GUIDELINES FOR NON-PARTY E-DISCOVERY UNDER RULE 45

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I. INTRODUCTION

Non-party subpoenas raise the same important issues relating to the discovery of electronically stored information ("ESI") as do initial disclosures and requests for production between the litigants. This was true even before the 2006 amendments to the Federal Rules of Civil Procedure but Rule 45 now expressly provides the right to discover ESI just like Rules 26 and 34. The other notable amendments to Rules 26 and 34 relating to ESI discovery were also incorporated directly into Rule 45. Accordingly, the headline ESI concepts of "inaccessibility," "test sampling" and "cost-shifting" – as well as the "one-bite" rule, the "reasonably usable" format rule, and "claw back" rule – are now specifically included in Rule 45.

A few differences exist, however, between Rule 45 and Rules 26 and 34. These variations raise some distinct procedural and strategic considerations for clients and practitioners against the non-party backdrop of a Rule 45 subpoena. Only a few published opinions exist to date on these points to guide the analysis.

II. RULES COMPARISON

The following sections of amended Rule 45, in order of appearance, have a corresponding ESI provision in amended Rules 26 and 34:

- Rule 45(a)(1)(D) provides the opportunity for "testing or sampling" a non-party's ESI and is derived from Rule 34(a)(1);
- Rule 45(d)(1)(B) contains the requirement that if the subpoena does not specify the form of ESI production, the non-party must produce it in the form in which it is ordinarily maintained or in a "reasonably usable" format, just like Rule 34(b)(2)(E)(ii);
- Rule 45(d)(1)(C) contains the "one bite" rule from 34(b)(2)(E)(iii) that protects a non-party from having to produce the same ESI in more than one form;
- Rule 45(d)(1)(D) contains the two-tiered limitation on the production of ESI from sources identified as "not reasonably accessible because of undue burden or cost", subject to a

showing of "good cause", which is identical to Rule 26(b)(2)(B) and also incorporates by direct reference the limitations of Rule 26(b)(2)(C) that a court must consider when ordering the production; and

- Rule 45(d)(2)(B) contains the "claw back" provision for inadvertent disclosure of privileged ESI.

The most obvious difference among the three rules is that Rule 45 does not contain any of the "meet and confer" obligations imposed on parties by Rule 26(f), including the requirement to discuss the preservation of discoverable information and to develop a discovery plan relating to ESI issues. Rule 45 attempts to addresses this potential problem, in part, by including an express requirement in section (c) that a party or attorney responsible for issuing a subpoena must "take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena." Rule 45(c)(2)(B) also authorizes non-parties to file written objections to proposed "testing or sampling" contained in the subpoena. No similar express provision exists for the parties in Rule 34(b)(2)(C) relating to ESI discovery.

Non-parties must be hyper-vigilant when calendaring the due date for their objections to a subpoena that specifically or implicitly seeks ESI. Under Rule 45(c)(2)(B), the objections are due 14 days after service unless the subpoena specifies a later time. In contrast, the named litigants have 30 days to respond under Rule 34(b)(2). This significantly shorter window of time for non-parties to file objections is a potential trap for the unwary and a vestige of discovery practice before the digital age. Today, a 14 day response deadline appears inconsistent with the realities and attendant burdens of modern ESI discovery, especially for non-parties who may be completely unaware of the litigation giving rise to the subpoena.

III. ISSUES

A. Document Preservation

Many document preservation issues remain untested for non-parties. It is unclear when a non-party's duty to preserve begins and ends. The factual circumstances of each case will control those decisions for the courts.

The service of a Rule 45 subpoena certainly triggers a non-party's duty to preserve ESI and implement internal procedures for responding to "litigation hold" letters, including the suspension of routine document destruction policies.[1] However, the duty to preserve may begin earlier for non-parties who have contractual or other special relationships with the parties, or for non-parties who are on notice of the litigation and have a reasonable basis to know that ESI in their possession is relevant to that litigation. This is especially true if the non-party has a reasonable basis to believe that it may be sued directly or joined in the underlying case.[2]

Non-parties may also be put on notice to implement litigation hold procedures directly by the parties as part of their Rule 26(f) discovery plans or the omnibus orders regarding preservation of evidence that direct the parties to notify non-parties of the litigation.[3] Likewise, the new requirement in Rule 45(c) that parties take reasonable steps to avoid imposing undue burden and expense on non-parties may encourage the parties to reach out to non-parties before service of a subpoena -- not only to begin a formal dialogue on ESI discovery issues much like a Rule 26(f) conference -- but also to trigger litigation hold procedures.

Finally, with the end to document preservation obligations uncertain and the potential consequences of premature termination of a litigation hold uncharted, non-parties would be wise to take affirmative steps to obtain some clarity. For example, after compliance with the subpoena, non-parties should consider seeking a "release" of their litigation hold obligations from the parties. Alternatively, if judicial proceedings on objections or motions to compel have occurred, non-parties could request a discharge directly from the court.

B. Undue Burden or Expense

Non-parties have a substantial interest in avoiding the burden and expense of discovery that parties must accept as an unavoidable onus of modern civil litigation.[4] Long before the 2006 amendments, courts have recognized that non-parties should not be required to subsidize litigation in which they have no stake in the outcome.[5] The discovery of ESI causes non-parties to have a heightened interest in controlling costs because the process of preserving, retrieving,

reviewing and producing ESI may entail considerable time and money.[6]

Rule 45 now provides non-parties with financial protections at every stage of the subpoena process. Even before the 2006 amendments, Rule 45(c)(2)(B)(ii) mandated Courts to protect non-parties from "significant expense" resulting from any order compelling compliance with a subpoena. This pre-2006 financial protection should now be bolstered by the 2006 amendment requiring the party issuing a subpoena to take "reasonable steps" to avoid imposing undue financial burdens on the non-party. Moreover, as noted above, the new Rule 45(d)(1)(D) also authorizes non-parties to identify ESI sources that are "not reasonably accessible because of undue burden or cost" in their responses/objections to subpoenas.

Courts will not automatically assume that an undue burden or expense exists, however, simply because ESI is involved or specifically sought from a non-party by subpoena. The Rule 45 financial protections for non-parties must be supported by a specific evidentiary showing. For example, one court rejected a non-party's motion for protective order that claimed production of its files in electronic format was not reasonably accessible because the non-party provided no evidence to support its motion other than the statements of its counsel in the motion.[7] The Court noted that the non-party had no direct stake in the litigation and that non-parties are entitled to particular protections in Rule 45 but found the non-party had not met its burden to make "a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements."[8] Although the Court denied the non-party's motion and ordered production of the ESI, it also allowed the non-party to file a new motion supported by evidence that some or all of costs to produce the ESI should be imposed on the party issuing the subpoena.[9]

C. Cost Shifting

The undue burden and expense issues raised by Rule 45 ESI discovery naturally lead to arguments for shifting the cost of compliance to the party issuing the subpoena. The body of cost-shifting jurisprudence developing under Rules 26 and 34 is beginning to translate to non-parties under Rule 45.[10] The financial protections of Rule 45 do not necessarily mean, however, that the requesting party must bear all of the expense of a non-party's production.

Courts have articulated numerous factors to consider in determining whether to shift costs to the requesting party. First, courts have looked to see whether the non-party is truly an innocent bystander or has an interest in the outcome of the litigation, the latter weighing against cost-shifting.[11] Courts also consider: (a) the scope of the request; (b) the invasiveness of the request; (c) how expensive and time-consuming the compliance will be; (d) the need to separate privileged material; (e) the size and ability of the non-party to bear the costs itself; (f) the relative resources of the party and non-party; (g) whether the expenses of compliance are part of the non-party's normal cost of doing business; (h) whether and to what extent the requesting party has made efforts to minimize the burden of compliance; (i) whether the requesting party prevails in the underlying litigation; (j) the reasonableness of the costs sought; and (k) the public importance of the litigation.[12] With the number and variability of the cost-shifting factors involved, each case will present its own unique circumstances that will control the outcome.

IV. CONCLUSION

An open dialogue concerning the ESI issues surrounding a Rule 45 subpoena is the hallmark of good practice and procedure. A party serving a Rule 45 subpoena seeking ESI should follow these best practices: contact the prospective non-party in advance; deliver a written litigation hold; and discuss issues such as burden, format, cost, and duration of the hold up front to determine the most practical, cost-effective method for compliance. A non-party receiving Rule 45 subpoena should immediately implement a written litigation hold and seek an extension of the 14 day response deadline, including for objections. If the party serving the subpoena has not already done so, the non-party should discuss the burden, format, cost, and duration of hold issues up front. The parties and non-parties should confer on any problems that arise before filing any motions with the court. Finally, the non-party should make sure to obtain a written release from the litigation hold once the production is completed.

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[1] See In re Napster, Inc. Copyright Litigation, 462 F.Supp.2d 1060, 1068 (N.D. Cal. 2006)(non-party under duty to preserve upon service of subpoena).

[2] See Peskoff v. Faber, 244 F.R.D. 54, 63-64 (D. D.C 2007)(non-party had notice to preserve ESI without subpoena because non-party had united interest in defense with party, shared counsel, was on notice of requirement to implement litigation hold, and reasonably anticipated being sued directly).
[3] See In re Flash Memory Antitrust Litigation, 2008 WL 1831668 (N.D. Cal. April 22, 2008); In re Nat'l Security Agency Telecom. Records Litigation, 2007 WL 3306579 (N.D. Cal Nov. 6, 2007); RMS Services-USA, Inc. v. Houston, 2007 WL 1058923 (E.D. Mich. April 5, 2007).
[4] See Guy Chemical Co. v. Romaco AG, 243 F.R.D. 310, 313 (N.D. Ind. 2007)("it is fundamentally unfair for non-parties to bear the significant litigation costs of others").
[5] See, e.g., Cusumano v. Microsoft Corp., 162 F.3d 708, 717 (1st Cir. 1998)(professors subpoenaed by Microsoft in antitrust litigation had no dog in the fight and unwanted burden thrust upon them was entitled to special weight in evaluating the balance of competing interests); see also Dart Indus. Co. v. Westwood Chem. Co., 649 F.2d 646 (9th Cir. 1980).
[6] See In re Fannie Mae Securities Litigation, 555 F.3d 814 (D.C. Cir. 2009)($6 million in fees and costs incurred complying with non-party subpoena for ESI). This January 6, 2009 opinion is undoubtedly the most notorious opinion on ESI discovery pursuant to Rule 45 to date and provides a blue print of "what not to do" when served with a Rule 45 subpoena.
[7] See Auto Club Family Ins. Co. v. Ahner, 2007 U.S. Dist. Lexis 63809 (E.D. La. August 29, 2007)(discussing Rule 45 "one bite" rule and "inaccessibility" issues where hard copy of engineering firm's file was produced but not electronic copy as required by subpoena).
[8] Id. at *9 & *15 quoting In re Terra Int'l, Inc., 134 F.3d 302, 306 (5th Cir. 1998).
[9] Id. at *16.
[10] See, e.g., Guy Chemical, 243 F.R.D. at 312 (N.D. Ind. 2007)(citing numerous cost shifting cases).
[11] See, e.g., In re Seroquel Products Liability Litigation, 2007 WL 427676 at *3 (M.D. Fla. Dec. 6, 2007).
[12] Id.; see also Tessera Inc. v. Micron Technology, Inc., 2006 WL 733498 (N.D. Cal. March 22, 2006).