

UNITED STATES DISTRICT COURT

*EASTERN DISTRICT OF PENNSYLVANIA
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11-CV-008

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November 18, 2011

Honorable David G. Campbell
United States District Court
United States Courthouse
401 West Washington Street, SPC 58
Phoenix, AZ 85003-2156

Re: Civil Rules Committee - Proposed Changes to Rule 45

Dear David:

Hope you are well. I understand from my colleagues that you had an outstanding meeting recently and that you are excelling in continuing the great traditions of the Committee. You have made significant progress on Rule 45.

I am enclosing a "skit" that was presented by the University of Pennsylvania Inn of Court on November 8, 2011, dealing with Rule 45 and the proposed changes. Bill Hangle and Dan Segal, name partners of the firm Hangle, Aronchick, Segal, Pudlin & Schiller, an outstanding law firm emphasizing major litigation in Philadelphia, primarily authored the enclosure. We had group discussions after several of the vignettes. There was great interest in the proposed changes to Rule 45.


I would appreciate your considering the enclosure as an unorthodox, but instructive, "comment" on the proposed Rule. The skit discloses many reasons why more disclosures, particularly disclosures of documents actually received by the party serving a subpoena, should be required under the rule.

We also discussed the appropriate circumstances under which a judge in the district in which the subpoena is served should be able to "transfer" the pending motion to the judge assigned to the case.

I also note a provision in the proposed Rule (see 45(f)) that allows for a "transfer" of a "order" and I was concerned that this was a very novel concept that may need more discussion.

Best wishes for the holiday season.

Sincerely yours,



Michael M. Baylson

MMB:lm
enclosure

cc William Hangle, Esquire (w/enclosure)
Daniel Segal, Esquire (w/enclosure)
Honorable Gene Pratter (w/enclosure)
Honorable Paul Diamond (w/enclosure)
Peter G. McCabe (w/enclosure) ✓

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THE PICKLE PICKER PAPER CAPER

(Dirty Little Secrets of Rule 45)

11/7
FINAL



Presented by Group 10
November 8, 2011

Cast of Characters

<i>Narrator:</i>	Hon. Carolyn Engel Temin
<i>For Plaintiff Pennsylvania Pickle Pickers</i>	
Bernadette Bridge, Attorney:	Kai Scott
Cissy Foos, Bridge's Partner	Andra Maniu
<i>For Defendant Georgia Jar</i>	
Jimmy Carter, COO	Bill Hangle
Bjorn Liar	
(Liar, Pence & Fire), Attorney	Tom Manning
Lotta Lern - Liar's Associate	Jennifer Wu
Bill Shutter - Liar's Partner	Dwayne Bensing
<i>For WholePaycheck Markets</i>	
Nicole Anne Dime, CEO	Lauren Sheller
Bud Uronner	
(Szell Uronner), Attorney -	Dan Segal
Igor Beaver - Uronner's Associate	Chris Bender
<i>Judge Knott :</i>	Hon. Michael Baylson

THE PICKLE PICKER PAPER CAPER

(Dirty Little Secrets of Rule 45)

Presented by Group 10
November 8, 2011

Background: Pennsylvania Pickle Pickers, a corporate citizen of Pennsylvania that manufactures pickles and related products, has sued Georgia Jar, a corporate citizen of Georgia, in the Commerce Court Division of the Philadelphia Court of Common Pleas. Assume that service of process was proper and that the Pennsylvania court has *in personam* jurisdiction. Before Pennsylvania Pickle Pickers terminated their relationship, Georgia Jar made jars and lids for Pennsylvania Pickle Pickers' pickles, which are distributed throughout the country.

Scene 1

Narrator: Georgia Jar has engaged Bjorn Liar's firm (Liar, Pence & Fire) to defend the case. Georgia Jar's COO, Jimmy Carter, comes to Mr. Liar's office in Philadelphia to meet with Liar and Liar's associate, Abel Cain.

Bjorn Liar: [Jimmy comes into the office] Welcome, Jimmy. We've examined the complaint. As I understand it, your company, Georgia Jar, manufactures the jars and lids that Pennsylvania Pickle Pickers packs its pickles in. They say the jars and/or lids are defective. They allege that some of the lids are so tight that customers have great difficulty opening their pickle jars. On top of that, they say that other jars leak Pennsylvania Pickle Pickers' pickle juice. They claim they've had to recall a lot of their products, and that purchasers aren't picking Pennsylvania Pickle Pickers' pickle products as a result. Have I got that right?

Jimmy: Only partly. The main thing is that we're mad as hell. We shouldn't have been sued, and Pennsylvania Pickle Pickers is just trying to hold us up. We have great defenses, without even conducting discovery. Pennsylvania Pickle Pickers wrote the specs for those pickle jars and lids, and it's not our fault if some

little old lady gets carpal tunnel syndrome trying to open them, or if Pennsylvania Pickle Pickers had to take back product because the jars were leaking pickle juice all over the place.

We should win just by showing that we made the jars and lids exactly as instructed.

Bjorn Liar: So you think we won't need a lot of burdensome discovery? My partners and I are very sorry to hear that.

Jimmy Oh, no, we want discovery. We want to discover those bastards into the ground. We want to get discovery from every single one of their customers. We want to make the customers disclose all their pickle and condiment sales and purchases -- not just Pennsylvania Pickle Pickers' pickles. We want to make them disclose their markups on Pennsylvania Pickle Pickers products and other products. We want to know about any difficulties they've had with Pennsylvania Pickle Pickers pickles and any other pickle products and condiments they sell. I'm sure a smart lawyer like you will think up other things to take discovery about. We want to make the customers sorry they ever chose to do business with Pennsylvania Pickle Pickers. That's how you put a

stop to this bad faith litigation. Discover them right into the poor house!

Bjorn Liar: Music to my ears.

Abel: [Shyly] I know it's not my place to ask this, but how would all that discovery be relevant to the question whether the jars and lids are up to spec?

Bjorn Liar: [Angry] You're absolutely right. It's not your place to ask that. But to answer your question, courts are pretty lenient in allowing broad discovery, and I'm sure we can think up reasons for the discovery that pass muster with the courts. Measuring damages, analyzing causation -- all that sort of stuff.

Abel: (Apologetically) Sorry about that, Boss (regaining his cool). Now, this is a case that could be removed to the federal court if we chose to do that. And since our discovery will be all around the country, shouldn't we remove the case to the Eastern District? You can do out-of-state discovery in a state court

action, but it's a little more cumbersome.

Jimmy: Bjorn, do you think we should move the case into the federal court?

Bjorn Liar: That's a hard question. I'm not so sure. Pennsylvania Pickle Pickers brought its case in the Commerce Court here in Philadelphia, and that's an excellent court with excellent judges. If we wound up before one of those federal judges down at 6th and Market ... Well. .. I'm not so sure!

Abel: And if we stayed in the state court, we could start our discovery right away. In the federal court, there's a lot of delay between the time you're served with the complaint and the time when you can start taking discovery.

Jimmy: OK. Let's leave the case in the state court and get started with those subpoenas ASAP.

Abel: Yes Sir. I'll prepare notices that we intend to serve the subpoenas, and I'll serve them on Pennsylvania Pickle Pickers

right away. Then, in a few weeks, we should be able to actually serve the subpoenas on the customers.

Jimmy: Wait a minute! I thought you said you could start the discovery right away!

Abel: Well, it works like this: If the case stays in the Pennsylvania courts, then the Pennsylvania Rules of Civil Procedure apply. And under Pa. Rule 4009.21, we'd have to give Pennsylvania Pickle Pickers at least 20 days' advance notice if we intended to subpoena a third party. We'd have to give them an advance copy of our subpoena and an opportunity to object and get a ruling from the court.

Jimmy: Ooh! I don't like that "advance notice" part. Those customers are probably in cahoots with Pennsylvania Pickle Pickers. I do business with some of those guys myself, and I can tell you from past experience that they wouldn't hesitate to destroy documents or try to avoid service of the subpoena. Isn't there some way we can sneak up on Pennsylvania Pickle Pickers?

Abel: Well, maybe. If you did remove the case to the District Court, you'd be under Federal Rule 45, and you wouldn't have to give notice that you were serving a subpoena until just before you actually served it on the third party.

Bjorn Liar: That's true. Even the proposed amendment to Rule 45, which is pending right now, is silent on the question of how much advance notice you have to give. In practice, many lawyers don't give any advance notice at all, and most of us give very short notice -- nothing like the 20 days in the Pennsylvania system.

Abel, isn't there also a difference when it comes to actually getting the documents?

Abel: Sure is! The Pennsylvania rule imposes an express requirement that the party who gets the documents tell the other parties that he's gotten them, and make copies at their expense if they want them, and let them come and inspect them if they want to. But I understand some people have proposed that the Federal Rules

be amended to impose the same requirement.

Liar: But it's NOT a requirement now, and it looks like it's not going to be a requirement. .

Jimmy: OK, I've changed my mind. Let's remove the case, and not give Pennsylvania Pickle Pickers any notice before we start subpoenaing documents from Pennsylvania Pickle Pickers' purchasers.

Liar: Well, we'll have to give some notice, like, maybe ten seconds.

Jimmy: I can't wait! Serves them right, those unethical bastards!
Goodbye.

Liar Goodbye, and thanks for coming.

Jimmy Oh, and don't forget to demand electronic discovery -- emails and stuff like that. And metadata. Ask for a lot of metadata. I have no idea what metadata is, but I know people get really upset

when you ask for metadata.

Liar Yes, we'll be sure to ask for metadata. (Client leaves.)

Abel: Boss, is it OK to remove a case just so you can take advantage
of a more favorable discovery system?

Scene 2

Narrator: Weeks later, the subpoenas have been served. We return to Bjorn Liar's office.

Bjorn Liar Abel, we have a problem. I thought you did a good job drafting
the subpoenas and getting them served all over the country. But
wouldn't you know it, our client is upset. I had a call today from
Carter, and he's on the warpath. He looked at our subpoena and
pointed out that it covers all pickle and condiment products and
containers, not just the Pennsylvania Pickle Pickers products.

Abel: What's he upset about? I made them as broad as I thought I could get away with! You remember that Carter told us to dig into all the customers' dealings with all of their suppliers in those product areas.

Bjorn Liar But he didn't tell us that Georgia Jars sells jars and lids directly to some of these retailers for their proprietary pickles and other condiments!

Abel So what's the big deal?

Bjorn Liar He didn't say, but I suspect Georgia Jars has had complaints about those products, too. But Jimmy didn't tell me that. He just berated me for being a snoop and a bad lawyer, and bawled me out for harassing *his* customers.

Abel So what do I do?

Bjorn Liar Well, Jimmy is giving me a list of all the customers he wants us to stay away from. As soon as we get it, call their attorneys and

tell them they can ignore the subpoenas. Don't tell them why.

Abel Don't we have to tell opposing counsel about these changes in the scope of our discovery?

Bjorn Liar Absolutely not. There's no such requirement in the Rules.

Abel And what are my orders for dealing with the other customers?

Bjorn Liar Carry on. Discover them to death.

Abel One last question, Boss. Am I supposed to let Pennsylvania Pickle Pickers' counsel know when I start receiving documents?

Bjorn Liar Do I really have to answer that question?

Group Discussion:

Scene 3

[**Narrator.** WholePaycheck, a grocery chain based in California, is one of Pennsylvania Pickle Pickers' particularly prosperous pickle customers.]

WholePaycheck has been served with Georgia Jar's broad subpoena. We take you to the San Francisco office of Nicole Anne Dime, WholePaycheck's CEO. Bud Uronner (a partner in the firm of Szell Uronner, WholePaycheck's outside counsel), has just arrived with an associate in tow.]

Nicole Anne: Bud, my friend, come on in. Thanks for coming over so quickly.

Bud Uronner: No problem, Nicole. Glad to be of service. Let me introduce our new associate, Igor Beaver. He graduated at the top of his class from Penn and this is his first week at our firm. He'll be sitting in on our meeting.

Igor Beaver: Hello, Ms. Dime.

Dime: Good to meet you... Igor, was it? Bud, let's get right down to business. We've talked before about that very nasty lawsuit between Pennsylvania Pickle Pickers and Georgia Jars. WholePaycheck's had absolutely nothing to do with it. We're not a party and we've even tried to stay clear of talking about it outside our offices. Despite that, we got a subpoena from Georgia Jars yesterday, demanding that we produce what will amount to thousands of documents and terabytes of electronically stored data in the next 30 days. I don't understand why they're getting us involved. If Georgia Jars needs to know about our sales and returns and other dealings with

Pennsylvania Pickle Pickers, they can get that information from Pennsylvania Pickle Pickers itself without hassling an innocent bystander. It'd cost me lots of extra manpower to get all this information together. Can't you put a stop to this? I'm a grocer, not a data bank!

Bud: Sorry, Nicole, that's not the way the world works. Parties can subpoena uninvolved third parties if they have relevant information. And what's more, unless there's something extraordinary here, you're going to have to bear the expense of responding to the subpoena.

Nicole: What a country! That's certainly not the way I anticipated supporting the national economy. What could they possibly want all this stuff for?

Beaver: [Arrogantly] Ah yes, I know this one. We talked about it in my Advanced Civ Pro class at Penn. It appears that the issue here is determining why Georgia Jars wants all of this information. It's probably looking for evidence to establish that Pennsylvania Pickle Pickers' allegations regarding customer dissatisfaction with Georgia Jars are unfounded and that there's been no

impact on sales of any such claimed dissatisfaction. Or, alternatively, Georgia Jars might be hoping to show that Pennsylvania Pickle Pickers' loss of revenue is caused not by the so-called defects in the jars, but rather by Pennsylvania Pickle Pickers' uncompetitive pricing, poor quality, etc. I'd need more information from the fact pattern to give you a more definite answer, but working off these assumptions...

Uronner: [Annoyed] OK, Igor, that's enough. [Aside to Nicole] The naiveté born of inexperience. [End of aside] My take is that what's going on here is that Georgia Jars is trying to force Pennsylvania Pickle Pickers' hand – perhaps hoping to settle – by threatening its business relations, including those with WholePaycheck, through oppressive subpoenas. I'm willing to bet that you're one on a long list of Pennsylvania Pickle Pickers' customers that have received this subpoena. My sense is that Georgia Jars' principle purpose, if not its only purpose, in serving the subpoena is to harass Pennsylvania Pickle Pickers' customers.

Anyway, what documents does Georgia Jars want?

Dime: Every document we have, it seems like: purchase and sales records for the past ten years of Pennsylvania Pickle Pickers products from each of our eight hundred and forty-six stores; same thing as to Pennsylvania Pickle Pickers' competitors; any complaints about Georgia Jars used by Pennsylvania Pickle Pickers or competitors; any communications from us to Pennsylvania Pickle Pickers; and lots of communications with our other suppliers. And on and on and on. And they keep talking about something called metadata. Is that a laxative like Metamucil? If it is, we don't even carry it at our stores.

Bud No, metadata is not a laxative. Not literally, at least. Metadata is data about data. Does that help?

Dime: Not a bit. But getting back to my question, Bud, what options do I have? Apart from the pain in the butt burden of time and expense, some of the requested documents, if they got out, could really hurt my business. I don't want lists of prices we negotiated with our suppliers to end up in either Georgia Jars' or Pennsylvania Pickle Pickers' pocket picking paws. I won't do it!

Bud: Well, Nicole, first, you can't just thumb your nose at a subpoena. It's essentially a court order. You do have a few options, though. We could seek a court order protecting you from production of certain types of information, or limiting the scope of what you have to give Georgia Jam. But, a court battle could get expensive. And we'd be rolling the dice if we were to argue relevance or burden. You see, the issue would be litigated here in California before a judge who doesn't know much about the case – not in Philadelphia where the underlying case is pending. That's good for you; it saves you the cost of getting a lawyer in Philadelphia, or having to travel there. But a California judge isn't going to know much about the case. A California judge might well err on the side of caution and permit broader discovery requests to make sure that Georgia Jars has the facts it needs to mount a defense.

I suggest that start by talking to Georgia Jars' attorney in Pennsylvania, Bjorn Liar, to see if he will narrow his request. I happen to know him from some ABA meetings.

Dime: Well, I'd rather not make a deal with the devil, if I can avoid it. I agree that you should give Bjorn Liar a call? But let's keep open

the possibility of trying to get Pennsylvania Pickle Pickers' people to obtain the protective order for us. Or at least pay for you to get it.

* * * *

Scene 4

Narrator: WholePaycheck's lawyers are back at their office, and Bud Uronner telephones Georgia Jar's lawyer, Bjorn Liar.

Bud: Hello, Mr. Liar. This is Bud Uronner.

Bjorn Liar: Bud Uronner, how're you doing, my friend? Long time no hear. I remembered that you represent WholePaycheck. I bet you're calling about the subpoena that I dropped on your client.

Uronner: Why, yes I am. By the way, Igor Beaver, my associate, is on the phone as well. Nicole Anne Dime, the WholePaycheck CEO, told us about the subpoena this morning. Any reaction to it from

Pennsylvania Pickle Pickers?

Liar: None as yet. I mailed them copies of all my subpoenas, as Rule 45 requires, just before we served the subpoenas by hand all over the country, so I'm not even sure Pennsylvania Pickle Pickers' lawyers have actually seen the subpoenas yet.

Uronner: You probably know my next question. The subpoena is extremely onerous. Can't we narrow the scope of the documents that you really want?

Liar: Well, my client feels it needs penetrating discovery to establish its defenses and possible counterclaims. But I believe we'd be willing to limit the sales and purchase records to two years, if we can agree on everything else. As for communications with suppliers of other pickle products and condiments, I'll give you a list of some that you can just forget about. That should limit the burden on you further.

Uronner: While we're on the subject, I've got good news and bad news for you. The good news, for your client, is that Pennsylvania Pickle Pickers is still having trouble with its jars and lids. As you know,

they've terminated their dealings with Georgia Jars, and their jars are now being manufactured by a different supplier.

Liar: Who's the new jar manufacturer?

Uronner Peter Piper Pickle Packers. But what makes it interesting is that we're continuing to have complaints about leaky jars, even with the new jar manufacturer.

Liar: Well, I certainly want that correspondence. What's the bad news?

Uronner: The bad news is that we did some internal testing, and we've got correspondence with our independent testing lab that seems to say the problem with the Georgia Jars jars is that they weren't consistently up to spec; the jar mouths aren't perfectly circular, and that's why they leak or are hard to open.

Liar: Well, I certainly don't want that correspondence! Don't turn any of that over.

Uronner OK. I'll ask you to put that in writing, so my client is protected in case your client changes its mind.

Liar Uh, I'm reluctant to do that, but you know you can trust me, Bud.

Uronner: Without commenting on that, what's your deal with Pennsylvania Pickle Packers and its lawyers? Am I supposed to just make a copy of documents for them and serve it when I serve you?

Liar: Absolutely not. Rule 45 doesn't require that. In fact, I'd like this understanding about narrowing the scope of the subpoena to remain just between us. I'd also like for you to agree not to communicate with Pennsylvania Pickle Packers or to give them copies of the documents you gave to us unless they send a subpoena of their own. So far, they haven't asked in their interrogatories and requests for production of copies of subpoenaed documents, and I'm hoping that they don't.

Down the road, before trial, we'll have to give them copies of the documents we intend to use at trial -- the documents that are

good for our side -- but the later the better.

So, do we have a deal?

Uronner: What you've said is interesting. I've got to confer with my client before commenting.

But off the top of my head, it seems like you're asking a lot. You still want us to do really extensive *and* expensive data-mining and production. You're asking us to withhold documents that they other guy would love to have, and your asking me to stonewall one of our own suppliers! Is your client willing to reimburse us for the cost of doing all this discovery in a case where we're not a party?

Let's both talk to our clients, and talk again.

* * * *

[*Narrator*. Bud goes out to lunch. Igor, as is his practice, works through lunch.

The phone rings in Igor Beaver's Office.]

Beaver: [Enthusiastically] Igor Beaver speaking.

Bernadette Bridge: Hi, this is Bernadette Bridge, counsel for Pennsylvania Pickle Pickers. I understand that Bud Uronner represents WholePaycheck. I tried to get him, but he was out to lunch and I was forwarded to you.

Beaver: [Arrogant] Yes, yes, that's right. How can I help you? [Aside: Wow, this is my first call about a real case!]

Bridge: I got a copy of the subpoena that Georgia Jars served on WholePaycheck for a whole raft of documents. I wanted to let WholePaycheck know that we're on the same side here. If it were up to us, you wouldn't be dragged into a fight between Pennsylvania Pickle Pickers and Georgia Jam.

Are you going to be producing all that stuff? If you do, I sure want copies of everything you turn over.

Beaver: [Quickly losing his arrogance] Well, Ms. Bridge [stumbling over his words], I'm afraid I have to refer you on that matter to Bud Uronner. I don't have an answer for you at this time.

Bridge: Wait a minute! Surely you must know that Pennsylvania Pickle Pickers and WholePaycheck have a business relationship stretching back for years.

Beaver Well, you can be sure that we'll comply fully with Rule 45.

Bridge That means nothing. Why can't you just answer my question? It sounds like you're hiding something. When I do talk to Bud, I better find out that that's not the case. [Hangs up].

Narrator: Bud Uronner, returning from a long lunch befitting a senior partner, looks in as he passes by.

Bud: Great lunch. Too bad you weren't invited. Any calls?

Beaver: [Hesitant] Well, yes. I got a call from Bernadette Bridge of Pennsylvania Pickle Pickers inquiring about the WholePaycheck

subpoena. [Flustered but trying to cover up quickly] I tried to put her off but she was really annoyed.

Uronner: Well, over lunch, I brought Bjorn Liar's offer about narrowing the document request to Nicole Anne Dime. She's still weighing the options. On the one hand, she's tempted by the offer to reach an agreement with Georgia Jars without going after a protective order, particularly if Georgia Jar will reimburse our expenses. On the other hand, Dime values WholePaycheck's relationship with Pennsylvania Pickle Pickers. She also suggested another approach from which WholePaycheck could benefit: conditioning our sharing of documents with Pennsylvania Pickle Pickers on some sort of price concession by Pennsylvania Pickle Pickers. Something like: "We'll give you copies of the documents we're producing if you cut the price for your pickles for the next six months."

Igor: Wow! Is that ethical?

Bud: Haven't a clue!

Group Discussion

Scene 5

Narrator: Almost a year has passed. Some of the subpoenaed nonparties have produced documents to Georgia Jar. Others have not. Discovery has closed and the parties have served and filed their pretrial memoranda, including lists of trial exhibits. Georgia Jars' exhibit list includes many documents that were obtained via third-party discovery but never disclosed to Pennsylvania Pickle Pickers. Pennsylvania Pickle Pickers has brought a motion in limine and is also seeking disclosure of the documents that were obtained by the same process but not identified as exhibits.

Next stop: 6th and Market.

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