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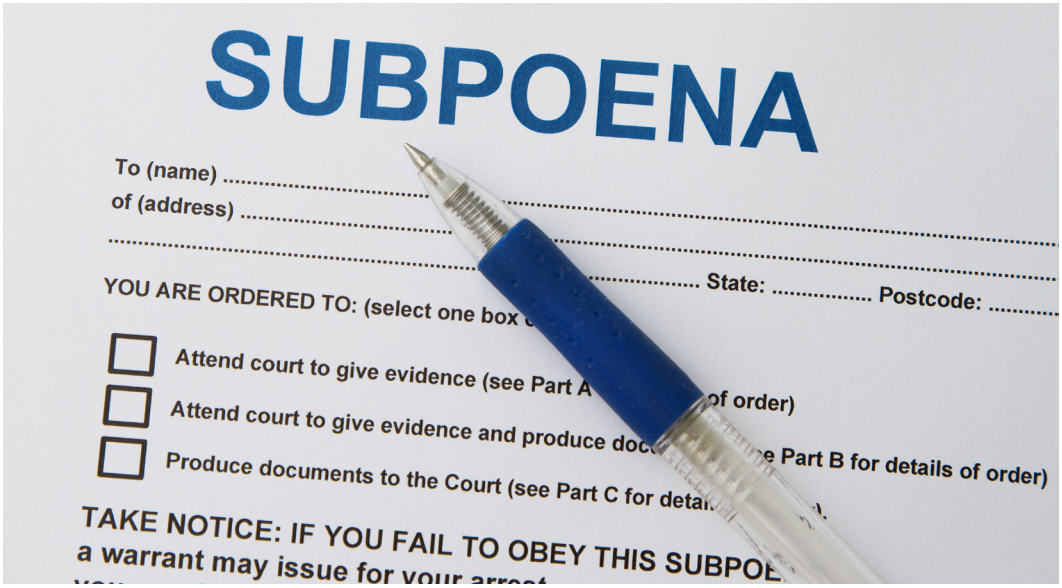
Does Rule 45 Protect Nonparties from Undue Burden?



October 3, 2018

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This article was published in Law360 on October 2, 2018.

Parties can serve subpoenas seeking discovery from nonparties pursuant to Federal Rule of Civil Procedure 45. The rule mandates that the court protect nonparties from undue burden and provides protections for those subject to subpoena, but courts are inconsistent in applying the tools provided by Rule 45. Since 2015, Rule 45's protections have been supplemented by Rule 26's explicit requirement that discovery be proportional to the needs of the case.[1] In this article, we analyze four recent decisions that addressed motions to quash or to shift the cost of compliance. These cases illustrate the wide range of measures that courts may employ to lessen the burden on nonparties. As we will see, while courts often grant relief to nonparties, that relief can take many forms — narrowing requests based on a relevancy or proportionality analysis, shifting a portion of reasonable

costs to the requesting party or quashing the subpoena entirely. Unless the subpoena is quashed in its entirety, however, the nonparty will still be required to incur some cost of compliance.

Accordingly, recipients of subpoenas should consider the following:

- Be prepared to support allegations of undue burden with detailed cost and time calculations, supported by knowledgeable declarations
- Make a record to demonstrate that they have no interest in the litigation
- Demonstrate that the information sought is not unique and can be obtained from a party or another source with more connection to the litigation and at less burden
- Develop facts to establish that the requested discovery and resultant burden are not proportional to the needs of the case
- Be prepared to offer a compromise that will minimize burden.

Federal Rule of Civil Procedure 45

Rule 45 empowers a party to serve a subpoena that commands a nonparty to "produce documents, electronically stored information [ESI], or tangible things."[2] A court must modify or quash such a subpoena if it fails to allow a reasonable time to comply, requires a person to travel more than 100 miles, requires disclosure of privileged or other protected materials or subjects a person to undue burden.[3] A court may modify or quash a subpoena when the subpoena requires the disclosure of a "trade secret or other confidential research, development, or commercial information."[4]

The federal rules limit the scope of subpoenas by the relevance standards set forth in Rule 26(b)(1) and the considerations of burden and expense set forth in Rules 26(b)(2) and 45(c)(1). "In evaluating whether a subpoena is unduly burdensome, the court balances the burden imposed on the party subject to the subpoena by the discovery request, the relevance of the information sought to the claims or defenses at issue, the breadth of the discovery request, and the litigant's need for the information."[5] Following the 2015 amendments, Rule 26 explicitly requires that discovery, including nonparty discovery, be proportional to the needs of the case.[6] Given the burden and expense that discovery,

particularly discovery of ESI, can impose, nonparties "deserve extra protection from the courts."[7] As demonstrated below, however, courts have been inconsistent in exactly how much they are willing to protect nonparties from the cost and burden of discovery.

Recent Decisions Show the Variety of Approaches Courts Take to Protect Nonparties Subject to Rule 45 Subpoenas

Subpoenas Must Provide Adequate Time for Compliance

In *Snow v. Knurr*,[8] Snow filed an emergency motion in the Eastern District of Virginia to modify a nonparty subpoena served by Knurr shortly before the discovery cutoff in the underlying case. Knurr countered with a motion to transfer Snow's motion to the Western District of Missouri, where the underlying litigation was pending. Snow's motion for protective order sought to modify the subpoena because it required production of 18 categories of documents in only six days. Snow also requested that the court reschedule a deposition to a time when Snow's counsel was available and sought attorneys' fees related to the motion for protective order.

The court denied Knurr's motion to transfer, holding that the court's prime concern should be avoiding burdens on local nonparties subject to subpoenas. "This Court need not comprehend the intricacies of the underlying factual dispute or securities law in the shareholder-derivative context to understand that short notice in discovery can cause an undue burden on the producing party."[9] To avoid undue burden on Snow, the court granted additional time for responding to the document requests and a later deposition date for Snow. Finally, finding that Knurr had failed to take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena, the court granted Snow's request for attorneys' fees incurred in bringing the action.

Courts May Require Interested Nonparties to Bear Some Costs

In *Koopmann v. Robert Bosch LLC*,[10] Koopmann served a Rule 45 document subpoena on nonparty Bosch. While the request initially sought a broad range of documents, Koopmann narrowed the request to only those documents that had been produced in another action. The court directed Koopmann and Bosch to meet and confer to agree on search terms to further cull the number of responsive documents. Koopmann and Bosch agreed on search terms but disagreed on whether Koopmann was required to share in the expense. The court agreed that Koopmann should bear some of Bosch's costs of complying with the subpoena.

The court noted that Rule 45 makes "makes cost shifting mandatory in all instances in which a nonparty incurs significant expense from compliance with a subpoena" but added that the nonparty can be required to bear some or all of the costs "where the equities of the particular case demand it."[11] The court identified three factors to consider in determining the proper allocation of costs: (1) whether the nonparty actually has an interest in the outcome of the litigation, (2) whether the nonparty can more readily bear the costs than the requesting party and (3) whether the litigation is of public importance.[12] Weighing those considerations, the court concluded that it was reasonable for Koopmann to bear half the cost of compliance, up to a maximum of $30,000.[13]

Costs Sought Must Be Reasonable and Incurred in Compliance

In *Valcor Engineering Corp. v. Parker Hannifin Corp.*,[14] nonparty MEDAL moved to shift the costs of responding to a subpoena. The court noted that the only question before it in considering whether to shift costs under Rule 45 was "whether the subpoena imposes significant expense to the nonparty."[15] The court held that a court must order the party seeking discovery to bear at least enough of the cost of compliance to render the remainder 'nonsignificant.' Accordingly, "a nonparty may be required to absorb a nonsignificant portion of its expenses resulting from compliance."[16] The court continued its analysis, however, stating that Rule 45 is aimed at protecting persons who are disinterested and thus have little to gain from their outlays in compliance cost. The court stated that the rule was intended to protect those who are "powerless to control the scope of litigation and discovery, and should [therefore] not be forced to subsidize an unreasonable share of the costs of a litigation" that does not concern them.[17] Accordingly, the court stated that it would consider MEDAL's ability to pay and its interest in the litigation in deciding MEDAL's motion seeking cost-shifting.[18]

Turning to MEDAL's claim that it spent approximately $476,000 responding to Parker's subpoena, the court noted that more than $343,000 of that was attorneys' fees, which resulted not from compliance with the subpoena but rather from MEDAL's aggressive tactics to oppose every motion filed. Moreover, MEDAL was intimately involved with the acts giving rise to the litigation and had a financial interest in the case.[19] In light of MEDAL's close involvement in the design of the part at issue in the lawsuit, the common interest agreement between MEDAL and Valcor and MEDAL's financial interest in the outcome, the court found that MEDAL was an interested party and therefore not entitled to cost-shifting. In fact, MEDAL's motion "comes close to wielding the shield of Rule 45 as a sword" rather than a shield.[20]

Requests to Nonparties Must Be Proportional to the Needs of the Case

Finally, in *Miceli v. Mehr*,[21] the court relied on the relevancy standard of Rule 26, including the requirement of proportionality, in granting a nonparty motion to quash. Miceli sued the town of Rocky Hill, its manager Mehr and several individual defendants, including the police lieutenant, for alleged discrimination and wrongful termination. Miceli served a subpoena on a law firm that Rocky Hill had engaged previously to conduct an internal affairs investigation that was terminated before its conclusion but after a draft report had been prepared. Miceli's request to the law firm sought all documents regarding the investigation, including, but not limited to, the internal affairs investigation, statements, exhibits — which the defendants had refused to produce — and other evidence.

The court, noting that the Rule 26 relevancy standard governs a Rule 45 subpoena, examined whether the exhibits and notes were relevant. Taking into consideration factors including the "parties' relative access to relevant information" and "the importance of the discovery in resolving the issues,"[22] the court determined that the previous disclosure of the draft report, without its exhibits, satisfied the needs of the case. "[T]he discovery Mr. Miceli seeks is insufficiently related to any of his claims or defenses, and where not irrelevant, it is disproportional to the value of the requested information and the needs of the case."[23] The court granted the motion to quash and denied the motion to compel.

As these four decisions demonstrate, the outcome of a motion to compel or a motion for protective order may vary widely due to courts' determinations of what is "undue burden" or "unreasonable costs" on the nonparty in light of the facts and circumstances presented. Given that complex multidistrict litigations often implicate multiple nonparties, results may vary even within the same litigation.[24]

Conclusion

While the results above vary, what is clear is that "undue burden" for purposes of nonparty discovery does not mean no burden at all. The protection offered by many courts is merely to narrow or tailor the requests, or to quash the subpoena as too broad. If the requests are appropriately drafted, courts seem reluctant to shift costs, especially if the nonparty has a financial connection to a party or if the discovery was served in good faith. To best position itself to avoid having to bear the costs of compliance with a subpoena, a nonparty should marshal the facts to demonstrate that it has no connection to, or interest in, the litigation and prepare detailed affidavits to substantiate the anticipated cost and burden. Further, proposing modifications to the requests, rather than establishing an absolute position, is more likely to achieve some modification.

Endnotes

1 Fed. R. Civ. P. 26(a)(1).

2 Fed. R. Civ. P. 45(a)(1)(C).

3 Fed. R. Civ. P. 45(d)(3)(A)(i-iv).

4 Fed. R. Civ. P. 45(d)(3)(B).

5 *Wahoo Int'l Inc. v. Phix Doctor Inc.*, No. 13CV1395-GPC BLM, 2014 U.S. Dist. LEXIS 98044, 2014 WL 3573400, at *2 (S.D. Cal. July 18, 2014) (internal citations omitted).

6 Fed. R. Civ. P. 26(a)(1).

7 *High Tech Med. Instrumentation v. New Image Indus.*, 161 F.R.D. 86, 88 (N.D. Cal. 1995)(citing *United States v. Columbia Broad. Sys.*, 666 F.2d 364, 371-72 (9th Cir. 1982)).

8 *Snow v. Knurr*, No. 4:18-MC-09015-RK, 2018 U.S. Dist. LEXIS 146466 (W.D. Mo. Aug. 28, 2018).

9 *Id.* at *6.

10 *Koopmann v. Robert Bosch LLC*, No. 18-CV-4065, 2018 U.S. Dist. LEXIS 88332 (S.D.N.Y. May 25, 2018).

11 *Id.* at *3.

12 *Id.*

13 *Id.* at *3-4.

14 *Valcor Eng'g Corp. v. Parker Hannifin Corp.*, No. 8:16-CV-00909, 2017 U.S. Dist. LEXIS 142120 (C.D. Cal. July 12, 2018).

15 *Id*. at *3-4 (citing *Legal Voice v. Stormans, Inc*., 738 F.3d 1178, 1184 (9th Cir. 2013) (Rule 45 amended in 1991 to make cost-shifting mandatory in all instances in which nonparty incurs significant expense from compliance)).

16 *Id*. at *3.

17 *Id*. at *4.

18 *Id*. at *7.

19 Discovery revealed that MEDAL had signed a common-interest agreement with the plaintiff, which required that the companies coordinate their discovery responses. *Id*. at *12.

20 *Id*. at *14.

21 *Miceli v. Mehr*, No. 3:17-cv-00029, 2018 U.S. Dist. LEXIS 136996 (D. Conn. Aug. 14, 2018).

22 *Id*. at *13.

23 *Id*.

24 *See, e.g., In re EpiPen Litig*., 2018 U.S. Dist. Lexis 90380, at *25-26 (class plaintiffs ordered to pay 25 percent of costs United incurs in timely producing documents responsive to the subpoena); 2018 U.S. Dist. LEXIS 90380, at *27-29 (court required plaintiffs to bear 50 percent of OptumRX's costs); 2018 U.S. Dist. LEXIS 102715, at *19-20 (court required class plaintiffs to bear 50 percent of the reasonable costs); 2018 U.S. Dist. LEXIS 110540, at *14-21 (relevant time period limited; plaintiffs required to pay 50 percent of costs).

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