the costs of a litigation to which they are not a party. . . . [W]e . . . emphasize that a witness's nonparty status is an important factor to be considered in determining whether to allocate discovery costs on the demanding or the producing party."); Nitsch v. DreamWorks Animation SKG Inc., No. 14-cv-04062-, 2017 WL 930809, at *3 (N.D. Cal. Mar. 9, 2017) (finding non-party's efforts to protect the confidential information to be reasonable and compensable and shifting the costs to the plaintiff); Spears v. First Am. eAppraiseIT, No. 5:08-cv-00868, 2014 WL 11369809, at *3–4 (N.D. Cal. July 3, 2014) (noting that a non-party subpoena recipient was not "substantially involved in underlying events [nor] had a significant relationship with the litigants" and thus was afforded full protection under Rule 45); *In re* Honeywell, Int'l, Inc. Sec. Litig., 230 F.R.D. 293, 303 (S.D.N.Y. 2003) (finding that whether the non-party has an interest in the outcome of the case is an important factor in determining who should bear the costs of discovery).

Illustration 2: A city traffic department is subpoenaed by a plaintiff in a personal injury case for its internally maintained video footage of an intersection where plaintiff claims defendant caused him injury. The city traffic department has no interest in the litigation and has sole possession, custody, or control of the requested documents and ESI. A non-party subpoena should be used, and the protections and cost-shifting mechanisms under Rule 45 should be fully available to the city traffic department. To the extent cost shifting is appropriate, the court may allocate those costs to the plaintiff.

2. Subpoenaing a Non-Party That Has a Relationship to a Party

Some non-parties have a prior or current relationship to a party to the litigation.[27] Subpoenas directed to these non-parties frequently involve complex possession, custody, or control issues as well as substantive issues of corporate separateness and veil piercing.[28] Here, where possession, custody, or control does not exist but a relationship exists (which could implicate privacy, confidentiality, or privilege concerns), special considerations for coordination may still be appropriate for responses to the subpoena.

Where a non-party has a relationship to a party, that relationship may impact cost shifting and coordination among the parties and the non-party. Therefore, courts would need to balance the competing interests of the parties and the non-party in the requested documents and ESI.

Illustration: A non-party parent company is subpoenaed by the plaintiff in a patent infringement case against its subsidiary. The plaintiff requests specific relevant documents regarding

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27 *See generally* St. Jude Med. S.C., Inc. v. Janssen-Counotte, 305 F.R.D. 630 (D. Or. 2015) (finding there was a "sufficient indicia of effective control" to require European affiliates of the non-party to conduct a search for responsive documents and ESI, where European affiliates were acting as non-party's agent-in-hiring and non-party itself did not have responsive documents and ESI); Wells Fargo Bank, N.A. v. Konover, 259 F.R.D. 206 (D. Conn. 2009) (finding that a non-party is not a "truly disinterested party," due to its corporate structure and representation by the same law firm); *In re* First Am. Corp., 184 F.R.D. 234, 242 (S.D.N.Y. 1998) (while Rule 45 protects non-parties from significant expense in producing documents and ESI, the non-party was not "the quintessential innocent, disinterested bystander," as it should have reasonably anticipated being drawn into litigation resulting from the underlying alleged fraud and was therefore responsible for some of the production costs).

28 *See* Flame S.A. v. Indus. Carriers, Inc., 39 F. Supp. 3d 752, 759 (E.D. Va. 2014) ("The analysis therefore applies with equal force, and for related non-parties, like parent, sister, or subsidiary corporations, courts examine (1) the corporate structure of the party/non-party; . . . (4) whether the related entities exchange documents in the ordinary course of business; . . . (6) common relationships between a party and its related non-party entity; (7) the ownership of the non-party; (8) the overlap of directors, officers, and employees; . . . and (11) agreements among the entities that may reflect the parties' legal rights or authority to obtain certain documents." (citing E.I. DuPont de Nemours & Co. v. Kolon Indus., Inc., 286 F.R.D. 288, 292 (E.D. Va. 2012)); *see also* Level One Techs., Inc. v. Penske Truck Leasing Co., L.P., No. 4:14 CV 1305, 2018 WL 3819042, at *1–2 (E.D. Mo. Aug. 10, 2018) (holding that defendant had "possession, custody, and control" of third-party service provider's time records and monthly register, as the service provider was present at defendant's offices, much of its work is stored on the defendant's servers and systems, and "it is clear that [service provider] would comply with any demand from [defendant] for documents supporting the contracted projects").

> the research and development of the allegedly infringing product. The requested documents are in the possession of the parent company, and the subsidiary does not have control over those documents. Therefore, the subpoena should be directed to the parent company, and if the nature of the relationship between the parent and the subsidiary is fully aligned and co-operative, special considerations for coordination in production between the parent and subsidiary may not be necessary because the parent may be incentivized and capable of protecting the subsidiary's interests in the litigation context.

Were it not for the corporate relationship in the Illustration, the subpoena to the parent should still be used, but the unrelated non-party likely would be entitled to greater protection.

IV. PRESERVATION

A. Prior to Receipt of a Subpoena

Generally, a non-party has no obligation to preserve documents prior to receipt of a subpoena or after complying with a subpoena, absent a special relationship to a party to the litigation.[29] A written or oral preservation demand creates no duty to preserve materials.[30] In *Tassin v. Bob Barker Co.,* the court found that a written request for the preservation of evidence did not create a non-party preservation obligation.[31] The plaintiff sent correspondence to a non-party's supervisory employee requesting that any video concerning his accident (the basis of his lawsuit against defendant) be preserved.[32] When no response was received from the non-party, the plaintiff sought an order from the court to compel the non-party to preserve the potential video evidence.[33] The court denied plaintiff's motion, explaining that it was not clear whether any such recordings existed, and there was no indication that the non-party had been dilatory.[34] The court advised the plaintiff that he could request potential video footage by subpoena and declined to address any issue of spoliation pending a response by the non-party to a subpoena.[35]

A non-party, however, may have a preservation obligation prior to receipt of a subpoena where contractual obligations to a party exist.[36] In *Holmes v. Amerex Rent-A-Car*, a case brought by a motorist against the manufacturer of a rental car in which he was injured while driving, the court assumed

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29 *See* The Sedona Conference, *Commentary on Legal Holds, Second Edition: The Trigger & The Process*, 20 SEDONA CONF. J. 341, 365 (2019) (discussing circumstances where there is a "special, affiliated, or contractual relationship with a party" and where, after receipt of a subpoena, non-parties that "have actual or constructive control of discoverable information" should decide whether a duty to preserve discoverable information has been triggered).

30 Courts have specifically noted the distinction between a written request and the legal force of a general subpoena or preservation subpoena. *See, e.g., In re* Heckmann Corp. Sec. Litig., No 10-378-LPS-MPT, 2011 WL 10636718, at *5 (D. Del. Feb. 28, 2011) (finding in Private Securities Litigation Reform Act (PSLRA) action, "[s]ending preservation letters . . . is distinct from serving preservation subpoenas because the latter imposes a legal obligation on third parties to take reasonable steps to preserve relevant documents") (relying in part upon Koncelik v. Savient Pharms., Inc., No. 08 Civ. 10262, 2009 WL 2448029, at *2 (S.D.N.Y. Aug. 10, 2009) ("The only thing that is certain is that without preservation subpoenas, the third party corporations in possession of potentially relevant information are free to destroy that information.")).

31 Tassin v. Bob Barker Co., No. 16-0382-JWD-EWD, 2017 WL 9963365, at *2 (M.D. La. Sept. 28, 2017).

32 *Id.* at *1.

33 *Id.*

34 *Id.* at *2.

35 *Id.*

36 Andra Grp., LP v. JDA Software Grp., Inc. No. 3:15-MC-11, 2015 WL 12731762, at *15, *17 (N.D. Tex. Dec. 9, 2015); Koplin v. Rosel Well Perforators, Inc., 734 P.2d 1177, 1179 (Kan. 1987) ("[S]ome special relationship or duty rising by reason of an agreement, contract, statute, or other special circumstance" is necessary to give rise to a "duty to preserve possible evidence for another party to aid that other party in some future legal action against a third party."); Fletcher v. Dorchester Mut. Ins. Co., 773 N.E. 2d 420, 425 (Mass. 2002) ("A third-party witness may also

"that a duty of care existed which was derived from a contractual relationship to transfer ownership of the car wreckage from the [car rental agency, which took possession of the wrecked automobile] to the [plaintiff] and that the duty was breached" by the rental agency's destruction of the car.[37] Similarly, a non-party witness may agree to preserve an item of evidence and thereby enter into an enforceable contract with a party.[38]

A non-party may also have a preservation obligation prior to a subpoena where it has a special relationship with a party.[39] However, very few cases discuss what kind of special relationship must exist to trigger a non-party's preservation obligation, and the cases that address this issue are fact-driven.

A close working relationship in and of itself does not rise to the level of the special relationship required to impose a retention obligation. In *Andra Group, LP v. JDA Software Group, Inc.*, the court examined whether a non-party project management limited liability company ("p202") for plaintiff Andra's software development project had a duty to preserve certain information prior to receipt of a subpoena from defendant JDA.[40] Andra had hired p202 to manage the software development project that was the basis for the dispute between Andra and JDA.[41] In its subpoena, JDA sought a number of items from p202, including telephone recordings between Andra's CEO and p202's project manager.[42] Prior to receipt of the subpoena, however, p202 had deleted those recordings.[43] p202's project manager testified at a deposition that he did not keep or archive the recordings once p202 had completed work on the project and been paid by Andra.[44] p202's project manager also testified that p202 did not have a document or email retention policy, nor did it have, at the time the evidence was deleted, a practice or custom for storing digital, video, tape, or audio recordings.[45] p202's project manager further testified that prior to the subpoena from JDA, Andra's CEO informed him that she was considering litigation against JDA, and that despite this communication from Andra's CEO, p202 did not have a litigation hold in place until it was served with JDA's subpoena in the matter.[46] JDA filed a motion for civil contempt against p202 regarding its deletion of

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agree to preserve an item of evidence and thereby enter into an enforceable contract." (citing *Koplin*, 734 P.2d at 1179)); *see also Tassin*, 2017 WL 9963365, at *1 ("[D]uty [to preserve] may extend to a non-party . . . when the non-party enters into an agreement to preserve the evidence sought to be obtained." (internal citation omitted)).

37 Holmes v. Amerex Rent-A-Car, 710 A.2d 846, 850 (D.C. 1998).

38 *Fletcher*, 773 N.E. 2d at 425 (citing *Koplin*, 734 P.2d at 1177).

39 *See Andra*, 2015 WL 12731762, at *15.

40 *Id.* at *15–16.

41 *Id.* at *2.

42 *Id.* at *5.

43 *Id.* at *6.

44 *Id.*

45 *Id.* at *6, *8.

46 *Id.* at *9.

the telephone recordings and certain other items, claiming p202 had not been compliant.[47] The court determined that despite the close working relationship between Andra and p202, and p202 being informed of potential litigation between Andra and JDA, p202 did not have a duty to preserve the telephone recordings and certain other items prior to receipt of JDA's subpoena.[48]

In some cases in which the commencement of discovery is delayed, generally due to a statutory stay or lengthy prediscovery motion practice, such as securities actions subject to the Private Securities Litigation Reform Act of 1995 (PSLRA), courts have issued orders, based upon a specific evidentiary showing, for the issuance of so-called preservation subpoenas to a non-party requiring preservation of relevant documents of ESI.[49] Such court orders, however, should include Rule 45's protection against undue burden and expense by avoiding overbroad requests and properly tailoring preservation to the scope of discovery required by the circumstances, including proportionality. Leave of court to serve preservation subpoenas has also been granted in other litigation settings, including cases consolidated or coordinated through the Judicial Panel for Multidistrict Litigation and other complex cases in which the commencement of discovery may be delayed substantially.[50]

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47 *Id.* at *6.

48 *Id.* at *15.

49 *In re* Smith Barney Transfer Agent Litig., No. 05 Civ. 7583(WHP), 2012 WL 1438241, at *3 (S.D.N.Y. Apr. 25, 2012); *see also*, e.g., Gruber v. Gilbertson, No. 16-cv-9727, 2017 WL 3891701, at *4 (S.D.N.Y. Sept. 5, 2017) (Where non-parties hold relevant documents to which plaintiff will be entitled if it prevails on the motion(s) to dismiss, "courts have generally permitted plaintiffs in PSLRA actions to issue subpoenas that have given specified third parties notice of the action and impose upon them only a duty to preserve certain relevant evidence in their possession." (quoting *In re Smith Barney*, 2012 WL 1438241, at *3)); Avenue Capital Management II, LP v. Schaden, No. 14-CV-02031-PAB-KLM, 2015 WL 758521, at *3–4 (D. Colo. Feb. 20, 2015) (same) (quoting *In re Smith Barney*, 2012 WL 1438241, at *3); Caston v. Hoaglin, No. Civil Action No. 2:08-CV-200, 2009 WL 1687927, at *2 (S.D. Ohio June 12, 2009) (holding plaintiff had good cause to serve preservation subpoenas in PSLRA action prior to Rule 26(f) discovery conference where information sought in subpoena request was narrow and the evidence was critical to defendants' alleged breaches of fiduciary duties); *In re* Refco, Inc. Sec. Litig., No. 05 Civ. 0826 (GEL), 2006 WL 2337212, at *5 (S.D.N.Y. Aug. 8, 2006) ("[C]ourts have generally permitted plaintiffs in PSLRA actions to 'issue subpoenas that give specified third parties notice of the action and impose upon them only a duty to preserve certain relevant evidence in their possession.'" (internal citations omitted; collecting cases)); Payne v. DeLuca, CA No. 02-1927, 2005 WL 8152650, at *5 (W.D. Pa. Dec. 23, 2005) (granting defendants' motion for order permitting issuance of preservation subpoenas); *In re* Nat'l Century Fin. Enter., Inc. Fin. Inv. Litig., 347 F. Supp. 2d 538, 542 (S.D. Ohio 2004) (granting motion to issue document subpoena to debtor); *In re* Tyco, 2000 WL 33654141, at *3–4 (subpoenas authorized where, unlike the defendants, the non-parties had not necessarily received actual notice of the action, and plaintiff produced evidence that large corporations typically overwrite and thereby destroy electronic data in the course of performing routine backups).

50 Johnson v. U.S. Bank Nat'l Ass'n, No. 1:09-cv-492, 2009 WL 4682668, at *1–2 (S.D. Ohio Dec. 3, 2009) (Telemarketing Fraud: applying "good cause" standard and authorizing service of preservation subpoena prior to Rule 26(f) conference where non-party was a "critical link" in the alleged scheme, and where preservation was necessary to ensure that records and databases were not destroyed, lost, or otherwise despoiled); Tama Plastic Indus. v. Pritchett Twine & Net Wrap, LLC, No. 8:12CV324, 2013 WL 275013, at *3–4 (D. Neb. Jan. 24, 2013) (Patent: excluding non-party discovery from stay: "Tama will likely have a more difficult time gathering information after a two-year wait because the third parties may dispose of documents and because memories tend to fade over the course of

B. After Receipt of a Subpoena

Rule 45 and its Advisory Committee Notes are devoid of any reference to preservation.[51] The Rule does require that the issuing party take steps to avoid undue burden or expense to the subpoenaed non-party, and the subpoenaed non-party can either produce the subpoenaed documents, object to the subpoena, or move to quash. However, a non-party subpoena recipient should be careful not to destroy or discard information responsive to a subpoena, because the Rule provides for contempt sanctions if the non-party "fails without adequate excuse to obey the subpoena or an order related to it,"[52] and some states have recognized spoliation as an independent tort.

Thus, although a subpoena imposes an obligation on the non-party to ensure documents responsive to the subpoena are not destroyed pending compliance with the subpoena, the nature and extent of the obligation varies depending on the facts and circumstances presented. In most cases, receipt of a properly served subpoena only obligates a non-party to take reasonable steps to produce the requested materials. The subpoena does not obligate the non-party to initiate a formal legal hold process. What is required is to ensure that materials are retained until there is compliance. Absent a contractual or other special obligation, a non-party has no duty to preserve information after it has complied with the subpoena.

Since Rule 45(d)(2)(B)(ii) places no time limit on when a party must move to compel production of documents sought in a subpoena, a subpoenaing party may find itself in a more difficult position when the non-party objects to producing all or part of the information subpoenaed or otherwise fails to fully comply with the subpoena. In those circumstances, it is advisable for the requesting party to provide prompt notice of its intent to move to compel compliance. If the requesting party does not promptly move to compel, the non-party may be faced with a dilemma about how long it needs to preserve documents. To protect itself, a non-party should consider specifying a reasonable date after which it will no longer retain the documents or ESI, thereby placing the requesting party on notice of the date by which it needs to move to compel, if it plans to do so. The party issuing the subpoena should promptly move to compel in such a situation. In addition, while not currently required by the Federal Rules of Civil Procedure, the non-party and the party issuing the subpoena may wish to meet and confer, to discuss and try to resolve any disputes as to the scope of discovery and scope of the subpoena, or other matters including retention, before seeking to quash or enforce the subpoena.

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time. Accordingly, a granting of a complete stay of all discovery in this case will likely cause prejudice and tactical disadvantage to Tama with respect to information currently in the hands of third parties."); *see also* State Farm Mut. Auto. Ins. Co. v. Physiomatrix, Inc., Civil Action No. 12-cv-11500, 2013 WL 10936871, at *5 (E.D. Mich. Nov. 26, 2013) (RICO: ordering non-party to preserve emails from identified account for 180 days in order to permit plaintiff to subpoena emails if it learned that the account was controlled by defendants).

51 Although a reference to preservation was specifically added to Rule 26 in the 2015 amendments, it was not added to Rule 45.

52 *See* FED. R. CIV. P. 45(g).

C. Remedies for Spoliation

While certain states have recognized spoliation as an independent tort,[53] there does not exist an independent federal cause of action for spoliation of evidence.[54] Moreover, Rule 37(e) applies only to parties, not to a non-party.[55] A non-party's failure to produce documents or ESI responsive to a subpoena may result in a Rule 45(g) sanction of contempt—often a monetary fine—before the court in that action.[56]

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53 While it is beyond the scope of this paper to consider the potential tort liability of non-parties who destroy evidence relevant to others' disputes, the law in this area is developing and has been addressed by a majority of states. Several publications analyze and tally the states that recognize or reject spoliation as a separate tort. *See, e.g.*, 86 C.J.S. *Torts* § 78, Westlaw (database updated Dec. 2018); 1 STEVEN PLITT & JORDAN ROSS PLITT, PRACTICAL TOOLS FOR HANDLING INSURANCE CASES § 7:42 (2018); 40 ERIC M. LARSSON, CAUSES OF ACTION 2D 1 (2018); AM. L. PROD. LIAB. 3D § 53:160, Westlaw (database updated Nov. 2018).

54 R.C. Olmstead, Inc. v. CU Interface, L.L.C., 657 F. Supp. 2d 878, 887 (N.D. Ohio 2009) (citing Lombard v. MCI Telecomm. Corp., 13 F. Supp. 2d 621, 628 (N.D. Ohio 1998)); *In re* Elec. Mach. Enters., Inc., 416 B.R. 801, 872 (Bankr. M.D. Fla. 2009). In diversity actions, federal courts will apply local law with regard to substantive issues, but under the *Erie* doctrine, they will apply federal law to procedural issues. Foster v. Lawrence Memorial Hosp., 809 F. Supp. 831, 835 n.1 (D. Kan. 1992).

55 *In re* Correra, 589 B.R. 76, 123–24 (N.D. Tex. 2018) ("Rule 37(e) applies only to parties.").

56 Rule 45(g) provides that the court "may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it." FED. R. CIV. P. 45(g). Indeed, because properly served subpoenas have the effect of a court order, contempt sanctions are the logical remedy for the failure to comply, including failure to preserve documents. *See, e.g.*, Washington v. Trump, No. 17-0141JLR, 2017 WL 2172020, at *4 (W.D. Wash. May 17, 2017) ("The issuance of subpoenas to third parties . . . provide the force of a court order with respect to the preservation of . . . evidence."); *In re* Heckmann Corp. Sec. Litig., No 10-378-LPS-MPT, 2011 WL 10636718, at *34 (D. Del. Feb. 28, 2011) (deeming preservation subpoenas to be court orders); *In re* Napster, Inc. Copyright Litig., 462 F. Supp. 2d 1060, 1068–70 (N.D. Cal. 2006) (imposing sanctions for violation of legal obligation to preserve documents pursuant to receipt of subpoena where it determined non-party had reasonable cause to believe it would become a party); Fletcher v. Dorchester Mut. Ins. Co., 773 N.E. 2d 420, 425 (Mass. 2002) (duty imposed by a subpoena is "enforced as needed by appropriate court orders, up to and including holding the witness in contempt"); SonoMedica, Inc. v. Mohler, No. 1:08-cv-230, 2009 WL 2371507, at *5 (E.D. Va. July 28, 2009) (finding non-parties in civil contempt for failing to produce documents pursuant to subpoena, destroying ESI, and lying at depositions; ordering non-parties to pay attorney's fees; and referring matter to U.S. Attorney for criminal contempt proceedings).

V. RULE 45(D) COSTS, SANCTIONS, AND MOTION PRACTICE

Although many Rule 45 subpoenas are handled without any court intervention, Rule 45(d) provides three avenues by which a non-party subpoena recipient may be protected from the costs of compliance. This *Commentary* addresses these provision in the order they appear in the Rule—first, sanctions under Rule 45(d)(1); second, cost shifting under Rule 45(d)(2)(B)(ii)—but it recognizes that quashing or modifying a subpoena, which is discussed in the third subsection, is many times a more appropriate first step. Thus, practitioners should not give less consideration to quashing or limiting the scope of the subpoena under Rule 45(d)(3) to resolve issues.

A. Rule 45(d)(1)—Avoiding Undue Burden or Expense and Sanctions

Rule 45(d)(1) provides:

> *Avoiding Undue Burden or Expense; Sanctions.* A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

The first mechanism for protecting subpoena recipients is squarely in the hands of the court. Rule 45(d)(1) requires that a party or attorney responsible for issuing a subpoena take *reasonable steps* to avoid imposing undue burden or expense on a non-party. The court for the district where compliance is sought must enforce this duty and impose an "appropriate" sanction on a party or attorney who fails to meet this requirement. Although the rule provides that "appropriate" sanctions may include lost earnings and reasonable attorney's fees, courts have discretion over the type and degree of sanctions imposed. In determining whether sanctions should be imposed under Rule 45(d)(1), courts consider a number of factors, "including the person's status as a non-party, the relevance of the discovery sought, the subpoenaing party's need for the documents, the breadth of the request, and the burden imposed on the subpoenaed party."[57]

Undue burden is assessed in a case-specific manner considering "such factors as relevance, the need of the party for the documents, the breadth of the document request, the time period covered by it, the particularity with which the documents are described and the burden imposed."[58] "Courts are required to balance the need for discovery against the burden imposed on the person ordered to

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57 Parker v. Four Seasons Hotels, Ltd., 291 F.R.D. 181, 188 (N.D. Ill. 2013).

58 Am. Elec. Power Co. v. U.S., 191 F.R.D. 132, 136 (S.D. Ohio 1999) (quoting Concord Boat Corp. v. Brunswick Corp., 169 F.R.D. 44, 53 (S.D.N.Y. 1996)).

produce documents, and the status of that person as a non-party is a factor that weighs against disclosure."[59] Thus, as this *Commentary* suggests, the status of a non-party as related to a party is a factor.

Courts are also required to evaluate the reasonableness of the steps the issuing party took to avoid undue burden. Where an issuing party attempted to engage in good-faith negotiations to either reduce the burden or narrow the scope of the subpoena, courts have declined to impose sanctions.[60] The plain language of the provision, however, does suggest that sanctions may be imposed when a subpoenaing attorney or party unfairly harms a subpoena recipient by acting carelessly or in bad faith when issuing a subpoena. However, a finding of bad faith is not required for sanctions to be imposed under Rule 45(d)(1).[61]

Merely losing a motion to compel does not in and of itself expose a requesting party to Rule 45(d)(1) sanctions.[62] While failure to narrowly tailor a subpoena may be a ground for sanctions, the court need not impose sanctions every time it finds a subpoena overbroad; such overbreadth may sometimes result from normal advocacy and does not necessarily give rise to sanctions.

The history of Rule 45 provides guidance on how this section should be interpreted in the event of a misuse of the subpoena process. Rule 45 was amended in 1991 to bring the protections for subpoenaed non-parties under a single subdivision. But the 1991 Advisory Committee Notes suggest that the amendment did not effect a "change in existing law" and was designed to codify existing practice, including to give "specific application" to the principles stated in Rule 26(g).[63] Federal Rule of Civil Procedure 26(g)(1)(B) requires parties seeking discovery to act "(i) consistent with these rules and warranted by existing law or by a non-frivolous argument for extending, modifying, or reversing existing law, or for establishing new law; (ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and (iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issue at stake in the action." Violation of any one of these duties without substantial justification may result in sanctions.[64] Because

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59 *Id.*

60 *See In re* Am. Kidney Fund, Inc. 2019 WL 1894248, at *6 (good-faith negotiations to limit the scope of the subpoena and the fact that requesting party refrained from serving the subpoena until obtaining party discovery demonstrates the requesting party took reasonable steps to limit undue burden; sanctions under Rule 45 (d)(1) not warranted).

61 Legal Voice v. Stormans Inc., 738 F.3d 1178, 1185 (9th Cir. 2013); *see also* Mount Hope Church v. Bash Back!, 705 F.3d 418, 429 (9th Cir. 2012) (holding that bad faith is sufficient but not necessary to impose sanctions if Rule 45(d)(1) otherwise is violated).

62 *See Mount Hope Church*, 705 F.3d at 425–27 ; Mattel Inc. v. Walking Mountain Prods., 353 F.3d 792, 814 (9th Cir. 2003). *Mount Hope Church*, 705 F.3d at 425–27.

63 *See* FED. R. CIV. P. 45(d) advisory committee's note to 1991 amendment. The 1991 Advisory Committee Notes refer to subdivision (c), which became subdivision (d) in the 2013 amendments.

64 FED. R. CIV. P. 26(g)(3).

Rule 45(d)(1) gives "specific application" to Rule 26(g),[65] it follows that a violation of any one of the Rule 26(g) duties will be relevant to assessing the propriety of sanctions under Rule 45(d)(1)'s "undue burden" language.

B. Rule 45(d)(2)(B)(ii)—Mandatory Cost Shifting When the Non-Party is Ordered to Produce with Significant Expense Over Objection

Rule 45(d)(2)(B) provides:

> *Objections*. A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:
>
> i. At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
>
> ii. These acts may be required only as directed in the order, and *the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.* (emphasis added.)

Part 2 of Rule 45(d) gives the non-party the ability to protect itself from significant expense if complying with a subpoena over its objection. Under Rule 45(d)(2)(B)(ii), when a court orders compliance with a subpoena over a non-party's objection, the court should protect the non-party from significant expense resulting from compliance upon a showing by the non-party that they would incur significant expenses in responding to the subpoena.[66] If the non-party would be subjected to significant expense, this protection shifts as much of the compliance expense as necessary to the requestor to render the remaining expenses non-significant.[67]

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65 *Id.*

66 FED. R. CIV. P. 45(d)(2)(B)(ii).

67 *Id.*; Koopmann v. Robert Bosch LLC, No. 18-CV-4065, 2018 WL 9917679, at *1 (S.D.N.Y. May 25, 2018) (holding that Petitioners "should bear some of the Respondent's costs for complying with the Subpoena. Courts have deemed Rule 45(d)(2)(B)(ii) 'to make cost shifting mandatory in all instances in which a non-party incurs significant expense from compliance with a subpoena.'" (quoting Sands Harbor Marina Corp. v. Wells Fargo Ins. Servs. of Or., Inc., No. 09-CV-3855, 2018 WL 1701944, at *3 (E.D.N.Y. Mar. 31, 2018) (internal quotation marks & brackets omitted))).

Before Rule 45 was amended in 1991, cost shifting was within the court's discretion.[68] As the Advisory Committee Notes to the 1991 amendment explain and courts have found, this section is now mandatory.[69] The changes were intended "to enlarge the protections afforded [non-parties] who are required to assist the court."[70]

1. Prerequisites for Seeking Cost Shifting

Before a non-party can seek reimbursement for costs under Rule 45(d)(2)(B)(ii)'s cost-shifting provision, several requirements must be met. First, the non-party must file a *timely* and *specific* objection to the subpoena. Second, the requesting party must move the court under Rule 45(d)(2)(B)(i) to compel production over the non-party's objection. Third, the court must enter an order compelling the non-party to comply with the subpoena and produce the requested documents or ESI at a significant expense to the non-party. Only after these prerequisites have been met can a non-party request reimbursement for "significant expenses" under Rule 45(d)(2)(B)(ii)'s cost-shifting provision.

a. Non-Party Serves Objections

(1) Must be Timely

If the non-party chooses to serve a written objection to a subpoena rather than, or in addition to, moving to quash or modify it under Rule 45(d)(3)(A), the objection "must be served [on the issuing party] before the earlier of the time specified for compliance or 14 days after the subpoena is served."[71] Although some courts have held that in unusual circumstances the failure to submit timely objections is not an automatic waiver and the objections still may be considered,[72] untimely service

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68 Linder v. Calero-Portocarrero, 251 F.3d 178, 182 (D.C. Cir. 2001).

69 *Id.* (finding that under the revised Rule 45, the "rule is susceptible of no other interpretation" but that it is mandatory); *see also* Voice v. Stormans Inc., 738 F.3d 1178, 1184 (9th Cir. 2013) ("This language leaves no room for doubt that the rule is mandatory"; Iowa Pub. Emples. Ret. Sys. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., No. 17-6221, 2019 WL 7283254 at *2 (S.D.N.Y. Dec. 26, 2019) (finding that the "plain text obligates, and not merely empowers, the Court to protect third parties from significant expenses resulting from compliance with subpoenas.").

70 *Id.* (citing FED. R. CIV. P. 45 advisory committee's notes to 1991 amendment); United States v. CBS, Inc., 666 F.2d 364, 371 n.9 (9th Cir. 1982).

71 *See* FED. R. CIV. P. 45(d)(2)(B).

72 *In re* Ex Parte Application of Grupo Mexico SAB de CV for an Order to Obtain Discovery for Use in a Foreign Proceeding, No. 3:14-mc-73, 2015 WL 12916415, at *3 (N.D. Tex. Mar. 10, 2015), *aff'd sub nom.* Grupo Mexico SAB de CV v. SAS Asset Recovery, Ltd., 821 F.3d 573 (5th Cir. 2016) ("However, in unusual circumstances and for good cause . . . the failure to act timely will not bar consideration of objections." (quoting *In re* Denture Cream Prods. Liab. Litig., 292 F.R.D. 120, 124 (D.D.C. 2013) (internal quotations & citation omitted))). "Unusual circumstances" exist when "(1) the subpoena is overbroad on its face and exceeds the bounds of fair discovery; . . . (2) the subpoenaed witness is a nonparty acting in good faith; . . . and (3) counsel for witness and counsel for subpoenaing party were in contact concerning the witness' compliance prior to the time the witness challenged [the] legal basis for the subpoena." *In re Denture Cream Prods.*, 292 F.R.D. at 124 (alterations in original) (citation omitted); *see also* Piazza's

"typically constitutes a waiver of such objections."[73] If necessary to ensure that the timeliness requirement is met, a non-party can request that the issuing party extend the non-party's deadline to serve written objections.[74] Some circuits have interpreted Rule 45 to require that all objections be "raised at once, rather than in staggered batches."[75] In addition to or rather than serving a written objection, the non-party may move to quash or modify the subpoena under Rule 45(d)(3)(A).[76]

Timely service of written objections suspends the non-party's obligation to comply with the subpoena until there is a court order compelling compliance.[77]

Seafood World, L.L.C. v. Odom, No. 07-413, 2011 WL 3664437, at *3 (M.D. La. Aug. 19, 2011) ("[I]f aspects of a subpoena are overbroad on their face and exceed the bounds of fair discovery and the subpoenaed witness is a non-party acting in good faith, waiver of the non-party's untimely objections is not automatic, and the objections may be considered.").

73 *In re Ex Parte Application of Grupo Mexico SAB de CV*, 2015 WL 12916415, at *3 (citing Isenberg v. Chase Bank USA, 661 F. Supp. 2d 627, 629 (N.D. Tex. 2009) ("'The failure to serve written objections to a subpoena within the time specified by [Rule 45(d)(2)(B)] typically constitutes a waiver of such objections.'" (quoting Concord Boat Corp. v. Brunswick Corp., 169 F.R.D. 44, 48 (S.D.N.Y. 1996)))); *Piazza's Seafood World, L.L.C.*, 2011 WL 3664437, at *3 ("Failure of a nonparty to serve timely objections to a Rule 45 subpoena generally results in a waiver of all grounds for objection." (citing Moon v. SCP Pool Corp., 232 F.R.D. 633 (C.D. Cal. 2005))).

74 Am. Fed'n of Musicians of the U.S. & Can. v. Skodam Films, LLC, 313 F.R.D. 39, 43 (N.D. Tex. 2015) ("The serving party may agree to extend the deadline to respond to a subpoena, including the deadline to serve written objections." (citing Shaw Grp., Inc. v. Zurich Am. Ins. Co., No. 12-257, 2014 WL 1816494, at *8 (M.D. La. May 7, 2014))).

75 Young v. City of Chicago, No. 13 C 5651, 2017 WL 25170, at *8 (N.D. Ill. Jan. 3, 2017) ("Rule 45 'require[s] the recipient of a subpoena to raise all objections at once, rather than in staggered batches, so that discovery does not become a game.'" (quoting Ott v. City of Milwaukee, 682 F.3d 552, 558 (7th Cir. 2012) (quoting *In re* DG Acquisition Corp., 151 F.3d 75, 81 (2d Cir. 1998)))).

76 MetroPCS v. Thomas, 327 F.R.D. 600, 607 (N.D. Tex. 2018) ("Under Federal Rule of Civil Procedure 45(d), '[e]ither in lieu of or in addition to serving objections on the party seeking discovery, a person can 'timely' file a motion to quash or modify the subpoena' under Federal Rule of Civil Procedure 45(d)(3)(A)." (citing *In re Ex Parte Application of Grupo Mexico SAB de CV*, 2015 WL 12916415, at *3)).

77 *MetroPCS*, 327 F.R.D. at 607; *see also* FED. R. CIV. P. 45(d)(2)(B)(ii); Pennwalt Corp. v. Durand-Wayland, Inc., 708 F.2d 492, 494 (9th Cir. 1983) (once a non-party objects to a subpoena *duces tecum*, the non-party is no longer "obligated to produce the subpoenaed documents"); Ctr. for Individual Rights v. Chevaldina, No. 16-20905-Civ, 2017 WL 5905191, at *4 (S.D. Fla. Nov. 29, 2017) ("If a non-party timely serves written objections, the non-party's objection to comply with the subpoena is suspended pending a court's order." (citations omitted)); *Am. Fed'n of Musicians*, 313 F.R.D. at 44 (denying subpoena issuer's request for fees for filing a motion to compel because the non-party was not required to produce documents unless and until the subpoena issuer obtained a court order); Forsythe v. Brown, 281 F.R.D. 577, 587 (D. Nev. 2012). This benefit does not extend to subpoenas seeking deposition testimony, objections to which do not suspend a non-party's duty to appear and testify. *See* BNSF Ry. Co. v. Alere, Inc., 18-CV-291-BEN-WVG, 2018 WL 2267144, at *7 (S.D. Cal. May 17, 2018) (finding that "the only way for a non-party to seek excusal from a subpoenaed deposition is to file a motion seeking to quash or modify the subpoena"); Abbott v. Kidder, Peabody & Co., No. 97 C 3251, 1997 WL 337228, at *3 (N.D. Ill. June 16, 1997) (finding that written objections to subpoena did not excuse non-party from attending deposition absent a motion to quash or a protective order).

(2) Must be Specific

In 2015, Rule 34 was amended to focus on specificity of objections. The pre-2015 case law held non-parties to similar standards when it came to objections.[78] Pre-2015 cases noted that a non-party's objection should be free from general or boilerplate language and should be made with enough specificity to allow the parties to understand the scope of the objection and the court to determine if the objection has merit.[79] These cases also note that the objection must specify the part of the request to which the objection pertains, the grounds for objecting, and whether any responsive materials are being withheld on the basis of that objection; and the non-party must produce documents or ESI responsive to the remainder of the request.[80] Failure to provide adequate specificity may result in a waiver of the objection.[81] Thus, the addition of specificity language in Rule 34 but not in Rule 45 should not diminish the importance of the prior Rule 45 cases on this issue.

Non-parties may not be familiar enough with the details of the underlying litigation to object on any grounds other than undue burden or expense and privilege. The specificity that courts require related to Rule 34 objections must be reconciled with this limitation. Courts should not hold a non-party's lack of specificity as to proportionality factors of which it is not aware against the non-party. The non-party, however, should be specific as to its burdens and costs, should refrain from boiler-

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78 *MetroPCS*, 327 F.R.D. at 607 ("And 'a non-party's Rule 45(d)(2)(B) objections to discovery requests in a subpoena are subject to the same prohibition on general or boiler-plate [or unsupported] objections and requirements that the objections must be made with specificity and that the responding party must explain and support its objections.' *Am. Fed'n of Musicians*, 313 F.R.D. at 46 (citing Heller v. City of Dallas, 303 F.R.D. 466, 483 (N.D. Tex. 2014), and adopting 'the explanations in *Heller* of what is required to make proper objections and how to properly respond to discovery requests')."); Orix USA Corp. v. Armentrout, No. 3:16-mc-63, 2016 WL 4095603, at *2 (N.D. Tex. Aug. 1, 2016); *Am. Fed'n of Musicians*, 313 F.R.D. at 46 ("Rule 34(b)(1)'s reasonable particularity requirement should apply with no less force to a subpoena's document requests to a non-party," so too "a non-party's Rule 45(d)(2)(B) objections to those requests should be subject to the same requirements facing a party objecting to discovery under Rule 34."); *but see Ctr. for Individual Rights*, 2017 WL 5905191, at *4 ("In the Eleventh Circuit, objections should be plain enough and specific enough so that the court can understand in what way the [discovery sought is] alleged to be objectionable." (citations omitted)).

79 *See generally Federal Rule of Civil Procedure 34(b)(2) Primer: Practice Pointers for Responding to Discovery Requests*, *supra* note 8.

80 *MetroPCS*, 327 F.R.D. at 607 (For each item or category, the non-party must "state with specificity the grounds for objecting to the request, including the reasons, and must state whether any responsive materials are being withheld on the basis of that objection; that an objection to part of a request must specify the part and permit inspection of the rest; that 'general or so-called boilerplate or unsupported objections are improper under Rule 45(d)(2)(B)'; and that the explanations in *Heller*, 303 F.R.D. at 466, of what is required to make proper objections and how to properly respond to discovery requests apply equally to non-parties subject to a Rule 45 subpoena." (citing FED. R. CIV. P. 34(b)(2)(B)–(C); *Am. Fed'n of Musicians*, 313 F.R.D. at 46)).

81 Sabol v. Brooks, 469 F. Supp. 2d 324, 328 (D. Md. 2006) (finding that a non-party is "subject to the same obligations and scope of discovery under Rule 45 as if it were a party proceeding under Rule 34" and that a "failure to make particularized objections to document requests constitutes a waiver of those objections." (citing FED. R. CIV. P. 45 advisory committee's notes to 1991 amendment; Hall v. Sullivan, 231 F.R.D. 468 (D. Md. 2005); Thompson v. HUD, 199 F.R.D. 168 (D. Md. 2001); Marens v. Carrabba's Italian Grill, 196 F.R.D. 35 (D. Md. 2000)).

plate objections, and should clearly identify what it is providing and what it is withholding on the basis of objections. The requesting party should cooperate with the non-party in an effort to narrow the scope of the request, if needed, to what the requestor truly needs to litigate its case.[82] And if brought to the court's attention, the court should temper its expectation that a non-party comply with Rule 34 objection specificity standards and should tailor its assessment of the non-party's objections to the circumstances of the case.

As indicated earlier, non-parties should comply with the sections of the subpoena to which there are no objections. Conversely, complying with portions of a subpoena that have been objected to *before* a court has ordered compliance may, absent certain precautions,[83] lessen the likelihood that costs will shift to the requestor.[84] To minimize that risk, the non-party should notify the requesting party as

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82 *See* discussion Section V.A., *supra* (violation of any Rule 26(g) duties by the requestor will be relevant to assessing the propriety of sanctions under Rule 45(d)(1)'s "undue burden" language).

83 New Prods. Corp. v. Dickinson Wright, PLLC (*In re* Modern Plastics Corp.), 890 F.3d 244, 252–53 (6th Cir. 2018) (distinguishing Angell v. Kelly, 234 F.R.D. 135, 138 (M.D.N.C. 2006) (holding that expenses incurred before issuance of an order to compel are compensable where production itself did not precede such order, particularly where the requesting party is apprised of the non-party's intention to seek reimbursement and where the requesting party would, absent reimbursement, unfairly benefit from the non-party's efforts)); *see also In re* Modern Plastics Corp., 577 B.R. 690, 707 (W.D. Mich. 2017) (affirming the lower court's order requiring requestor to pay the non-party's reasonable costs of compliance, "including costs that were incurred before the [] court ordered [the nonparty] to turn over the documents" and noting that the "rule does not distinguish compliance costs incurred prior to the court's order from costs incurred after the order. It might be argued that the term 'compliance' in 45(d)(2)(B)(ii) specifically refers to compliance with the court's order, but this interpretation is inconsistent with the rest of Rule. When the term 'compliance' is used in other parts of Rule 45(d)(2), it always means compliance with the subpoena." (citations omitted)).

84 *See In re* Aggrenox Antitrust Litig., No. 3:14-md-02516, 2017 WL 4679228, at *13–14 (D. Conn. Oct. 18, 2017); Wellin v. Wellin, No. 2:13-CV-1831, 2016 WL 7613663, at *8 (D.S.C. July 1, 2016) (recounting that "courts are reluctant to shift costs where the subpoenaed party has not provided the procuring party with sufficient notice of available cost information prior to incurring the expense to allow the procuring party an opportunity to re-evaluate its request and seek less costly alternatives"); Sun Capital Partners, Inc. v. Twin City Fire Ins. Co., No. 12-CIV-81397, 2016 WL 1658765, at *5 (S.D. Fla. Apr. 26, 2016) ("The Non-Parties should have notified the Court . . . that production of the documents listed in the subpoena was becoming excessively burdensome and expensive to produce so that the Court could have worked with the parties and the Non-Parties on the front end of this discovery issue to try to minimize the costs incurred. . . . The Non-Parties' failure to notify the Court and Twin City of the significant expenses the Non-Parties were incurring prevented the Court from further protecting the Non-Parties from significant expense and prevented Twin City from further taking steps to try and reduce the expense. The Court will not allow the Non-Parties to sit back, fail to respond to the Court's Order, and then later assert they require reimbursement . . . . This is akin to sandbagging, which the Court will not permit."); Spears v. First Am. eAppraiseIT, 2014 WL 6901808, at *3 (N.D. Cal. December 8, 2014) (noting that "costs may be shifted under Rule 45(d)(2)(B)(ii) if the requesting party is on notice that the non-party will seek reimbursement of costs," but finding that the non-party did not provide clear notice to requestor that it would seek reimbursement of costs (of over $450,000) until after production was underway or complete); *but see* Miller v. Ghirardelli Chocolate Co., No. C 12-4936 LB, 2013 WL 6774072, at *5 (N.D. Cal. December 20, 2013) ("One good insight that a meet-and-confer process gives is how much it might cost to get the discovery, which in turn will guide Plaintiff's decision about what to ask for (knowing that costs can be shifted) and the court's inquiry about whether to shift costs. The court will not order that cost-shifting without a record.").

early as possible that it intends to pursue reimbursement and should seek the requesting party's cooperation to limit expenses and avoid delays. The non-party should also outline for the requesting party its anticipated efforts and expenses so the requesting party can understand those efforts and, if appropriate, limit its discovery requests to reduce the burden. The requesting party should, in turn, engage with the non-party in these efforts to avoid unnecessary expenses that it may be required to pay.[85] It may be beneficial for the non-party and the requesting party to confer on these issues.

b. Requesting Party Files Motion to Compel

The second condition before a non-party can seek reimbursement for costs is met when the requesting party files a motion to compel under Rule 45(d)(2)(B)(i).[86] Although a non-party must serve objections before the earlier of the time specified for compliance or 14 days after the subpoena is served,[87] there is no time limit under Rule 45(d)(2)(B)(i) for when a requesting party has to move to compel in response to non-party objections.

c. Court Orders Compliance

A court order compelling the non-party to comply with the subpoena and produce the requested documents or ESI at a significant expense to the non-party satisfies the third condition before a non-party can seek reimbursement for costs under Rule 45(d)(2)(B)(ii)'s mandatory cost-shifting provision.[88] Without a motion to compel and a court order granting the motion, this mandatory

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85 *See* Modern Plastics Corp. v. Tibble, No. 13-80252, 534 B.R. 723 (W.D. Mich. 2015) ("To accept New Products' argument based on Rule 45(d)(2)—*i.e.*, that the [non-party] must now absorb all compliance costs incurred after they served their Objections and that [the requestor] is entitled to the documents at no charge—would reward gamesmanship and punish cooperation. The court cannot countenance such a windfall on this record, and will not construe Rule 45 in this way."); *In re Modern Plastics Corp.*, 890 F.3d at 252–53 (distinguishing *Angell*, 234 F.R.D. at 138); *see also In re Modern Plastics Corp.*, 577 B.R. at 706–07 ("Appellants contend that after serving objections, Recipients were required to cease all efforts toward complying with the subpoena until ordered to comply by the court. Then, and only then, would Recipients be entitled to protection from significant expense. [This court sees] 'no point in penalizing a cooperative [non-party] who gathers documents while reaching out to the requesting party in an effort to limit the expense and delay for all concerned.' . . . Recipients repeatedly [voiced] their concerns with the subpoenas and [ ] their intent to seek reimbursement of the costs and expenses for compliance, but [requesting party] turned a deaf ear. Rather than work with Recipients to reduce the burden and expense of the subpoenas, or even inquire what those expenses might be, he encouraged them to continue working by extending the deadline for compliance. . . . Allowing Appellants to obtain the benefit of production without payment of Recipients' reasonable fees and expenses would reward inaction by Appellants and is inconsistent with Appellants' duty to take reasonable steps to avoid imposing an undue burden or expense on Recipients. Moreover, Appellants' position would encourage non-compliance with subpoenas and unnecessary court intervention rather than communication, cooperation and expedient discovery. . . .").

86 Williams v. City of Dallas, 178 F.R.D. 103, 113 (N.D. Tex. 1998) (relief provided by Rule 45(d)(2)(B) applies only when a motion to compel is filed in response to an objection to a subpoena).

87 *See* FED. R. CIV. P. 45(d)(2)(B).

88 *See* FED. R. CIV. P. 45(d)(2)(B)(i)–(ii).

cost-shifting mechanism is unavailable. Similarly, Rule 45(d)(2)(B)(ii) mandatory cost shifting may not apply where the party and non-party have entered into an agreement that governs reimbursement for subpoena compliance costs.[89]

2. Significant Expense and Cost Shifting[90]

If all prerequisites above have been met and compliance will impose "significant expense" on the non-party, the court must order mandatory cost shifting. Courts consider several factors when determining if compliance has imposed significant expense on the non-party to warrant mandatory full or partial cost shifting. A non-party has the burden of presenting these factors (including its incurred or anticipated costs) to the court during the motion-to-compel briefing or as soon as it becomes evident to the non-party that compliance will result in "significant cost."

3. When and How to Request Cost Shifting

In response to the requesting party's motion to compel, the non-party should describe with particularity and provide a detailed affidavit or declaration describing its anticipated costs to comply with the subpoena,[91] and should specifically request that if the court orders production, it also should shift costs to the requesting party to the extent necessary to render costs insignificant. If, at that time, the non-party cannot detail its expenses or does not know whether the cost of compliance will be significant so as to trigger cost shifting under the rule, the non-party should notify the court and the requesting party as soon as it becomes apparent that continued compliance will necessitate a re-

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89 *See* FDIC v. LSI Appraisal LLC, No. SACV 11-00706, 2014 WL 12561102, at *3 (C.D. Cal. July 21, 2014) ("[P]rivate agreements should be considered and honored by the courts. . . . *Legal Voice* does state that cost-shifting is 'mandatory,' but does not address whether the parties may alter the requirements of Rule 45 through agreement. This is not a situation in which the Court is exercising any discretion to decide whether fees are owed. Instead, the Court finds only that the parties entered into a separate binding agreement that addresses the substance of Rule 45(d)(2)(B)(ii)'s requirements. Because their arrangement covers costs of subpoena compliance, Rule 45(d)(2)(B)(ii) is simply inapposite." (citing Angell v. Shawmut Bank Conn. Nat'l Ass'n, 153 F.R.D. 585, 590 (M.D.N.C. 1994))).

90 Under Rule 45(d)(2)(B)(ii), when a court orders compliance with a subpoena over an objection, "the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance." FED. R. CIV. P. 45(d)(2)(B)(ii).

91 *In re* EpiPen (Epinephrine Injection, USP) Mktg., Sales Practices & Antitrust Litig., No. 17-md-2785, 2018 WL 3240981, at *4 (D. Kan. July 3, 2018) ("Express Scripts asks the Court to order Plaintiffs to pay the costs of compliance if the Court grants the motion to compel. Express Scripts has submitted an affidavit showing it has spent more than $20,000 in legal fees and costs to serve objections, produce documents, negotiate and otherwise respond to the subpoena. Express Scripts also projects costs in the range of $75,000 to $250,000 to search for and produce additional documents. . . . Plaintiffs object that Express Script's declaration is speculative, premature, and does not address the reasonableness of its projected costs. While the Court finds it appropriate for Class Plaintiffs to share in the cost of production, such payment will of course be limited to Express Script's actual and reasonable costs in producing documents pursuant to this order. Accordingly, the Court will require Class Plaintiffs to bear 50% of the reasonable costs Express Scripts incurs in timely producing documents responsive to the subpoena as ordered herein.").

quest for reimbursement. A response to a motion to compel or a subsequent cost shifting/reimbursement motion should "include a careful accounting of all expenses, how they 'resulted from compliance,' and an explanation as to their reasonableness;"[92] and it should focus on whether the cost of compliance was "significant," not on whether compliance was "unduly burdensome."[93]

a. Factors to Consider

Rule 45(d)(2)(B)(ii) requires a two-step inquiry: (1) whether the costs are considered "expenses," and, if so, (2) whether the expenses are "significant."[94]

(1) "Expense" Under the Rule

As previously stated, a non-party seeking compensation must demonstrate that the expense for which it seeks reimbursement is reasonable.[95] That determination is within the court's discretion.[96] Courts have clarified that "an unreasonably incurred expense is not an expense 'resulting from compliance.'"[97] Thus, "'services provided by an attorney to a non-party for the non-party's sole benefit and peace of mind' [likely cannot] be counted as 'expenses.' . . . In other words, unnecessary or unduly expensive services do not 'result from compliance' and, therefore, do not count as 'expenses.'"[98]

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92 United States v. McGraw-Hill Cos., 302 F.R.D. 532, 536 (C.D. Cal. 2014); *see also* Bridgestone Ams., Inc. v. Int'l Bus. Machs. Corp., 2016 WL 11683327 (N.D. Ga. Aug. 5, 2016); Hyundai Motor Am., Inc. v. Pinnacle Grp., LLC, No. SAVC 14-0576-CJC, 2016 WL 6208313, at *1 (C.D. Cal. Apr. 20, 2016) ("[Non-party] [h]as made almost no factual showing in support of its request."); Callwave Commc'ns, LLC v. Wavemarket, Inc., No. C 14-80112 JSW (LB), 2014 WL 2918218, at *6 (N.D. Cal. June 26, 2014) ("The problem here is that Location Labs did not even tell the court how much it estimates it will spend to comply with the subpoena, let alone provide any evidence to support that amount. Without a specific dollar amount, the court cannot say whether Location Labs' costs are significant.").

93 Legal Voice v. Stormans Inc., 738 F.3d 1178, 1185 (9th Cir. 2013).

94 *McGraw-Hill Cos.*, 302 F.R.D. at 536 (citing *Legal Voice*, 738 F.3d at 1184 (adopting the rule set out by Linder v. Calero-Portocarrero, 251 F.3d 178, 182 (D.C. Cir. 2001)).

95 *See In re* Modern Plastics Corp., 577 B.R. 690, 707–08 (W.D. Mich. 2017) ("Rule 45(d)(2) does not expressly limit the compensable expenses to those that are reasonable, but courts have read it to do so."); Sands Harbor Marina Corp., 2018 WL 1701944, at *4 ("A non-party who moves for costs and fees bears the burden of demonstrating that those costs and fees are reasonable" (internal citations omitted)).

96 *See In re* Aggrenox Antitrust Litig., No. 3:14-MD-02516, 2017 WL 4679228, at *1–2 (D. Conn. Oct. 18, 2017).

97 *McGraw-Hill Cos.*, 302 F.R.D. at 536 (citing Michael Wilson & Partners, Ltd. v. Sokol Holdings, Inc. (*In re* Michael Wilson & Partners, Ltd.), 520 Fed. App'x. 736 (10th Cir. 2013)); *see also* Steward Health Care Sys. LLC v. Blue Cross & Blue Shield of R.I., No. 15-272, 2016 WL 8716426, at *4–5 (E.D. Pa. Nov. 4, 2016).

98 *McGraw-Hill Cos.*, 302 F.R.D. at 536 (citing O'Cheskey v. Koehler (*In re* Am. Hous. Found.), No. 12-cv-00222, 2013 WL 2422706, at *3 (N.D. Tex. June 4, 2013)); *see Steward Health Care Sys. LLC*, 2016 WL 8716426, at *6 (non-party's vendor costs deemed excessive and not resulting from compliance with subpoena where requesting party had offered a less expensive vendor that non-party failed to even contact and where non-party chose its vendor due to a relationship of trust that inured only to its own benefit, not to the benefit of requesting party); United States v. Cardinal Growth, L.P., No. 11 C 4071, 2015 WL 850230, at *3 (N.D. Ill. Feb. 23, 2015) (non-party's selected method of

When opposing a motion to compel, a non-party should inform the court, prior to incurring any costs, the type of expenses it will undertake to comply with the subpoena and for which it will seek to shift costs. Once the court determines the types of expenses subject to cost shifting, the non-party can move forward with both an understanding of what expenses it may need to cover in full and the ability to determine the risk it is willing to take to forgo any such expenses.

In determining what counts as an "expense," "[t]he touchstone is whether the expense 'result[s] from compliance' with the court's order compelling production."[99] Expenses allowed in the context of non-party subpoenas are broader than those allowed for party discovery.[100] Courts may allow non-party expenses to include printing costs and technology consulting fees[101] as well as costs associated with collection, database creation, and, under certain circumstances, document review[102] and privilege log preparation.[103] Given that electronic discovery is often the most costly part of compliance, it follows that courts consider these types of items as expenses so that, if significant, the cost to comply shifts to the requestor. Notably, attorneys' fees may count as costs resulting from compliance if incurred for "production-related legal tasks,"[104] but a court generally will exclude "attorneys'

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storing e-mails drove the need for an outside vendor, resulting in non-compensable overhead expenses); *In re Michael Wilson & Partners, Ltd.*, 520 Fed. App'x. at 741 (cutting shifted costs by fifty percent on the grounds that the non-parties 'assume[d], rather than demonstrate[d], that all of their requested attorney's fees are reasonable"); *see also In re Am. Hous. Found.*, 2013 WL 2422706, at *3 (expressing skepticism that "services provided by an attorney to a non-party for the non-party's sole benefit and peace of mind" can be counted as "expenses").

99 *McGraw-Hill Cos.*, 302 F.R.D. at 536 (quoting the text of Rule 45(d)(2)(B)(ii)); *see also Steward Health Care Sys. LLC,* 2016 WL 8716426, at *4–7.

100 Many courts have held that costs for responsiveness, privilege, and confidentiality review costs are non-compensable. *See, e.g, Lefta Assocs. v. Hurley*, No. 1:09-CV-2487, 2011 WL 1793265, at *4 (M.D. Pa. May 11, 2011) (declining to award costs for conducting responsiveness and privilege review); *Cahoo v. SAS Inst. Inc.*, No. 17-10657, 2019 WL 4139152, at *4 (E.D. Mich. Aug. 30, 2019) ("It has been well recognized that a subpoenaed party cannot seek reimbursement for costs of privilege review."); *Sands Harbor Marina Corp. v. Wells Fargo Ins. Servs. of Oregon, Inc.*, No. 09-CV- 3855, 2018 WL 1701944, at *6 (E.D.N.Y. Mar. 31, 2018) (declining to award costs for privilege review).

101 Stormans Inc. v. Selecky, No. C07-5374 RBL, 2015 WL 224914, at *5 (W.D. Wash. Jan. 15, 2015).

102 G&E Real Estate, Inc. v. Avison Young-Washington, D.C., LLC, 317 F.R.D. 313, 318–20 (D.D.C. 2016) (excluding costs related to extensive subpoena litigation because it believed a collaborative approach was more appropriate, but permitting costs related to document review where costs were based on adequately explained estimated hourly rates for reviewers (distinguishing W. Convenience Stores, Inc. v. Suncor Energy (U.S.A.), Inc., No. 11-cv-01611, 2014 WL 1257762 at *24 (D. Colo. Mar. 27, 2014), where the task descriptions were vague)).

103 *Selecky*, 2015 WL 224914, at *5 ("There is no doubt that Rule 45 expenses resulting from compliance may include some attorneys' fees. Complying with a subpoena will almost always require some production-related legal tasks like document review, creating a privilege log, and drafting protective orders. Attorneys' fees for those production-related legal tasks are 'expenses resulting from compliance,' whether they are completed by in-house counsel or outside attorneys.").

104 *Id.*; *see also Steward Health Care Sys. LLC.*, 2016 WL 8716426 , at *4 ("[A] nonparty's legal fees, especially where the work benefits the requesting party, have been considered a cost of compliance and may be subject to reimbursement." (citations omitted)).

fees for litigating a subpoena"[105] or, as with other costs, those that are unnecessary and incurred only for the benefit of the producing non-party.[106] At least one court, however, has held that even attorneys' fees incurred in litigating fee disputes are compensable.[107]

(2) "Significant" Under the Rule

Before the 1991 amendment to Rule 45, courts considering whether to shift costs could consider at least seven factors related to "significant expense."[108] Some courts continued to analyze cost shifting as though the original factors survived the 1991 amendment.[109] In *United States v. McGraw-Hill Cos.*, however, the U.S. District Court for the Central District of California, upon a thorough review of the relevant authority and statutory background, deemed the original factors "obsolete."[110] The Court found that many of the factors "d[id] not bear" on the question of whether the subpoena imposes significant expense on the non-party but instead were developed to guide the court's exercise of discretion on whether cost shifting was appropriate, which the 1991 amendment eliminated.[111] It is the non-party's obligation to adequately document the costs it seeks.

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105 *Selecky*, 2015 WL 224914, at *5 ("It is a tenuous proposition, at best, that attorneys' fees incurred resisting a subpoena are expenses resulting from compliance. . . . [Without] this interpretation . . . , when a party abuses its subpoena power or files frivolous or vexatious motions to compel, a non-party could contend that attorneys' fees for litigating a subpoena are expenses resulting from compliance. But that situation is exactly what Rule 45(d)(1) is meant to address."); *see also In re* Aggrenox Antitrust Litig., No. 3:14-MD-02516, 2017 WL 4679228, at *9–10 (D. Conn. Oct. 18, 2017) ("[M]any of the expenses that [non-party] Gyma incurred . . . appear to have been related—directly or indirectly—to its efforts to resist the subpoena. Gyma is not entitled to recoup those costs. . . . Attributing [those] costs to the DPPs is particularly unwarranted because Gyma's efforts to resist the subpoena were largely unsuccessful.").

106 *Steward Health Care Sys. LLC*, 2016 WL 8716426 , at *4-5 (a "tailored production," which the non-party claimed it had put together in order to avoid a document dump, was deemed excessive and not compensable where: the requesting party had not asked for attorney review on relevance or other grounds; the non-party had conducted the review due to its own desire to check for privileged and confidential documents; and the review ultimately did not benefit the requesting party).

107 *See* Linglong Americas Inc. v. Horizon Tire, Inc., No. 1:15CV1240, 2018 WL 1631341, at *3–4 (N.D. Ohio Apr. 4, 2018).

108 Those factors, as detailed in *United States v. McGraw-Hill Cos.*, 302 F.R.D. 532, 534 (C.D. Cal. 2014), are: (1) the non-party's interest in the case; (2) the parties' relative abilities to bear the costs; (3) the public importance of the litigation; (4) the scope of discovery; (5) the invasiveness of the request; (6) the extent to which the producing party must conduct a privilege or responsiveness review; and (7) the reasonableness of the costs of production.

109 *Id.* at 534–35 (noting support for the notion that the original factors survived the amendment appears in *In re* Exxon Valdez, 142 F.R.D. 380 (D.D.C. 1992)).

110 302 F.R.D. at 534–36 (citations omitted); *see also* Cornell v. Columbus McKinnon Corp., No. 13-CV-02188-SI, 2015 WL 4747260, at *3 (N.D. Cal. Aug. 11, 2015) (describing *McGraw-Hill* analysis as "compelling").

111 *McGraw-Hill Cos.*, 302 F.R.D. at 534–36.

It is still within the court's discretion, however, to determine which costs are "significant"[112]—"a term that readily lends itself to myriad interpretations depending on the circumstances of a particular case."[113] The main factors, derived from the seven equitable factors used in the pre-1991 analysis, by which courts determine whether expenses are "significant" are: (a) whether the non-party actually has an interest in the outcome of the case; (b) whether the non-party can bear the costs; and, in some courts, (c) whether the underlying litigation is of public importance.[114]

(a) Non-Party's Interest in Outcome

Cost shifting is less appropriate where the non-party "was substantially involved in the underlying transaction," could have anticipated that the "transaction would reasonably spawn some litigation," and "[had] an interest in the outcome of the litigation."[115] Additionally, cost shifting is not appropriate where a non-party stands to recoup money from the underlying judgment[116] or, more broadly, where it is intimately involved with or has already financially benefited from a party.[117]

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112 *See* Callwave Commc'ns, LLC v. Wavemarket, Inc., No. C 14-80112 JSW (LB), 2014 WL 2918218, at *3 (N.D. Cal. June 26, 2014) (citing Sound Sec., Inc. v. Sonitrol Corp., No. CIV.3:08-CV-05350-RB, 2009 WL 1835653, at *1 (W.D. Wash. June 26, 2009)).

113 *McGraw-Hill Cos.*, 302 F.R.D. at 536; *see also* Balfour Beatty Infrastructure, Inc. v. PB&A, Inc., 319 F.R.D. 277, 281 (N.D. Cal. 2017); *Cornell*, 2015 WL 4747260, at *4 ("[T]he weight of the case law makes clear that determining what constitutes a 'significant cost' is a relative, not an absolute, inquiry.").

114 *See* Wellin v. Wellin, No. 2:13-CV-1831, 2016 WL 7613663, at *11 (D.S.C. July 1, 2016); Sun Capital Partners, Inc. v. Twin City Fire Ins. Co., No. 12-CIV-81397, 2016 WL 1658765, at *7 (S.D. Fla. Apr. 26, 2016); United States v. Cardinal Growth, L.P., No. 11 C 4071, 2015 WL 850230, at *3 (N.D. Ill. Feb. 23, 2015); Stormans Inc. v. Selecky, No. C07-5374 RBL, 2015 WL 224914, at *6 (W.D. Wash. Jan. 15, 2015) (citing Linder & Wells Fargo Bank, N.A. v. Konover, 259 F.R.D. 206 (D. Conn. 2009)); *In re* Application of Michael Wilson & Partners, Ltd., No. 06-CV-02575-MSK-KMT, 2012 WL 1901217, at *3 (D. Colo. May 24, 2012); *In re Exxon Valdez*, 142 F.R.D. at 383–84.

115 W. Convenience Stores, Inc. v. Suncor Energy (U.S.A.) Inc., No. 11-CV-01611-MSK-CBS, 2014 WL 1257762, at *23 (D. Colo. Mar. 27, 2014) (citing United States v. Blue Cross Blue Shield of Michigan, No. 10-CV-14155, 2012 WL 4838987, at *3 (E.D. Mich. Oct. 11, 2012)).

116 *See, e.g., Cornell*, 2015 WL 4747260, at *3, *5 ("FedEx, as plaintiff's employer at the time of the accident, has filed a lien against any judgment or settlement in plaintiff's favor in order to recoup worker's compensation benefits it has paid to him. . . . While slightly more attenuated than its direct financial interest, the outcome of this case could also affect FedEx's employee training, safety policies, and future exposure to liability. . . . The Rule . . . was not intended as a mechanism for entities which stand to benefit from certain litigation outcomes to evade discovery costs arising from their involvement in the underlying acts that gave rise to the lawsuit.").

117 *See Balfour Beatty Infrastructure, Inc.*, 319 F.R.D. at 282 ("[Non-party] URS perhaps is not in the typical position of a completely uninterested nonparty, as it was purportedly involved in the underlying acts that gave rise to the lawsuit." (citation omitted)); Ala. Aircraft Indus. v. Boeing Co., No. 2:11-cv-03577-RDP, 2016 WL 6892113, at *5 (N.D. Ala. Oct. 17, 2016) ("TCP is an interested non-party, as it has 'a significant, underlying connection to the case,' namely its intimate involvement in AAI's affairs during the periods relevant to the instant case. . . . [W]hile TCP is successful in showing that it lacks a financial or reputational stake in this case's outcome, it cannot explain away its significant connection to the underlying events. . . . [I]t also exercised a certain level of influence over AAI's decisions and actions due to its control of numerous seats on AAI's Board of Directors."); *Wellin*, 2016 WL 7613663, at *12 (non-party trust beneficiaries had an interest in the outcome of the case where they were aligned in

(b) Non-Party's Ability to Bear the Cost

When determining whether a subpoena imposes a significant expense, courts also consider a non-party's "financial ability to bear the costs of production."[118] Specifically, courts consider whether the non-party can "more readily bear the costs than the requesting party."[119] When assessing the non-party's financial means, the court should note that burden is relative and fact-specific.[120] Some of the factors the court may consider include the (i) cost of compliance as a percentage of the non-party's total value/yearly revenue; (ii) cost of compliance as a percentage of the total that a party has contributed to the non-party in a business relationship; and (iii) size of the non-party

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interest with their parents, who were parties to the litigation); *Sun Capital Partners, Inc.*, 2016 WL 1658765, at *5 (non-parties were either co-defendants in separate, underlying litigation or were created to facilitate settlement of that litigation, coordinated with party counsel in motion practice, and stood to be reimbursed by a party); Hyundai Motor Am., Inc. v. Pinnacle Grp., LL, No. SAVC 14-0576-CJC, 2016 WL 6208313, at *1 (C.D. Cal. Apr. 20, 2016) ("[Non-party] Mobis . . . is affiliated with Plaintiff Hyundai—they share the same parent company—and serves as its parts distributor. As such, it is a competitor of Defendant's and has a strong interest in the outcome of this litigation."); Am. Fed'n of Musicians of the U.S. & Can. v. Skodam Films, LLC, 313 F.R.D. 39, 58 (N.D. Tex. 2015) (non-party film producer's "level of involvement with the production—including the scoring—of the Movie at issue in the underlying Litigation" deemed a sufficient "interest in the case" to weigh against an award of costs); *Cardinal Growth, L.P.*, 2015 WL 850230, at *3 ("P&H served as Cardinal's counsel [and] derived substantial income from Cardinal, drafted and prepared hundreds of transactional documents, and participated in the design of numerous complex transactions. Thus, P&H 'is not a classic disinterested non-party.'").

118 *Balfour Betty Infrastructure, Inc.*, 319 F.R.D. at 281; Cedar Rapids Lodge & Suites, LLC v. Seibert, No. 0:14-cv-04839, 2018 WL 3019899, at *2 (D. Minn. June 18, 2018).

119 Koopmann v. Robert Bosch LLC, No. 18-CV-4065, 2018 WL 9917679, at *1 (S.D.N.Y. May 25, 2018) (citing Sands Harbor Marina Corp. v. Wells Fargo Ins. Servs. of Or., Inc., No. 09-CV-3855, 2018 WL 1701944, at *3 (E.D.N.Y. Mar. 31, 2018) (internal quotation marks & brackets omitted)).

120 *See* United States v. McGraw-Hill Cos., 302 F.R.D. 532, 536 (C.D. Cal 2014) ("This consideration makes practical sense—an expense might be 'significant,' for instance, to a small family-run business, while being 'insignificant' to a global financial institution." (citing Linder v. Calero-Portocarrero, 251 F.3d 178, 182 (D.C. Cir. 2001))); *Ala. Aircraft Indus.*, 2016WL 6892113, at *6 ("[G]iven TCP's admitted ability to pay for its production costs, its apparent reluctance to provide a workable sense of its financial condition, and its established interest in the case, the undersigned is comfortable concluding that this element weighs against shifting costs."); *Cornell*, 2015 WL 4747260, at *4 ("FedEx is correct to argue that this factor is not dispositive in every instance. However, in this particular case, the discovery costs are dwarfed by FedEx's profit figures, and therefore weigh in favor of finding them insignificant."); *Cardinal Growth, L.P.*, 2015 WL 850230, at *3 ("Relative to the substantial income that P&H collected from Cardinal, the expenses incurred by P&H in complying with the Court's order do not constitute a 'significant expense.'"); *Seibert*, 2018 WL 3019899, at *2 ("[Non-party] did not present any argument or proof to demonstrate that he cannot bear the costs of production. Given that he bills his time at $450 per hour, it seems unlikely that the costs associated with three hours of gathering and reviewing documents for production really amounts to a significant expense.").

company.[121] In some circumstances, the court may also take into account the financial status of the requesting party.[122]

These factors protect individuals and smaller companies, who may have a more limited ability to bear the cost of compliance when facing significant expense. This is the intent of Rule 45(d)(2)(B)(ii), which seeks to "protect a person who is neither a party nor a party's officer from significant expense resulting from compliance."[123]

Large or very profitable organizations may deem the ability of the non-party to bear the cost as unjust, particularly if they regularly receive a large volume of subpoenas. Entities such as large national banks or car rental companies may receive thousands of non-party subpoenas a year pertaining to customers involved in litigation. Even a $500-per-subpoena cost could result in substantial aggregate costs. In most of these matters, the non-party is a custodial non-party, i.e., the non-party corporation is a repository of customer information and does not have an interest in the litigation. The language of Rule 45, however, does not support cost shifting unless the cost of responding to the specific subpoena over objections is significant. Entities that face a large volume of low-cost subpoenas for their customers cannot usually claim significant costs, so they should anticipate and look for other ways to defray these costs. One way is to contractually obligate customers to be liable for costs related to non-party subpoenas of records if customers become parties to a litigation. Another option is to negotiate the cost issue with the requesting party prior to production. Here, too, it could be beneficial for the non-party and requesting party to confer to keep costs down and reduce the burden on the non-party, no matter its size or ability to pay.

(c) Public Importance

When determining whether a subpoena imposes a significant expense, some courts also consider the underlying litigation's public importance. These courts have noted that this factor "is very much in the eye of the beholder"[124] and can turn, in part, on the nature of the parties themselves and the

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121 Shasta Linen Supply, Inc. v. Applied Underwriters Inc., No. 2:16-CV-00158, 2018 WL 2981827, at *5 (E.D. Cal. June 14, 2018) (finding that $15,000 is not a "significant" cost such that fee shifting is appropriate because the non-party did not provide the court with information regarding its gross revenues or "indicating that $15,000 is significant with respect to its total value as a company," and noting that because the non-party was a "national company with multiple offices," it had "the financial ability to bear the costs of production"); Stormans Inc. v. Selecky, No. C07-5374 RBL, 2015 WL 224914, at *7 (W.D. Wash. Jan. 15, 2015) (stating that because a non-party nonprofit received over $700,000 in contributions in one year, it was capable of paying some of its own expenses).

122 *See, e.g.*, Pitts v. Davis, No. 212CV0823TLNACP, 2015 WL 6689856, at *5 (E.D. Cal. Oct. 30, 2015) ("Rule 45 does not preclude post-compliance reimbursement of costs. . . . Since plaintiff is proceeding in forma pauperis . . . and has made no indication that he is capable of covering such costs, the motion to compel will be denied to the extent it seeks further production of non-staff complaint grievances.").

123 *See* FED. R. CIV. P. 45(d)(2)(B)(ii).

124 W. Convenience Stores, Inc. v. Suncor Energy (U.S.A.) Inc., No. 11-CV-01611-MSK-CBS, 2014 WL 1257762, at *24 (D. Colo. Mar. 27, 2014).

functions they perform.[125] Other courts, however, have refused to consider this factor, noting that a "non-party's expenses are not made less significant by the fact that the litigation is important to the general public."[126]

b. Allocation of Costs

Even if the court determines that a non-party bears "significant expense" in complying with a subpoena, "this does not mean that the requesting party must necessarily bear the *entire* cost of compliance."[127] A non-party can be required to bear some or all of its expenses "where the equities of the particular case demand it."[128] Courts also are not inclined to award cost shifting to a non-party that has engaged in needlessly litigious, obstructionist behavior.[129]

Rule 45(d)(2)(B)(ii) mandates cost shifting sufficient to render the non-party's subpoena expenses non-significant. As the D.C. Circuit noted in *Linder v. Calero-Portocarrero*:

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125 *See, e.g., Cardinal Growth, L.P.*, 2015 WL 850230, at *3 ("[Plaintiff,] [t]he SBA[,] is a public agency that regulates the operations of publically [sic] financed SBICs. . . . [T]he SBA has a duty to responsibly liquidate Cardinal's assets, pay its creditors, and preserve its claims in furtherance of the public interest. To properly execute those duties, the SBA needed documents that were in the possession of P&H. Under these circumstances, the SBA should not have to bear the cost of production."); *Selecky*, 2015 WL 224914, at *7 (noting that there was "no doubt" that the underlying lawsuit regarding a challenge to Washington's State Board of Pharmacy regulations that compelled pharmacies and pharmacists to dispense lawfully prescribed emergency contraceptives over sincere religious objections was of "great public importance").

126 Cornell v. Columbus McKinnon Corp., No. 13-CV-02188-SI, 2015 WL 4747260, at *2 (N.D. Cal. Aug. 11, 2015) (citing United States v. McGraw-Hill Cos., 302 F.R.D. 532, 534 (C.D. Cal. 2014)).

127 Callwave Commc'ns, LLC v. Wavemarket, Inc., No. C 14-80112 JSW (LB), 2014 WL 2918218, at *3 (N.D. Cal. June 26, 2014) (citing Legal Voice v. Stormans Inc., 738 F.3d 1178, 1185 (9th Cir. 2013)).

128 *Legal Voice*, 738 F.3d at 1184 ("[If] the subpoena imposes significant expense on the non-party . . . the district court must order the party seeking discovery to bear at least enough of the cost of compliance to render the remainder 'non-significant.'" (quoting Linder v. Calero-Portocarrero, 251 F.3d 178, 182 (D.C. Cir. 2001))); Wellin v. Wellin, No. 2:13-CV-1831, 2016 WL 7613663, at *8 (D.S.C. July 1, 2016); Sound Sec., Inc. v. Sonitrol Corp., No. CIV.3:08-CV-05350-RB, 2009 WL 1835653, at *2 (W.D. Wash. June 26, 2009) ("[A] non-party can be required to bear some or all of its expenses where the equities of a particular case demand it." (quoting *In re* Exxon Valdez, 142 F.R.D. 380, 383 (D.D.C. 1992))); *In re* EpiPen (Epinephrine Injection, USP) Mktg., Sales Practices & Antitrust Litig., No. 17-md-2785, 2018 WL 3240981, at *3 (D. Kan. July 3, 2018) ("If Plaintiffs maintain their interest in these documents to the extent they are willing to pay a share of the actual reasonable costs Express Scripts incurs in producing them [approximately $75,000], the Court orders Express Scripts to search for and produce the documents according to Plaintiffs' proposal.").

129 *See In re* Aggrenox Antitrust Litig., No. 3:14-MD-02516, 2017 WL 4679228, at *11 (D. Conn. Oct. 18, 2017) ("Gyma was notably intransigent and dilatory in its response to the subpoena, taking a full year and necessitating three interventions by the court to complete a review of 5,545 pages of documents. Gyma also appears to have repeatedly exaggerated its costs, claiming in its latest motion that it spent nearly $20 per page in document review. . . . Considering the Second Circuit's admonition that courts 'not endors[e] scorched earth tactics' or 'hardball litigation strategy,' . . . Gyma should bear the . . . balance of its costs." (citations omitted)).

> Under the revised Rule 45, the questions before the district court are whether the subpoena imposes expenses on the non-party, and whether those expenses are "significant." If they are, the court must protect the non-party by requiring the party seeking discovery to bear at least enough of the expense to render the remainder "non-significant."[130]

After considering the factors and determining that the non-party will bear "significant expense" resulting from compliance,[131] a court will then allocate responsibility for these expenses between the non-party and the requesting party to ensure that the costs incurred by the non-party are *non-significant*.[132]

If the non-party has served objections, the requesting party could consider offering to pay most or all of the non-party's compliance costs up front to expedite production and avoid motion practice. This approach limits the ability of the non-party to argue "significant expense" and delay compliance.

C. Rule 45(d)(3)(A)—Quashing or Modifying a Subpoena

Rule 45 also provides that a court may quash or modify a subpoena under certain circumstances. Specifically, Rule 45(d)(3)(A) states:

> *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:
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> i. fails to allow a reasonable time to comply;

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130 *Linder*, 251 F.3d at 182 ("The rule is susceptible of no other interpretation."); *see also McGraw-Hill Cos.*, 302 F.R.D. at 534; *CallWave Commc'ns, LLC*, 2014 WL 2918218, at *3; *Legal Voice*, 738 F.3d at 1184 ("[O]nly two considerations are relevant under the rule: '[1] whether the subpoena imposes expenses on the non-party, and [2] whether those expenses are significant.' . . . The plain language of the rule dictates our conclusion. . . . [If] the subpoena imposes significant expense on the non-party . . . the district court must order the party seeking discovery to bear at least enough of the cost of compliance to render the remainder 'non-significant.'" (quoting *Linder*, 251 F.3d at 182)).

131 *See, e.g., Legal Voice*, 738 F.3d at 1185 ($20,000 in expenses held "significant"); *Linder*, 251 F.3d at 182 (finding $9,000 in costs "significant"); G&E Real Estate, Inc. v. Avison Young-Washington, D.C., LLC, 317 F.R.D. 313, 320–21 (D.D.C. 2016) (holding $3,148.44 in expenses "significant"); *see also* Broussard v. Lemons, 186 F.R.D. 396, 398 (W.D. La. 1999) (finding that $43 to copy and mail 11 sheets of paper was a "significant" expense).

132 *In re Aggrenox*, 2017 WL 4679228, at *11 ("Rule 45 only protects non-parties from 'significant expense resulting from compliance,' *Legal Voice*, 738 F.3d at 1184 (quoting FED. R. CIV. P. 45(d)(2)(B)(ii)), and '[a] non-party may be required to absorb a non-significant portion of its expenses,' particularly 'where the equities of the particular case demand it.'"); *see In re* Subpoena of American Nurses Ass'n, 924 F. Supp. 2d 607 (D. Md. 2013) ("Although the . . . Plaintiffs shall bear the majority of the costs of production, there are some costs the ANA should absorb."); Koopmann v. Robert Bosch LLC, No. 18-CV-4065, 2018 WL 9917679, at *1 (S.D.N.Y. May 25, 2018) (deeming it reasonable that the requestor bear half the cost of compliance, up to a maximum of $30,000).

ii. requires a person to comply beyond the geographical limits specified in Rule 45(c);

iii. requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

iv. subjects a person to undue burden.

This provision is noteworthy as it provides the court the procedural authority to alter the scope of—or quash altogether—the requesting party's subpoena. For example, courts have used this provision to prevent a foreign witness from being required to appear for a deposition;[133] permit a non-party to withhold clearly privileged documents called for by a subpoena;[134] and revise a subpoena to provide the responding non-party enough time to produce documents and seek appropriate protection for sensitive materials.[135]

The provision that has created the greatest source of conflict with other parts of Rule 45 is the authority to quash or modify a subpoena where it subjects a non-party to undue burden. Even before the inception of this provision, courts have attempted to build a framework to guide litigants in their analysis of whether information requested by a Rule 45 subpoena constitutes an undue burden for the non-party. However, the rule (and resulting case law) lacks clarity for how the analysis of undue burden under this section is related to or impacted by other "undue burden" provisions in the rule—particularly those that afford non-parties the right to seek costs associated with their burden.

When confronted with the question of "undue burden," the 2008 edition of this *Commentary* noted that "[o]nly a few reported cases address the acquisition of ESI from non-parties."[136] In the decade since, the volume of subpoenas seeking ESI production has skyrocketed. As a result, courts have continued to refine the contours of what imposes an undue burden on a responding non-party.

Courts routinely note that the movant bears the responsibility of establishing that a subpoena imposes an undue burden.[137] Although the court has discretion to determine whether a subpoena's request constitutes an undue burden on the non-party, it is tasked with weighing the requesting party's

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133 *See, e.g.*, *In re* Donald Edwin May, 2014 WL 12923988 (Bankr. N.D. Ind. Jul. 9, 2014) (quashing a subpoena that would have required a deponent to travel outside the state and more than 100 miles from where he resided, was employed, and regularly transacted business in person).

134 Cones v. Parexel Int'l Corp., No.: 16cv3084, 2018 WL 3046424, at *1–2 & n.2 (S.D. Cal. Jun. 20, 2018).

135 Verisign, Inc. v. XYZ.com, No. 15-mc-175, 2015 WL 7960976, at *3 (D. Del. Dec. 4, 2015) (noting that several courts have found 14 days to be presumptively reasonable and that others have found that seven days is "clearly unreasonable" (citations omitted)).

136 The Sedona Conference, *Commentary on Non-Party Production and Rule 45 Subpoenas*, 9 SEDONA CONF. J. 197 (2008).

137 Stokes v. Cenveo Corp., No. 2:16cv886, 2017 WL 3648327, at *2 (W.D. Penn. Aug. 24, 2017) ("[T]he burden of establishing that a subpoena *duces tecum* imposes an undue burden is on the party moving to quash the subpoena.

need for the requested documents against the hardship imposed on the non-party. In making these determinations, courts have relied on a case-specific balancing test that typically includes some combination of the following six factors:

1. the relevance of the information requested;
2. the requesting party's need for the documents or ESI;
3. the breadth of the document or ESI request;
4. the time period covered by the request;
5. the particularity with which the requesting party describes the requested documents or ESI;
6. the burden imposed upon the responding non-party.[138]

While case law dealing with obtaining ESI from non-parties has increased, the courts' concerns about a subpoena's burden placed on a non-party have largely remained the same. In particular, courts emphasize that non-parties should not be required to subsidize litigation in which they have no stake in the outcome.[139]

With these factors in mind, courts have expanded their analysis of undue burden as they examine the growing universe of ESI. For instance, courts have granted motions to quash subpoenas demanding the forensic imaging of a non-party's cell phone where a party failed to narrowly tailor the request to

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This burden is a heavy one. . . . A successful demonstration of undue burden requires more than 'generalized and unsupported allegations.'" (citation omitted)).

138 Wiwa v. Royal Dutch Petroleum Co., 392 F.3d 812, 818 (5th Cir. 2004); *see also* New Prods. Corp. v. Dickinson Wright, PLLC (*In re* Modern Plastics Corp.), 890 F.3d 244, 251 (6th Cir. 2018) (quoting Am. Elec. Power Co., Inc. v. United States, 191 F.R.D. 132, 136 (S.D. Ohio 1999) (citation omitted)); Koch v. Pechota, No. 10 Civ. 9152, 2012 WL 4876784, at *3 (S.D.N.Y. Oct. 12, 2012) (quoting Night Hawk Ltd. v. Briarpatch Ltd., L.P., No. 03 CIV.1382, 2003 WL 23018833, at *8 (S.D.N.Y. Dec. 23, 2003)); Call of the Wild Movie, LLC v. Does 1-1,062, 770 F. Supp. 2d 332, 354 (D.D.C. 2011). The same factors are also applied to subpoenas for testimony. *See, e.g.*, Black Knight Fin. Servs. v. Powell, No. 3:14-mc-42, 2014 WL 10742619, at *2 (M.D. Fla. Dec. 11, 2014).

139 Cusumano v. Microsoft Corp., 162 F.3d 708, 717 (1st Cir. 1998) ("Although discovery is by definition invasive, parties to a law suit must accept its travails as a natural concomitant of modern civil litigation. Non-parties have a different set of expectations."); *see also* Butler v. Christian Island Food Serv., No. 4:15-CV-1118, 2016 WL 11683326 (E.D. Mo. May 9, 2016) ("[C]oncern for the unwanted burden thrust upon non-parties is a factor entitled to special weight in evaluating the balance of competing needs." (quoting *Cusumano*, 162 F.3d at 717)); Pugh v. Junqing, No. 4:16-CV-1881, 2018 WL 10733633 (E.D. Mo. Mar. 29, 2018) ("Where, as here, discovery is sought from a non-party, courts have wide latitude in deciding motions regarding non-party subpoenas, and courts are directed to give special consideration in assessing whether the subpoena subjects a non-party to annoyance or an undue burden or expense." (citation omitted)).

ESI relevant to the matter.[140] Courts also have used the undue-burden framework to quash subpoenas seeking ESI from a non-party where the volume and scope of the requested ESI is unlikely to lead to the discovery of relevant information.[141]

Given the rule's language requiring a court to quash or modify a subpoena that imposes an undue burden on a non-party recipient, there is some tension between this provision's protections to the non-party and a party's need for discovery necessary to afford a fair opportunity to develop and prepare its case. Mindful of this tension, courts tend to take a pragmatic, measured approach to motions to quash. Several courts have noted that "[m]odification of a subpoena is generally preferable to quashing it outright."[142] Frequently, courts achieve this goal by ordering production of a narrowed set of the requested documents or by imposing other limiting factors on the subpoena's requests.[143]

Of course, not every request to a non-party to produce ESI constitutes an undue burden on the non-party. For instance, courts have held that there is no undue burden where the requesting party agrees to cover the expenses of the responding non-party.[144] Courts also have found no undue burden where the burden is of the non-party's own making.[145]

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140 Charles Schwab & Co. v. Highwater Wealth Mgmt., LLC, No. 17-cv-00803, 2017 WL 4278494, at *6–7 (D. Colo. Sep. 27, 2017).

141 Hock Foods, Inc. v. William Blair & Co., No. 09-2588-KHV, 2011 WL 884446, at *7 (D. Kan. Mar. 11, 2011) (denying the portion of a motion to compel that would have required a non-party to search through 12,786 boxes of hard copy data and 12 terabytes of ESI to find "a needle in a haystack—an irrelevant needle").

142 Andra Grp., LP v. JDA Software Grp., Inc., 312 F.R.D. 444, 449 (N.D. Tex. 2015) (quoting *Wiwa*, 392 F.3d at 818); *see also* Fernandez v. Cal. Dep't of Corr. & Rehab., No. 2:11-cv-01125, 2014 WL 794332, at *2 (E.D. Cal. Feb. 27, 2014) ("Quashing subpoenas goes against the court's general preference for a broad scope of discovery, [but] limiting discovery is appropriate when the burden of providing the documents outweighs the need for it.").

143 Sams v. GA West Gate, LLC, 316 F.R.D. 693, 697 (N.D. Ga. 2016) (modifying a subpoena to "provide for an initial production" of ESI and permitting supplemental production "if, and only if, the electronic documents point to additional, relevant documents").

144 *In re* Domestic Drywall Antitrust Litig., 300 F.R.D. 234, 252 (E.D. Pa. 2014) ("Although it is true that compliance with the subpoena will require [the non-party] to review and redact numerous reports and investigative files, this burden is not undue because Plaintiffs will compensate [the non-party]."); *see also* Wood v. Town of Warsaw, No. 7:10-CV-00219, 2011 WL 6748797, at *3 (E.D.N.C. Dec. 22, 2011) (rejecting a non-party's undue burden objection where, *inter alia*, the plaintiff "agreed to pay the cost of a forensic expert to copy and search [the non-party's] hard drive"); FED. R. CIV. P. 45(d)(3)(C) ("[T]he court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party shows a substantial need for the . . . material that cannot be otherwise met without undue hardship; and ensures that the subpoenaed person will be reasonably compensated.").

145 *See* W. Convenience Stores, Inc. v. Suncor Energy (U.S.A.) Inc., No. 11-CV-01611-MSK-CBS, 2014 WL 1257762, at *25 (D. Colo. Mar. 27, 2014) ("I understand that the court should be especially vigilant to protect the non-party from undue burden and expense. However, this principle should not be invoked to excuse the non-party's own evasive or obstructive conduct. It strains logic to suggest that the court should hold a party or attorney issuing a subpoena to a standard of reasonableness, but then turn a blind eye to a non-party's unreasonable behavior . . . . Counsel for a non-party subpoena recipient, however, should be expected to 'stop and think' before taking actions that

Although courts have continued to refine jurisprudence under this provision, the fact-specific nature of whether a request constitutes an undue burden on a subpoenaed non-party will continue to change with advances in technology and new ways of creating and retaining ESI.

Perhaps the most significant outstanding questions concern how this provision should operate in the context of other Rule 45 provisions dealing with undue burden. Arguably, Rule 45(d)(3)(A)(iv) can be best understood as a purely procedural mechanism that affords courts the ability to quash or modify a subpoena when other provisions of Rule 45 are not an option—such as Rule 45(e)(1)(D) (which outlines the undue burden of inaccessible ESI) and Rule 45(d) (which puts requesting parties on notice that they may be subject to cost shifting if they request documents or ESI that may impose an undue burden).

D. Rule 45(e)(1)(D)—Non-Party ESI That Is Not Reasonably Accessible Due to Undue Burden or Cost

Rule 45(e)(1)(D) protects non-parties from the production of ESI that is not reasonably accessible due to undue burden or cost. It provides as follows:

> *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 or for a protective order, 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)(2)(C). The court may specify conditions for the discovery.[146]

The not-reasonably-accessible issue is the same under Rule 34 and Rule 45.

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will almost certainly result in unnecessary delay and burden an already congested court docket. Rule 45(d)(1) correctly focuses on the burdens imposed upon the subpoena recipient. However, Rule 45(d)(1) should not be construed or applied in a way that ignores the subpoena recipient's own conduct or confers a right to obfuscation or obstinacy." (internal quotations & citations omitted)); Morgan Hill Concerned Parents Ass'n v. California Dep't of Educ., No. 2:11-CV-3471, 2017 WL 445722, at *7 (E.D. Cal. Feb. 2, 2017), *reconsideration denied,* No. 2:11-CV-03471, 2017 WL 1382483 (E.D. Cal. Apr. 18, 2017) (rejecting an undue burden argument where the party making the argument "created the problem it now complains about").

146 FED. R. CIV. P. 45(e)(1)(D). Because this Rule is materially the same as Federal Rule of Civil Procedure 26(b)(2)(B), case law interpreting that Rule may be applicable to Rule 45(e)(1)(D).

VI. THE SEDONA CONFERENCE RULE 45 PRACTICE POINTERS

Practice Pointer 1. Timely disclosure by the parties is helpful to prevent over reliance on Rule 45 subpoenas. Early in litigation (possibly during the Rule 26(f) conference), each party should endeavor to identify relevant documents and ESI held by non-parties.

Practice Pointer 2. When the parties confer about discovery, they should work to reach stipulations concerning authenticity and admissibility to avoid the need to subpoena a non-party custodian to prove up documents or ESI.

Practice Pointer 3. Prior to issuing a subpoena to a non-party, it may be beneficial for a party to confirm that the information cannot be obtained through discovery from a party. The party issuing a subpoena generally should avoid seeking information from a non-party that likely is duplicative of information in a party's possession, custody, or control. If the non-party has possession or custody of ESI but a party retains control, the *Commentary* recommends that the information should be obtained from the party under Rule 34, not from the non-party under Rule 45.

Practice Pointer 4. It may be beneficial, before service on the non-party, for the party issuing the subpoena to give the other parties time to raise relevance, proportionality, confidentiality, and privilege concerns.

Practice Pointer 5. If the party issuing a subpoena does not have sufficient information to tailor the subpoena, the party should seek to confer with the non-party promptly after issuance of the subpoena, or possibly before issuance, in order to properly tailor the scope of the subpoena and to reduce the burden and expense on the non-party. The subpoena recipient should meet and confer in good faith with the issuing party to explain any objections it may have and work collaboratively to resolve them without need for court intervention. The parties should be mindful of local rules that may require parties and non-parties alike to meet and confer before bringing motions.

Practice Pointer 6. The party issuing a subpoena should be mindful of its obligations under Rule 45(d)(1) and Rule 26(g) to avoid imposing undue burden and expense on a non-party subpoena recipient. Accordingly, subpoenas should include, as applicable, limitations regarding time periods, individuals involved, and scope. The party issuing a subpoena should consider and incorporate the concept of proportionality. That would include whether the information sought is proportional to the needs of the case, including whether the burden and cost of preserving or producing such information outweigh the potential value and uniqueness of the information.

Practice Pointer 7. If not clear, a subpoena should seek to explain the non-party's relationship to the lawsuit or a party, in order to provide context to the non-party recipient and facilitate

identifying responsive information. The party issuing the subpoena should consider enclosing a copy of the complaint and the answer to assist the non-party.

Practice Pointer 8. It may be beneficial for the parties to ensure that the protective order and Fed. R. Evid. 502(d) order in place protect the non-party. The party issuing a subpoena should include a copy of any protective order and Fed. R. Evid. 502(d) order that were entered in the action.

Practice Pointer 9. The party issuing a subpoena should specify a form of production and, if applicable, attach any ESI order addressing the form of production that may have been entered in the action if the issuing party seeks the non-party's compliance with that format. If the subpoena specifies a form of production, the non-party subpoena recipient can object to the requested form of production and specify a different form of production. The non-party subpoena recipient usually will want to specify a form of production, regardless of whether the subpoena specifies one. It may be beneficial for the requesting party to consider agreeing to an alternative production format or to pay some or all of such additional cost and expense necessary to comply with the requested format that is less costly or seek other solutions that reduce the costs of compliance. For example, a party may wish to consider offering less costly means of processing and production to reduce the non-party's processing and production costs.

Practice Pointer 10. It may be beneficial for a non-party recipient to initiate discussions with the issuing party soon after receiving a subpoena (or vice versa), due to the relatively short period for serving objections and responses under Rule 45(d)(2)(B).

Practice Pointer 11. Whenever feasible, the party issuing a subpoena and the non-party recipient should agree to a reasonable extension of time for the non-party to serve objections and to respond to the subpoena. Meaningful dialogue regarding issues concerning the subpoena is more likely to occur when an extension has been provided, and the dialogue may reduce or eliminate the need for objections and subsequent unnecessary motion practice.

Practice Pointer 12. When an extension is not feasible, the non-party recipient should assert objections prior to compliance or 14 days of service of a subpoena (whichever is earlier) to ensure that mandatory cost-shifting provisions for significant expenses are available.

Practice Pointer 13. Subpoenas should be written with reasonable particularity based on the issuing party's then-knowledge of the non-party's documents and custodians. The non-party should be as specific as possible under the circumstances in its objections.

Practice Pointer 14. This *Commentary* encourages a non-party to provide a specific date after which it will no longer retain the documents or ESI that it objects to producing. Such a step thereby places the requesting party on notice of the date by which it needs to determine the completeness of the production and move to compel.

Practice Pointer 15. It may be beneficial for the party issuing a subpoena and the non-party recipient to confer in an effort to resolve any disputes regarding the scope of the subpoena before seeking to quash or enforce a subpoena. If appropriate, other parties should be given the opportunity to participate in such discussions.

Practice Pointer 16. The party issuing a subpoena and the non-party recipient should consider, where appropriate, a tiered or staged production, particularly if requested by the non-party.

Practice Pointer 17. Rule 45(e)(2)(A) and (B) require a non-party subpoena recipient to, among other things, expressly make a "claim [of privilege] and the basis for it" and set forth a process for the handling of the inadvertent production of such information. The party issuing a subpoena should seek to minimize the burden of privilege claims on the non-party. For example, the issuing party and the non-party may agree to exclude some potentially privileged and protected information from the subpoena based upon dates, general topics, or subjects. To minimize the burden on the non-party, the subpoenaing party should consider alternatives to the traditional privilege log.

Practice Pointer 18. The parties should work together and with the non-party, as appropriate, to facilitate the authentication of material received through non-party subpoenas. To avoid the necessity for a non-party's appearance at trial, the parties should obtain and utilize, when possible, non-party certifications under Fed. R. Evid. 902. The parties should stipulate to the authenticity and the business records hearsay exception, when possible, to minimize the burden and expense imposed on a non-party subpoena recipient, including any need to testify for foundational matters.