

## MEMORANDUM

**DATE:** March 14, 2009

**TO:** Professor Richard Marcus

**FROM:** Andrea Kuperman

**CC:** Judge Lee H. Rosenthal

**SUBJECT:** Survey of Issues Regarding Federal Rule of Civil Procedure 45

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This memorandum addresses issues that have been raised in commentary regarding Federal Rule of Civil Procedure 45. The Discovery Subcommittee of the Civil Rules Advisory Committee is currently exploring potential amendments to Rule 45. The Subcommittee requested that I survey the commentary that has been published since the last amendments to Rule 45 became effective in 1991. The goal is to determine what issues have developed so that when the Subcommittee is considering revisions to the Rule, it can address all issues that have come up regarding the Rule's application. In researching the secondary literature, I have focused largely on publications directed to practitioners rather than law review articles, because publications directed to practitioners seem more likely to identify difficulties that have come up in practice regarding application of Rule 45.<sup>1</sup> Below is a list of topics that were discussed in the secondary literature I reviewed. Under each topic, I have listed the articles that discuss that topic, followed by quotations or summaries of the Rule 45

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<sup>1</sup> A search for law review articles and other secondary publications citing Rule 45 since the 1991 amendments became effective reveals thousands of citations. Many of these documents merely cite the Rule without containing substantive discussion. It is difficult to determine the extent of discussion of the Rule in each citation without reviewing all of the documents individually. Because of the large number of secondary sources citing the rule, I have conducted searches for more specific topics within Rule 45, searched in various Westlaw databases for documents containing Rule 45 in the title, and reviewed a large sample of documents citing the rule in different Westlaw databases. I believe these searches have uncovered most of the articles with substantial discussion of Rule 45's application since the 1991 amendments, but I can continue to search for additional articles if the Subcommittee would like further review of secondary literature.

discussion in the article.

### **Cost-Shifting Under Rule 45(c)(2)(B)**

- William R. Maguire, *Current Developments in Federal Civil Litigation Practice: Setting Reasonable Limits in the Digital Era*, 772 PLI/LIT 205 (2008).
  - This article notes that cost-shifting protections in Rule 45(c)(2)(B) are mandatory, but that “a subpoenaed non-party has to object to the subpoena first to preserve its right.” *Id.* at 250 (citations omitted). The article explains that “[a]lthough the decisions are somewhat inconsistent, many courts hold that indemnification under Rule 45(c)(2)(B) includes the reasonable cost of the labor expended to gather and review documents for production, which may include attorneys fees for privilege review, in addition to the actual costs of photocopying.” *Id.* (citations omitted).
  - “Although the affirmative cost protections afforded under Rule 45(c)(2)(B) are technically not triggered until the subpoenaed non-party has objected to production and the party seeking discovery has made a motion to compel, the subpoenaed non-party’s written response may properly include an objection on the ground that the subpoena will impose an undue burden unless the party is indemnified for full costs and expenses. Once a written objection is served, the party seeking disclosure can either negotiate or make a motion to compel, knowing that the court hearing such a motion must grant full costs and expenses to the responding party.” *Id.* at 253 (citing FED. R. CIV. P. 45(c)(2)(B)(ii)).
  - “It is therefore proper and effective for a non-party to demand that the party seeking disclosure undertakes to reimburse the full costs of compliance, including attorneys’ fees, before the non-party will go forward with production.” *Id.*
  - “It should be noted that some courts have been reluctant to apply Rule 45(c) literally. For example, judges have declined to order reimbursement of a non-party’s costs where the non-party was implicated in the events that gave rise to the lawsuit or could otherwise be considered to have an interest in the outcome.” *Id.* at 254. “Courts have sometimes looked at three factors to address this point: ‘whether the nonparty actually has an interest in the outcome of the case, whether the nonparty can more readily bear the costs than the requesting party, and whether the litigation is of public importance.’” *Id.* at 255 (quoting *Linder v. Calero-Portocarrero*, 180 F.R.D. 168, 177 (D.D.C. 1998)).
- Don Zupanec, *Discovery Subpoena – Nonparty – Attorneys’ Fees*, 19 No. 8 FED. LITIGATOR 12 (2004).
  - This article discusses *McCabe v. Ernst & Young, LLP*, 221 F.R.D. 423 (D.N.J. 2004), which held that “[a] nonparty who fails to timely object to a discovery subpoena is not entitled to reimbursement of attorneys’ fees incurred in responding to the subpoena.” 19 No. 8 FED. LITIGATOR 12.
  - In the “Litigation Tips” section, the article notes: “Significant here is the district court’s assumption that attorneys’ fees incurred by a nonparty in complying with a court order compelling production of subpoenaed documents are reimbursable under

Rule 45(c)(2)(B). This is not a universally held view. See *United States v. CBS, Inc.*, 103 F.R.D. 365 (C.D. Cal. 1984). Moreover, there may be a distinction between legal fees incurred for a nonparty's own benefit or for the benefit of the subpoenaing party: the former may not be reimbursable while the latter may. See *Florida Software Systems, Inc. v. Columbia/HCA Healthcare Corp.*, 2002 WL 1020777 (W.D.N.Y. 2002), order vacated in part by, *Florida Software Systems, Inc. v. Columbia/HCA Healthcare Corp.*, 2002 WL 31022885 (W.D.N.Y. 2002)." *Id.*

- "Relevant factors in determining what costs the subpoenaing party should absorb include: (1) the nonparty's interest, if any, in the outcome of the litigation; (2) whether the nonparty can more readily bear the costs than the subpoenaing party; and (3) whether the litigation has 'public importance.'" *Id.* (citing *In re Application of the Law Firms of McCourts and McGrigor Donald*, No. M 19-96(JSM), 2001 WL 345233 (S.D.N.Y. Apr. 9, 2001)).
- Don Zupanec, *Discovery Subpoena – Compliance Costs – Reimbursement*, 21 NO. 6 FED. LITIGATOR 6 (2006).
  - This article discusses *Angell v. Kelly*, 234 F.R.D. 135 (M.D.N.C. 2006), which held that "[o]bjecting to a discovery subpoena does not entitle a nonparty to reimbursement of costs incurred in complying with the subpoena where compliance is voluntary." 21 NO. 6 FED. LITIGATOR 6. Although the third party had objected to the subpoena and stated its intention to claim reimbursement for attorney time spent reviewing the documents, the court held that by voluntarily complying with the subpoena, the third party had waived its right to recover costs. *Id.* The court concluded that the expense of objecting is not a usual Rule 45(c) cost, but is compensable under Rule 37(a), which authorizes awarding costs, including attorneys' fees, incurred in opposing a motion to compel. With respect to the cost of complying with the subpoena, the court held that a nonparty voluntarily complying with a subpoena is not entitled to reimbursement of costs under Rule 45. *Id.* The court found that any recovery had to be based on a voluntary agreement and that the defendants had only agreed to compensate the third party for copying costs. *Id.*
  - The article concludes: "To avoid forfeiting a right to reimbursement, object, and wait for a court order before producing subpoenaed documents." *Id.*
- Alan Blakley, *Sharpen Your Discovery from Nonparties*, 43-APR TRIAL 34 (2007).
  - This article contains general discussion regarding obtaining electronic discovery from nonparties. The article notes that one case has set out factors to consider in determining whether to shift costs to the requesting party, including: the request's scope, the request's invasiveness, the need to separate privileged material, the nonparty's financial interest in the litigation, whether the party seeking production ultimately prevails, the relative resources of the party and the nonparty, the reasonableness of the costs sought, and the public importance of the pending litigation. *Id.* at 37 (citing *Tessera, Inc. v. Micron Technology, Inc.*, No. C06-80024MISC-JW(PVT), 2006 WL 733498, at \*10 (N.D. Cal. Mar. 22, 2006)). "The

[*Tessera*] court took the factors from William W. Schwarzer et al., *Federal Civil Procedure Before Trial* ¶¶ 11:2308-2309 (the Rutter Group 2004), which notes that ‘ordinarily, attorney fees and overhead costs will not be allowed.’ However, if the subpoena is quashed, the court may impose sanctions that could include attorney fees.” *Id.* at 37 n.14 (citing Schwarzer et al., at ¶ 11:2311).

- *Document Production from Non-Parties – Trade Associations – Costs*, 8 No. 2 FED. LITIGATOR 46 (1993).
  - This article examines a subpoena at issue in *In re The Exxon Valdez*, 142 F.R.D. 380 (D.D.C. 1992), where the court held that “[a]lthough new Rule 45(c) requires the discovering party to bear the major portion of a non-party’s costs of producing and copying subpoenaed documents, a non-party trade association may have to bear that portion of its costs that equals the percent of its income attributable to dues paid by the parties opposing the discovering party.” *Id.* at 46. “The court stated that the new rule’s mandatory language represented a clear change from former Rule 45(b) which gave district courts discretion to condition the enforcement of a subpoena on the discovering party’s paying the costs of production. The court also stated, however, that protection from ‘significant expense’ does not necessarily mean that the discovering party must bear the entire cost of compliance, particularly where, as here, doubt has been cast on the subpoenaed party’s status as a non-party.” *Id.* at 47. The article further notes: “The court stated that while it was clear that drafters of new Rule 45 intended to expand the protection for pure non-parties such as disinterested expert witnesses, there was no indication that they also intended to overrule prior Rule 45 case law, under which a non-party could be required to bear some or all of its expenses where the equities of a particular case demanded it. Under that case law, it is relevant to inquire whether the putative non-party actually has an interest in the outcome of the case, whether it can more readily bear its costs than the discovering party, and whether the litigation is of public importance.” *Id.* (internal citation omitted).
- *Subpoena – Compliance Costs – Reimbursement*, 14 No. 7 FED. LITIGATOR 173 (1999).
  - This article discusses *In re First American Corp.*, 184 F.R.D. 234 (S.D.N.Y. 1998), where the court found that “[l]egal fees incurred by nonparties in complying with an order to produce documents or other materials in response to a subpoena are reimbursable under F.R.C.P. 45(c)(2)(B).” 14 No. 7 FED. LITIGATOR at 173. The court granted a third-party’s request for reimbursement of certain expenses incurred in complying with a subpoena, including legal fees, but found that “[p]rotection from significant expense does not mean that the subpoenaing party necessarily must bear the entire cost of compliance,” and that “[f]actors that are relevant in determining how much of the cost is recoverable include the nonparty’s interest, if any, in the outcome of the case, whether it can bear the cost more readily than the subpoenaing party, and whether the litigation is of public importance.” *Id.* at 174 (citations omitted).
  - In the “Litigation Tips” section, the article notes: “Typically, reimbursement covers

the cost of inspection and copying – the functions specifically referred to in the rule. But nothing in the rule necessarily limits recovery to these costs. As the court pointed out, the Advisory Committee Note states that nonparties ordered to comply with a subpoena are protected against ‘significant expense resulting from involuntary assistance to the court.’” *Id.*

- Alan Blakely et al., *The Sedona Conference® Commentary on Non-Party Production & Rule 45 Subpoenas*, 9 SEDONA CONF. J. 197 (2008) [hereinafter *Sedona Commentary*].
  - “Rule 45 contains a potential internal inconsistency that no court has yet addressed. Well before the 2006 amendments, Rule 45(c)(2)(B)(ii) was amended to protect a non-party under an order to compel from ‘significant expense’ related to the production. There is a significant body of case law applying that requirement in the pre-2006 amendment context. Rule 45(d)(1)(D) now has been amended to allow a non-party to object to discovery that is ‘not reasonably accessible because of undue burden or cost.’ The interplay between these two provisions has not yet been examined. Must a non-party first object and show that the material sought by a subpoena is not reasonably accessible due to undue burden or cost, and then when opposing a motion to compel based on the same subpoena, plead ‘significant expense?’ Are these standards the same? Will courts automatically protect a non-party from ‘significant expense’ if, during the process, the non-party has shown ‘undue burden or cost?’” *Id.* at 199.
  - “Whether a non-party will be able to shift the cost of attorney review is an open question, but some courts have allowed such shifting.” *Id.* at 200 (citing *In re Application of the Law Firms of McCourts and McGrigor Donald*, No. M. 19-96, 2001 WL 345233, at \*3 (S.D.N.Y. Apr. 9, 2001); *In re Auto. Refinishing Paint Antitrust Litig.*, 229 F.R.D. 482, 496 (E.D. Pa. 2005)).
  - “In *Tessera[, Inc. v. Micron Tech., Inc.]*, No. C06-80024MISC-JW(PVT), 2006 WL 733498 (N.D. Cal. Mar. 22, 2006)], the Northern District of California sets forth eight factors in determining whether to shift cost to the requesting party: (1) the scope of the request; (2) the invasiveness of the request; (3) the need to separate privileged material; (4) the non-party’s financial interest in the litigation; (5) whether the party seeking production of documents ultimately prevails; (6) the relative resources of the party and the non-party; (7) the reasonableness of the costs sought; and (8) the public importance of the litigation.” *Id.* (footnotes omitted). The Sedona Commentary suggests as a Best Practice that these factors be considered in connection with cost-shifting discussions. *Id.* at 202.
- John K. Villa, *The Subpoena Surprise: Cost-Shifting in Discovery Requests*, 24 No.6 ACC DOCKET 76 (2006).
  - “[T]he failure to timely object can constitute a waiver of the nonparty’s right to reimbursement: a prerequisite to the nonparty’s invoking these protections is service of written objections or conditioning compliance on the reimbursement of expenses within the 14-day period. Thus a nonparty cannot first comply with a subpoena and



- later seek reimbursement for the costs of compliance.” *Id.* at 77 (footnote omitted).
  - “As construed by one court, there are only two inquiries under subsection (c)(2)(B): ‘whether the subpoena imposes expenses on the non-party, and whether these expenses are ‘significant.’” What is ‘significant expense’? In making this determination the court has discretion and may consider factors such as the nonparty’s interest in the outcome of the litigation or even the nonparty’s superior ability to bear the costs of production.” *Id.* (footnotes omitted).
  - “Even if the subpoenaed party does not object, the court may as a matter of discretion grant costs in ruling on the nonparty’s motion to quash claiming undue burden. It does so by conditioning enforcement of the subpoena on the issuing party’s payment of these costs. In making this determination courts have considered: the scope of discovery; the depth of the invasion involved in the request; the extent to which the producing nonparty must separate responsive information from privileged or even irrelevant material; and the reasonableness of the expenses. Also relevant is the nonparty’s interest in the outcome of the litigation.” *Id.* at 77–78 (footnotes and internal bullet points omitted).
- John F. Baughman & H. Christopher Boehning, *Amended Rule 45, Shifting Non-Party Attorney’s Fees*, 10/24/2006 N.Y. L.J. 5, (col. 1) (2006).
  - This article discusses uncertainty in whether attorneys’ fees can be shifted after the electronic discovery amendments, noting that “[i]t is clear that courts have the authority to shift attorney-review costs from non-party subpoena recipients onto requesting parties, and [that] in the world of paper discovery, such shifting did happen.” *Id.* The article notes that a three-factor test was developed for shifting attorneys’ fees in *In re Application of the Law Firms of McCourts & McGrigor Donald*, No. M. 19-96, 2001 WL 345233 (S.D.N.Y. Apr. 9, 2001), including “(1) whether the non-party actually had an interest in the outcome of the litigation, (2) whether the non-party could more readily bear the costs than the requesting party, and (3) whether the litigation was of public importance.” 10/24/2006 N.Y. L.J. 5.
  - The article notes that “cost-shift of attorney’s fees has been slow to manifest itself in the world of e-discovery,” but suggests that the factors used by the *Zubulake* decisions for cost-shifting, although outside the context of nonparty subpoenas, would provide a useful framework for considering cost-shifting of attorneys’ fees for reviewing electronically stored information. Those factors include: (1) “The extent to which the request is specifically tailored to discover relevant information”; (2) “The availability of such information from other sources”; (3) “The total cost of production, compared to the amount in controversy”; (4) “The total cost of production, compared to the resources available to each party”; (5) “The relative ability of each party to control costs and its incentive to do so”; (6) “The importance of the issues at stake in the litigation”; and (7) “The relative benefits to the parties of obtaining the information.” *Id.* The article argues that the first two factors have particular relevance to the nonparty context. *Id.* Finally, the article argues that “because the presumption that producing parties must bear their own review costs does not necessarily hold true in the non-party context, the *Zubulake* court’s outright rejection

of attorney-review cost shifting in the circumstances of that case need not be a bar to shifting such costs in favor of non-parties once amended Rule 45 takes effect.” *Id.*

### **Sanctions (Against Either the Requesting Party or the Subpoenaed Party)**

- *Document Production from Non-Parties – Trade Associations – Costs*, 8 NO. 2 FED. LITIGATOR 46 (1993).
  - This article explains that the only sanction available under Rule 45 is contempt: “Plaintiffs sought sanctions under F.R.C.P. 37 (discovery sanctions). The court held, however, that Rule 37, by its terms, applies only to a motion to compel production from a party under Rule 34. Rule 34, in turn now provides that motions to compel production from non-parties are governed by Rule 45. The only sanction provided by Rule 45 is contempt. Contempt was not available here because API had timely objected to the subpoena, and plaintiffs had not attempted to obtain an order compelling production for more than a year.” *Id.* at 48.
- Gregory P. Joseph, *Assessing Federal Rule 45*, 12/28/92 NAT’L L.J. 23, (col. 1) (1992).
  - “If the serving party fails to provide other parties to the lawsuit with the requisite notice that the document subpoena has been served, the likely remedy is preclusion from offering the produced documents into evidence at trial.” *Id.* (citing *BASF Corp. v. Old World Trading Corp.*, No. 86 C 5602, 1992 WL 24076 (N.D. Ill. Feb. 4, 1992)).
  - “If the recipient should decline to produce properly subpoenaed documents, Rule 45 specifies a contempt remedy. A new second sentence added to subdivision (e) of the rule in 1991 eliminates contempt power, however, if the third party is required to travel more than 100 miles to produce the documents or attend a deposition.” *Id.* (footnote omitted).
  - “Rule 37 sanctions are applicable only to motions to compel brought for violation of Rule 34. Rule 34(c) was amended in December 1991 to provide that nonparty document production is compelled not pursuant to Rule 34 but, rather, pursuant to Rule 45. Accordingly, no Rule 37 sanctions are available for third-party noncompliance with a document subpoena.” *Id.* (footnotes omitted).

### **Nonparties’ Duty to Preserve**

- Alan Blakley, *Sharpen Your Discovery from Nonparties*, 43-APR TRIAL 34, 39 (2007) (noting that “[n]o rule requires a party or nonparty to enter a litigation hold – to preserve any materials that may be relevant to potential or pending litigation,” but that such a duty “has developed from the law of spoliation and sanctions as a common law duty”).
- *Sedona Commentary, supra.*
  - “Some courts place a burden on the party to have the non-party preserve the evidence. And at least one court has ruled that the issuance of a subpoena to a third party imposes a legal obligation on the third party to preserve information relevant to the subpoena including ESI, at least through the period of time it takes to comply with the subpoena and resolve any issues before the court.” *Id.* at 199 (footnotes omitted). “Case law does not require a non-party to continue to preserve materials after they

- have taken reasonable measures to produce responsive information.” *Id.*
- Among the suggested Best Practices is the suggestion that “[a]bsent a contractual or other special obligation, the non-party’s duty to preserve typically begins upon receipt of a subpoena.” *Id.* at 202.

### **Service of Subpoenas**

- Alan N. Greenspan, *Process and Subpoenas in Federal and Texas State Courts*, 46 BAYLOR L. REV. 613 (1994).
  - “No rules or case law in either federal or state court address service of subpoenas on corporations, partnerships, or other business entities. In federal court, the court in *Matter of Electric & Musical Industries, Ltd.*, [155 F. Supp. 892 (S.D.N.Y. 1957)], implied that service may be accomplished by the methods provided in Rule 4. It would seem logical to rely on the method most likely to provide actual notice to the witness.” *Id.* at 630 (footnotes omitted).
- Orlee Goldfeld, Note, *Rule 45(b): Ambiguity in Federal Subpoena Service*, 20 CARDOZO L. REV. 1065 (1999).
  - “[H]istorically, most courts have held that Rule 45 requires personal service, which mandates that the person serving the subpoena must physically hand the subpoena to the witness. These courts have held other types of service invalid. However, . . . some courts have recently held that substituted service satisfies the Rule’s service provision.” *Id.* at 1065–66 (footnotes omitted).
  - “Rule 45’s service requirement is ambiguous and has led to conflicting holdings in different jurisdictions, leaving practitioners unable to rely on the Rule’s language. These holdings have caused a state of confusion regarding which methods of service attorneys may employ to properly serve witnesses with subpoenas. Until there is some clarification as to Rule 45’s service provision, practitioners will remain uncertain as to whether they have choices regarding service of subpoenas.” *Id.* at 1066 (footnotes omitted).
  - “The position adopted by most courts (‘majority position’) is that Rule 45 limits ‘delivering’ to personal, in-hand service. At the time of the Rule’s last amendment in 1991, no court had deviated from such a position. Since that time, however, a few courts have begun a new trend of allowing other methods of subpoena service (‘minority position’). Many other courts have not yet spoken on this issue, leaving practitioners and commentators uncertain as to the Rule’s requirements.” *Id.* at 1071 (footnotes omitted).
  - “In addition, unlike service of papers other than a summons[,] some courts have not permitted service of a subpoena on a witness’s attorney or any other person.” *Id.* at 1072 (footnotes omitted).
  - “Courts have articulated several grounds for holding that Rule 45(b) permits only personal service. First, courts have looked at the language of the Rule and have found that it does not authorize any other method of service. Because the Rule’s language states only that service shall be made by ‘delivering’ a copy of the subpoena



to the witness, courts have found that, when the drafters of the Rule used the word ‘delivering’ without any elaboration, they intended personal delivery only and rejected any other method of service.” *Id.* at 1073 (footnotes omitted). “In addition, courts have reasoned that Rule 45 exclusively requires personal service because its language does not provide courts with any discretion to authorize other methods of service, leaving the courts’ proverbial hands tied.” Goldfeld, *supra*, at 1073. “Apart from language, courts have cited precedent as a reason for not permitting any other type of service.” *Id.* at 1074 (footnote omitted). The article notes that courts have also relied on treatises and commentators that “summarily maintain, without any explanation, that Rule 45(b)’s service provision requires personal service.” *Id.* (footnote omitted).

- “[A] strong policy reason justifies the minority position, since permitting substituted service helps dovetail subpoena service with the overriding spirit of efficiency of the Federal Rules as detailed in Rule 1 of the Federal Rules . . . .” *Id.* at 1077.
- “If Rule 45 only allows personal service, as courts in the majority position hold, a requirement of specifying the manner of service when filing proof of service [as provided in FED. R. CIV. P. 45(b)(3)] would be superfluous and unnecessary.” *Id.* (footnotes omitted).
- The article also notes differences between Rule 4 and Rule 45: “For example, Rule 45 does not include a provision on how service is to be effectuated upon a corporation. Thus, courts have adopted the requirements of Rule 4(h) to determine how to serve a corporation with a subpoena. . . . Rule 45 incorporates state law only with regard to the place of service. Rule 45 provides that a subpoena may be served ‘at any place within the state where a state statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place of the deposition, hearing, trial, production, or inspection specified in the subpoena. Rule 45 does not include state provisions on the method of service. Thus, while a plaintiff may serve a summons in any way permitted by both federal and state law, that same plaintiff is limited with regard to service of a subpoena. Although the subpoena may only be served by the method or methods authorized by federal law—which itself is unclear—the location for service may be governed by the law of the state in which the federal district court sits.” *Id.* at 1081–82 (footnotes omitted). The author argues that the methods of service permitted in Rules 4 and 45 should be consistent. Goldfeld, *supra*, at 1082.
- “All states have provisions for subpoenas that include service requirements. An examination of the states’ subpoena service rules reveals that, although they based their rules on the Federal Rules, many states have deviated from Rule 45. This deviation suggests that states have rejected the language of Rule 45 because it does not adequately meet the states’ requirements for subpoena service.” *Id.* at 1082–83 (footnotes omitted).
- “Methods of substituted service that are reasonably calculated to reach the witness should be embraced as alternatives to personal service. These methods of service afford reliable means of transmitting a subpoena to witnesses and are less costly and less time-consuming than personal service. The alternative means of service

permissible under Rule 4 and state subpoena provisions provide a good starting point from which to explore those substituted service methods that Rule 45 should permit.” *Id.* at 1086–87 (footnotes omitted).

- The author suggests that the following alternative methods of service be permissible under Rule 45: “registered or certified mail with return receipt requested . . .”; “abode service”; and service “on a nonparty’s agent.” *Id.* at 1087–88.
- “A motivation for clarifying Rule 45’s service requirement is the elimination of courts’ adjudication of what constitutes proper service under Rule 45. Litigants would conserve judicial resources if they no longer burdened courts with this issue. A hearing or motion practice relating to service of a subpoena shifts the parties’ and the court’s focus from the merits of the case to an ancillary issue, incurs additional expenses for litigants, and expends the court’s resources.” *Id.* at 1088.
- “To obviate the need for judicial determination of Rule 45’s requirements, the drafters of the Rule should clarify its service provision. This may be achieved by amendment to the language of Rule 45(b). If the drafters of the amendment wish to follow the majority position, they should insert the word ‘personally’ into the text of the Rule. The language of the Rule should then read: ‘Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such individual personally . . . .’ Alternatively, and preferably, the service provisions of Rule 45 should mimic Rule 4’s service provision, which provides several different modes of service. Rule 45 should permit varied methods of service that are reasonably calculated to reach nonparties and provide them with notice of litigants’ requests for information. The proposed language of the revised Rule 45(b) should therefore state:

Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to the individual personally; or by leaving a copy thereof at the individual’s dwelling house or usual place of abode with some person of suitable age and discretion then residing therein and by mailing an additional copy thereof by first class mail to the individual at the dwelling house or usual place of abode; or by mailing a copy of the subpoena by certified or registered mail, return receipt requested; or by delivering a copy thereof to an agent authorized by appointment or by law to receive service of process.”

*Id.* at 1089 (footnotes omitted).

- John E. Bowerbank, *Do’s and Don’ts About a Nonparty’s Response to Federal and State Court Deposition Subpoenas Involving Civil Litigation*, 48-JUN ORANGE COUNTY LAWYER 38, 41 (2006) (“Unlike a summons and complaint, there is no substitute service of a subpoena. In both federal and [California] state court, the subpoena must be personally served on the nonparty.”).
- Don Zupanec, *Subpoena Duces Tecum – Service*, 20 NO. 11 FED. LITIGATOR 12 (2005).
  - This article examines the decision in *Hall v. Sullivan*, 229 F.R.D. 501 (D. Md. 2005),

which held that “[a] subpoena requiring production of documents by a nonparty need not be served personally.” 20 NO. 11 FED. LITIGATOR 12. The court noted that “delivering” in Rule 45 is not defined, that Rule 45(b)(1) says nothing about personal service, and that Rule 4(e) states that a summons and a complaint may be served “personally,” pointing out that “personally” could have been included in Rule 45(b)(1) if personal service was required. *Id.*

- The article explains: “This is an issue on which agreement remains elusive. The traditional (and probably still predominant) position is that a subpoena must be served personally, *i.e.*, by delivering it in-hand to the person served. However, a number of recent rulings reject the personal service requirement and allow service by other means. These include certified mail, Federal Express, or substituted service as provided for by F.R.C.P. 5(b). Service as provided for by state rules may also be permissible.” *Id.* (internal citations omitted).
- *Only Personal Service Permissible for Subpoena; Mail Service Quashed*, 24 SIEGEL’S PRAC. REV. 4 (1994) (“Personal delivery is the only method specified for a subpoena, which is a contrast to service of a federal summons under Rule 4, for which a variety of methods are available.”; noting one case that upheld certified mail as proper service of a subpoena, but that New York federal cases have held that mail service is not sufficient).
- *Need to Serve a Subpoena? Put It in the Mail*, 9 NO. 8 FED. LITIGATOR 240 (1994) (noting that in *Doe v. Hersemann*, 155 F.R.D. 630 (N.D. Ind. 1994), the court found that a subpoena could be served by certified mail and that hand delivery is not always required).
- *State Methods Also Apply to Federal Subpoena, so State Substituted Service Is Available for Subpoenas, Too*, 72 SIEGEL’S PRAC. REV. 4 (1998).
  - This article notes that in *King v. Crown Plastering Corp.*, 170 F.R.D. 355 (E.D.N.Y. 1997), the court held that despite the majority position requiring personal service of subpoenas, Rule 4(e), which adopted state methods for summons service, should also apply to subpoenas. 72 SIEGEL’S PRAC. REV. 4. The court noted that “by requiring proof of service to refer to the ‘manner of service’, Rule 45(b)(3) necessarily implies that several methods are possible.” *Id.* The article states: “While this seems to us a supportable construction, the mere fact that the majority view is to the contrary suggests that it is best, if at all possible, to effect the service of the subpoena by in-hand delivery.” *Id.*
- Richard G. Placey, *Developing Evidence from Nonparties*, 25 NO. 3 LITIGATION 32 (1999) (noting that subpoenas must be personally served under FED. R. CIV. P. 45).
- Jason A. Grossman, *Federal Court Discovery*, 642 PLI/LIT 331 (2000).
  - “Service of a subpoena, however, is not governed by FRCP 5, but rather by FRCP 45. FRCP 45 provides that a subpoena must be served by delivering a copy of the document to the person named therein (*i.e.*, personal in-hand delivery) . . . . As such, substitute service is not an option for the service of a subpoena. However, required

notice of the subpoena that must be served upon all parties to the action may be served in accordance with FRCP 5.” *Id.* at 339 (footnote omitted).

- Adrienne B. Koch, *Service of Subpoenas Under Rule 45 and the Influence of Treatises*, 7/1/2004 N.Y. L.J. 4, (col. 4) (2004).
  - This article argues that there is confusion in the treatises and case law as to whether personal service of subpoenas is required. It argues that Rule 5 defines “delivering” and distinguishes it from other methods of service. *Id.* The article points out that the language in Rule 45 can be contrasted with the language in Rule 4, providing methods for service that include personal delivery, which, according to the article, “suggests that the drafters understood how to provide for personal delivery when they intended to do so.” *Id.* The article further argues that any doubt about the meaning of “delivering” in Rule 45 should have been dispelled in 1991 when Rule 45(b)(3) was added to provide that proof of service would include an indication of the manner of service. *Id.*
  - The article argues that the issue has been resolved by a Second Circuit decision that has largely been ignored. It points out that in *First City, Texas – Houston, N.A. v. Rafidain Bank*, 281 F.3d 48 (2d Cir. 2002), the Second Circuit affirmed a district court holding that service was valid under the parties’ agreement and Rule 45 when the subpoena had been left in a conspicuous place at the bank’s agent’s place of business. The article argues that “[b]y holding that this manner of service – which did not involve personal delivery, but did involve ‘delivery’ in a manner expressly included in Rule 5’s definition of the term [specifically, in Rule 5(b)(2)(A)] – satisfied the requirements of Rule 45, the Second Circuit appears to have resolved an issue that had been the subject of a conflict among the lower courts.” *Id.* The article laments that “the Second Circuit did not mention that it was resolving such a conflict,” and states that “the extent to which the potential import of this decision will be recognized remains to be seen,” and that “[t]he treatises have continued to express the view that personal delivery is required as a matter of law in the Second Circuit.” *Id.* The article also notes that the treatises and case law have relied on *Federal Trade Commission v. Compagnie de Saint-Gobain-Point-a-Mousson*, 636 F.2d 1300, 1312–13 (D.C. Cir. 1980), to find a personal delivery requirement in Rule 45, but argues that that case considered only whether a Federal Trade Commission subpoena was properly served on a foreign corporation by registered mail and only looked to Rule 45 by way of analogy. *Id.*
  - The article contends that “Rule 5 provides a workable and clear standard in its definition of ‘delivery’ as a subset of the types of ‘service’ it describes,” but notes that “no court has adopted it,” and that “some courts that have rejected a personal service requirement under Rule 45 have permitted service in ways inconsistent with Rule 5’s definition of ‘delivery.’” *Id.* (footnote omitted).
- David D. Siegel, *Federal Subpoena Practice Under the New Rule 45 of the Federal Rules of Civil Procedure*, 139 F.R.D. 197 (1992).
  - “No change is made in method [of service], alas. The method is still by ‘delivering’

the subpoena to the person to be served. Subdivision (b)(1). The substituted methods available for summons service under Rule 4 are not available for a subpoena, such as by delivery to a person of suitable age and discretion at the witness's dwelling house under Rule 4(d)(1). The word 'delivering' has been rigidly construed." *Id.* at 207 (citing *Fed. Trade Comm'n v. Compagnie de Saint-Gobain-Pont-A-Mousson*, 636 F.2d 1300 (D.C. Cir. 1980)).

### **Requirement of Notice to Other Parties**

- Henry L. Hecht, *How to Prepare and Serve a Federal Notice of Deposition or Subpoena (with Forms)*, 18 No. 6 Prac. Litigator 9 (2007).
  - "A party noticing a deposition of any person must give 'reasonable notice' in writing to every other party to the action. Rule 30(b)(1). The Rule for issuance of a Subpoena does not specify a statutory notice period, but the rule does refer to 'reasonable time for compliance.'" *Id.* at 11 (citing FED. R. CIV. P. 45(c)(2)).
- *Subpoena – Notice – Service*, 14 No. 2 FED. LITIGATOR 44 (1999).
  - This article discusses *Biocore Medical Technologies, Inc. v. Khosrowshahi*, 181 F.R.D. 660 (D. Kan. 1998), which held that "[p]rior notice' of a nonparty subpoena for production or inspection is notice prior to service, not notice prior to the return date." 14 No. 2 FED. LITIGATOR at 44.
  - In the "Litigation Tips" section, the article notes: "Rule 45(b)(1) requires 'prior notice' to each party. The purpose is to give parties an opportunity to object to the subpoena. Objection would not be possible if notice were sufficient as long as it is given prior to the return date. Since service by mail is complete upon mailing (Rule 5(b)), notice could be mailed as late as one day before the return date. Obviously, this would effectively eliminate any opportunity to object." *Id.* at 45.
- Gregory P. Joseph, *Assessing Federal Rule 45*, 12/28/92 NAT'L L.J. 23, (col. 1) (1992) ("If the serving party fails to provide other parties to the lawsuit with the requisite notice that the document subpoena has been served, the likely remedy is preclusion from offering the produced documents into evidence at trial.") (citing *BASF Corp. v. Old World Trading Corp.*, No. 86 C 5602, 1992 WL 24076 (N.D. Ill. Feb. 4, 1992)).
- David D. Siegel, *Federal Subpoena Practice Under the New Rule 45 of the Federal Rules of Civil Procedure*, 139 F.R.D. 197 (1992).
  - "[T]he party who has to rely on a subpoena under Rule 45 to get those papers, or for that matter on any other judicial process, can't do it without notice to all other parties to the action. Under the last sentence of subdivision (b)(1) of Rule 45, the party who seeks pretrial production of documents from a non-party through use of a subpoena duces tecum must serve notices on all the other parties. This requirement of notice of a pretrial subpoena duces tecum is analogous to what Rule 30(b)(1) requires when it is a deposition that is sought of a person (party or nonparty): all the other parties must be given notice of the time and place of the examination and of all related particulars." *Id.* at 207.



- Roger W. Kirst, *Filling the Gaps in Federal Rule 45 Procedure for Nonparty Nondeposition Document Discovery*, 205 F.R.D. 638 (2002).
  - This article discusses what the author views as a gap in Rule 45 regarding protection for the party who is the subject of the documents to be produced by a nonparty. “The single mention of an undefined period of prior notice in Rule 45(b)(1) creates a risk that the party who is the subject of the documents will be harmed by improper disclosures before that party has a chance to object or seek a protective order.” *Id.* at 638. “Since the period of notice is not defined, every party can only guess about how watchful they must be for a nondeposition subpoena seeking their records from a nonparty. A growing list of reported decisions that document instances in which prior notice was not given provides a reason to reexamine the details of Rule 45.” *Id.* The author laments that “the 1991 amendment [to Rule 45] created a procedure that appears to require no cooperation at all. Counsel does not have to coordinate schedules with anyone, does not have to arrange for a court reporter or a location for a deposition, and does not have to ask anyone else to issue the subpoena.” *Id.* at 640.
  - “The courts that have written opinions have consistently held that the party serving the subpoena must provide prior notice, but they have not answered all of the questions about Rule 45(b)(1). Recent trial court opinions hold that the prior notice must precede issuance of the subpoena, but have not tried to define the period of notice.” *Id.* at 641 (citing *Schweizer v. Mulvehill*, 93 F. Supp. 2d 376, 411 (S.D.N.Y. 2000); *Murphy v. Bd. of Ed.*, 196 F.R.D. 220 (W.D.N.Y. 2000)).
  - “Other reported cases have shown where the language of Rule 45(b) is incomplete. For example, some courts have borrowed the 14-day time limit in Rule 45(c)(2)(B) during which the nonparty is required to comply with the subpoena and held that a later objection from the party who is the subject of the documents is untimely.” *Id.* (citations omitted). “The only way to be sure a party who is the subject of the documents will have time to object is to provide notice to all parties before the subpoena is served on the custodian. The courts have agreed with that conclusion when the issue has been raised, but they have not defined the amount of notice that is required or suggested where a party might turn for an authoritative definition of an adequate time.” *Id.* at 642.
  - One proposal suggested in the article is that state rules requiring notice to other parties of nonparty document subpoenas could be adopted in federal court. “The most common state adaptation has been a definition of a specific period of notice to all other parties in order to allow them to object or take other action.” *Id.* “[T]he consensus of the state adaptations of Rule 45 is that the best rule would require notice to all parties for the defined period before the subpoena is served,” and “that an objection should be sufficient to stop issuance and service of a nonparty nondeposition subpoena.” *Id.* at 644.
  - Another suggestion in the article is that the scheduling order can address gaps in Rule 45. *Id.* at 643–45.
  - “The language of Rule 45 does not address the procedure to follow if an objection prevents a party from using the nonparty nondeposition subpoena to obtain

documents. The most direct procedure under the current rules may be a motion by the party seeking the documents for an order under Rule 26(c). While the catchline refers to a protective order, the language of the rule permits the court to decide whether the material is discoverable and the methods by which it may be obtained. The cross reference in Rule 26(c) to Rule 37(a)(4) also permits the court to assess expenses and attorney's fees for bad faith efforts to obstruct a proper discovery request." *Id.* at 644.

- "At present[,] Rule 45 does not define how or whether the other parties can get duplicate copies of the documents provided by the nonparty in response to the subpoena. The emphasis in Rule 45(c)(1) on protecting the non-party from burdens and expense suggests that a single production should be sufficient and that the parties should be able to share the additional copying and distribution, but cooperation among counsel to reduce the burden on a nonparty may not happen in a contentious case. This may be a less frequent problem when a deposition is used to obtain records because the court reporter is responsible for producing the transcript and exhibits, but the use of a nondeposition subpoena means there is no court reporter. The details of the cooperation required by Rule 45(c) could also be addressed in the scheduling order." *Id.*

### **Resisting Subpoenas – Burden Shifting**

- John E. Bowerbank, *Do's and Don'ts About a Nonparty's Response to Federal and State Court Deposition Subpoenas Involving Civil Litigation*, 48-JUN ORANGE COUNTY LAWYER 38 (2006).
  - "A common misconception about nonparty deposition subpoenas is that a responding nonparty (or party other than the subpoenaing party) can always file written objections to any subpoena to shift the burden to the demanding party to move to compel compliance with the subpoena. Beware: simply serving written objections is insufficient in certain cases." *Id.* at 43.
  - "Whether a nonparty can merely serve written objections depends on the type of subpoena. In federal court a nonparty (or litigant) challenging a subpoena for 'testimony only' must bring a motion to quash, motion to modify the subpoena, or motion for a protective order prior to the date of production. However, a nonparty responding to subpoenas involving production of documents can merely serve written objections to shift the burden to compel production to the subpoenaing party." *Id.* (citing FED. R. CIV. P. 45(c)(2)(B)).
- Jason A. Grossman, *Federal Court Discovery*, 642 PLI/LIT 331 (2000).
  - "A person commanded to produce documents may, within 14 days after service of the subpoena (or before the time specified for compliance if such time is less than 14 days after service), serve upon the party designated in the subpoena a written objection to inspection or copying of any or all of the designated materials. (see FRCP 45(c)(2)). If such an objection is made, the party serving the subpoena is not entitled to inspect and copy the materials (or inspect the premises) except pursuant to an order of the court by which the subpoena was issued. It is important to note that this 14-day time

limit for objections does not apply to deposition subpoenas.” *Id.* at 339.

- Michael Traynor & Lori Ploeger, *Hot Topics in Electronic Discovery*, 712 PLI/PAT 51, 61 (2002) (“If the subpoenaed party objects [to a subpoena requesting electronic information], the burden is on the requesting party to seek an order compelling production.”) (footnote omitted).
- Gregory P. Joseph, *Assessing Federal Rule 45*, 12/28/92 NAT’L L.J. 23, (col. 1) (1992) (“A timely objection [to a subpoena for documents] frees the subpoenaed person from any obligation to make production under subdivision (c)(2)(B). The burden is on the issuing party to obtain an order compelling production.”).
- John P. Woods, *Basics of Accounting for Lawyers 2008 : What Every Practicing Lawyer Needs to Know*, 1684 PLI/CORP 165, 187 (2008) (citing *Bouwkamp v. CSX Corp.*, 2007 U.S. Dist. Lexis 2834, at \*5–6 (N.D. Ind. Jan. 12, 2007), for the proposition that the “objecting party must show with specificity that the request is improper[’]”).
- David D. Siegel, *Federal Subpoena Practice Under the New Rule 45 of the Federal Rules of Civil Procedure*, 139 F.R.D. 197 (1992).
  - Where the subpoenaed party feels there is inadequate time to respond to the subpoena, “the subpoenaed person need only serve on the party or attorney designated in the subpoena a ‘written objection’ to the production of the documents, and that mere service of the objection shifts the initiative to the party in whose behalf the subpoena was issued to move to compel compliance.” *Id.* at 208. “But the cited provision [Rule 45(c)(2)(B)] doesn’t apply to the testimonial witness. If that witness has some excuse for not appearing, the witness for its own protection, does best either to appear or to move to quash before an appearance is due.” *Id.* at 238.

### **Return Time for Subpoena**

- David D. Siegel, *Federal Subpoena Practice Under the New Rule 45 of the Federal Rules of Civil Procedure*, 139 F.R.D. 197, 207 (1992) (noting that no specific time period is set forth in Rule 45 for when a subpoena is returnable, but that “[t]he bar understands the rule to be that a ‘reasonable’ time must be allowed,” and “[w]hat is reasonable is not defined,” but “depends on the circumstances”).
- Jason A. Grossman, *Federal Court Discovery*, 642 PLI/LIT 331, 338 (2000) (“There is no fixed time limit for service of a subpoena under FRCP 45, as the same ‘reasonable’ notice standard of FRCP 30 is a guideline.”).

### **Effect of Motion to Quash**

- David D. Siegel, *Federal Subpoena Practice Under the New Rule 45 of the Federal Rules of Civil Procedure*, 139 F.R.D. 197, 239 (1992) (“While technically there is no automatic stay of compliance upon the mere making of a motion to quash a subpoena, there is a general understanding that compliance may be withheld until the court rules on the motion.”).

### **Electronic Discovery Issues Regarding Subpoenas**

- John M. Barkett, *E-Discovery Help May Be on the Way . . . Sort of: Civil Rules Advisory Committee Proposal*, 72 DEF. COUNS. J. 37 (2005).
  - The article notes that under the proposed electronic discovery amendments, “the respondent [to a subpoena] is protected *ipso facto* if the respondent ‘identifies’ electronically stored information ‘as not reasonably accessible,’” but questions whether “the subpoena respondent has to advise anyone of this determination.” *Id.* at 44. The article notes that “[b]ecause the proposed rules say the third-party respondent ‘need not’ provide e-discovery that the person ‘identifies as not reasonably accessible,’ one could argue that the standard is subjective and once the determination of inaccessibility is made by the subpoena recipient, a written objection is not required because the respondent is then not obligated to provide discovery.” *Id.*
  - “Assuming that the requesting party learns that an inaccessibility claim is being made by the subpoena recipient, that party must then file a motion. It would appear that the proposed rule contemplates that the mere filing of the motion challenging the claim is enough to trigger a showing by the subpoena recipient that the information sought is not reasonably accessible. Will the costs of addressing this motion be included among those that the third party might recover to receive the ‘protection’ afforded by Rule 45(c)(2)(B)? The case law will have to unfold before this question is answered.” *Id.* at 44–45.
  - “How much of a showing of inaccessibility must a subpoena recipient make? The proposed rule sets no standard. The proposed Advisory Committee note to Rule 45 offers no guidance. Instead, the note focuses on the broader question of expense, stating that the protections in Rule 45(c) should ‘guard against undue impositions on nonparties.’” *Id.* at 45.
- Don Zupanec, *Stored Communications Act – Discovery*, 23 NO. 11 FED. LITIGATOR 12 (2008).
  - This article discusses *Flagg v. City of Detroit*, 252 F.R.D. 346 (E.D. Mich. 2008), which found that “[t]he Stored Communications Act does not preclude production in civil litigation of electronic communications stored by a nonparty electronic service provider.” 23 NO. 11 FED. LITIGATOR 12. In *Flagg*, the plaintiff served a nonparty with a subpoena seeking text messages sent or received by City officials, some of whom were defendants. *Id.* Some of the defendants moved to block the subpoena, arguing that the Stored Communications Act, 18 U.S.C. § 2701 et seq., barred production by a nonparty service provider absent the defendants’ consent. *Id.* The court assumed that the plaintiff sought disclosure pursuant to a Rule 34 request to the City rather than through a subpoena to the nonparty, and found that the City had the obligation and ability to obtain the requisite consent for disclosure by the service provider. *Id.*
  - The article notes that the Eastern District of Virginia had recently found that the Stored Communications Act does not include an implicit exception for disclosure of protected electronically stored communications in response to a civil subpoena. *Id.*

(citing *In re Subpoena Duces Tecum to AOL, LLC*, 550 F. Supp. 2d 606 (E.D. Va. 2008)). “So, when protected communications are sought from a nonparty electronic service provider and consent that would permit disclosure is denied (*see* § 2702(b)(3)), disclosure is barred.” *Id.* “The key is to keep disclosure pursuant to a Rule 34 request for production, directed to a party to the litigation, rather than a Rule 45 subpoena to the nonparty electronic service provider. Assuming the party’s ability to provide, expressly or implicitly, or to obtain, the consent necessary for the service provider to divulge the requested communications, there is a way around the obstacle.” *Id.*

### **Subpoenas in Arbitration**

- Timothy C. Krsul, *The Limits on Enforcement of Arbitral Third-Party Subpoenas*, 57-JAN DISP. RESOL. J. 30 (2003).
- “A two-step analysis helps to understand how the geographic limitation on the enforcement of an arbitral subpoena works. The first step is to identify the proper district court in which to file a petition to enforce the arbitrator’s subpoena. . . . [T]he FAA requires the petition to be filed in the ‘district in which such arbitrators, or a majority of them, are sitting.’ This is the only federal court that can legally enforce the arbitrator’s subpoena, no matter where the witness works or resides.

The second step is to identify the jurisdictional limitations of the particular court. Rule 45 of the Federal Rules, specifically, Rule 45(b)(2) and (c)[(3)](A)(ii), delineate the court’s territorial jurisdiction with respect to subpoenas. These provisions restrict the district courts’ ability to enforce a subpoena to the area within 100 miles of the courthouse or within the state in which the trial or the hearing is being held. Because Section 7 [of the FAA] invokes Rule 45, this limitation applies to the court’s authority to compel a witness to attend an arbitration hearing. Thus, if a third party receives an arbitral subpoena to appear at the hearing but fails to show up, the remedy the FAA provides is to petition the district court in the district in which the panel is sitting for an order to compel compliance with the subpoena. Alternatively, Section 7 authorizes the district court to punish the non-complying party for contempt.”

*Id.* at 31–32 (footnotes omitted).

- The author defines the problem: “In arbitration proceedings involving complex commercial disputes, third parties often possess material records and other evidence that are highly material to the issues in dispute. If they happen to reside and work outside the territorial jurisdiction of the district court in which the arbitration is pending, they cannot be compelled to comply with an arbitral subpoena. Therefore, unless the third party agrees to cooperate, important evidence may not be obtained.” *Id.* at 32.
- The article summarizes the case law: “In general, it appears that a third-party subpoena for a deposition in an arbitration is not enforceable unless the parties have specifically agreed to the deposition or to full discovery or have provided in their arbitration agreement that the Federal Rules will apply. The enforceability of a



subpoena for documents is unclear if the witness resides outside the federal district court where the arbitration is pending. Some courts have held that Rule 45's territorial limits do not apply to document subpoenas, but recently one court has held that it does." *Id.*

- "Assuming Rule 45 applies to document subpoenas as well as deposition subpoenas," the author believes that "arbitrators [should] be able to issue enforceable subpoenas for documents from third parties, regardless of where they live." *Id.* at 34. "Since an arbitrator can subpoena documents of a person working or residing within 100 miles of the district court in the district where the arbitrator is sitting, the territorial limit on enforcement is purely arbitrary." *Id.*
- The author also believes that arbitrators should be able to issue subpoenas for the deposition of a third party in the district where the witness works or resides, without requiring the parties to agree to broad discovery or to arbitrate under the Federal Rules. The author proposes an amendment to Section 7 of the FAA to achieve this result. *Id.*
- *2nd Circuit Limits Court's Jurisdiction to Enforce Third-Party Subpoenas*, 61-OCT DISP. RESOL. J. 4, 4 (2006) (noting that in *Dynegy Midstream Services, LP v. Trammochem, A.P. Moller & Igloo Shipping, A/S*, 451 F.3d 89 (2d Cir. 2006), the court held that "the Federal Rules governing subpoenas to which Section 7 [of the FAA] refers do not contemplate nationwide service of process or enforcement; instead, both service and enforcement proceedings have clear territorial limitations."").
- Paul D. Friedland & Lucy Martinez, *Arbitral Subpoenas Under U.S. Law and Practice*, 14 AM. REV. INT'L ARB. 197 (2003).
  - "While it is well-established that arbitrators may order discovery as between the *parties*, there is a recently articulated divergence of opinion at the federal appellate level as to whether pre-hearing discovery is available in relation to *non-parties*. At the time of this writing, the Sixth Circuit has indicated a willingness to enforce non-party arbitral discovery subpoenas, the Eighth Circuit has enforced arbitral subpoenas to non-parties for pre-hearing document production provided that the non-party is sufficiently connected with the underlying dispute, the Fourth Circuit will enforce such subpoenas only if a 'special need' is shown, and the Third Circuit will not enforce such subpoenas under any circumstances." *Id.* at 205.
  - The authors propose: "Arbitrators should be empowered to issue judicially enforceable pre-hearing discovery subpoenas to non-parties when (i) either the non-party is sufficiently connected with the underlying dispute or (in the absence of such a connection) there is a demonstrated 'special need' for the documents, and (ii) the order will not impose undue burden on the non-party. Under this approach, arbitrators retain flexibility to dispose of disputes as efficiently as possible, and courts would be empowered to protect non-parties from over-reaching arbitral orders." *Id.* at 214.
  - "[A] federal district court has no jurisdiction to compel compliance with an arbitral order or subpoena served on a person (party or non-party) who resides outside of the

forum of the arbitration, or at least more than 100 miles from the place of the hearing. One way for an arbitral panel to overcome this territorial jurisdictional obstacle is temporarily to relocate the arbitration hearing to within 100 miles of the subject of the subpoena. The alternative to the contrivance of a temporary hearing is for the arbitrator to issue the subpoena and for the requesting party to see if that suffices; if not, the party can then seek assistance in the relevant jurisdiction.” *Id.* at 227 (footnotes omitted).

- “Under the FAA, in the Eighth Circuit, the Sixth Circuit, the Southern District of New York, the Southern District of Florida and the Middle District of Tennessee, courts will enforce arbitral subpoenas to non-parties for *pre-hearing document discovery* (although at least in the Eighth Circuit and in the Middle District of Tennessee the non-party must be sufficiently connected to the underlying dispute). In the Fourth Circuit, such an order will be enforced under the FAA only upon a showing of special need. In the Third Circuit, such an order will not be enforced under any circumstances.” *Id.* at 228.
- “Under the FAA, courts in the Fourth Circuit and the Southern District of New York have to date refused to enforce arbitral orders of *discovery depositions of non-parties*. The issue has not been tested elsewhere, although such orders are probably not enforceable in the Third Circuit. Case law in the Eighth Circuit, the Sixth Circuit, the Southern District of Florida and the Middle District of Tennessee suggests that arbitral orders of discovery depositions of both parties and non-parties would be enforced in those jurisdictions under certain circumstances.” *Id.* at 229.
- Dean W. Sattler, Note, *Is There a Compelling Interest to Compel? Examining Pre-Hearing Subpoenas Under the Federal Arbitration Act*, 27 PACE L. REV. 117 (2006)
  - “Because the FAA contains no such limiting language [on the power of arbitrators to issue subpoenas], some courts have held that an arbitrator’s subpoena power should be no greater than that of the federal district courts set forth in Rule 45 of the Federal Rules of Civil Procedure. Using Rule 45 as a yardstick to measure an arbitrator’s subpoena power on non-parties is both logical and fair. It uses a set of rules that is tried, true and familiar. It specifically defines the discovery power parties will have in a future arbitration, and places a lid on extreme or malicious tactics. Alarming, however, there are some cases in which the courts have held that Section 7 [of the FAA] vests the arbitrator with broad and unlimited subpoena power, beyond that set forth in Rule 45.” *Id.* at 134–35.
  - This article also argues that the 100-mile boundary in Rule 45 should be broadened in certain circumstances in arbitration. The author suggests a modification of a five-part test that had previously been proposed by Cathleen A. Roach regarding amendments to Rule 45. *Id.* at 138. “Roach suggests that even for litigation, Rule 45 and its 100-mile boundary is archaic in the modern world. She notes that strict adherence to Rule 45 can lead to absurd results, decreased judicial efficiency, outrageous costs and unwarranted burdens upon the federal district courts . . . .” *Id.* The five-part test proposed by Roach was:

“1) To distinguish between types of witnesses (party or non-party) and types of litigation (complex single district and multidistrict litigation or simpler diversity actions); 2) to acknowledge that certain types of litigation may benefit more from live testimony and cross-examination than other types of litigation; 3) to provide federal courts with nationwide trial subpoena power for three categories of witnesses—multidistrict litigation party witnesses, multidistrict litigation non-party witnesses, and single district litigation party witnesses; 4) to retain satellite testimony as an option for any of the four categories of witnesses, subject to a proper showing of necessity; and 5) to maintain a fairness element by authorizing the court to conduct a balancing test in order to deny or vacate a subpoena when undue hardship to the witness is shown.”

*Id.* at 138–39 (quoting Cathleen A. Roach, *It’s Time to Change the Rule Compelling Witness Appearance at Trial: Proposed Revisions to Federal Rule of Civil Procedure 45(e)*, 79 GEO. L.J. 81, 113 (1990)).

- *Subpoena – Arbitration Proceeding – Pre-Hearing Document Discovery*, 15 No. 12 FED. LITIGATOR 302 (2000)
  - This article summarizes the decision in *In re Security Life Insurance Co. of America*, 228 F.3d 865 (8th Cir. 2000), where the court allowed a prehearing subpoena for documents in arbitration to be issued to a third party. The article notes that “[t]his result conflicts with the position recently taken by the Fourth Circuit that the FAA does not authorize prehearing discovery from nonparties to arbitration.” 15 No. 12 FED. LITIGATOR at 303 (citing *COMSAT Corp. v. Nat’l Sci. Found.*, 190 F.3d 269 (4th Cir. 1999)).
  - In the “Litigation Tips” section, the article explains: “While the availability of nonparty discovery in arbitration proceedings is not entirely certain, it should be possible, assuming the arbitrators can be convinced to issue a subpoena, to obtain prehearing disclosure of documents from nonparties.” *Id.* (citing *Brazell v. Am. Color Graphics, Inc.*, No. M-82 AGS, 2000 WL 364997 (S.D.N.Y. Apr. 7, 2000); *Integrity Ins. Co. v. Am. Centennial Ins. Co.*, 885 F. Supp. 69 (S.D.N.Y. 1995);<sup>2</sup> *Meadows Indemnity Co., Ltd. v. Nutmeg Ins. Co.*, 157 F.R.D. 42 (M.D. Tenn. 1994); *Stanton*

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<sup>2</sup> The holding in *Integrity Insurance Co.* was recently abrogated by *Life Receivables Trust v. Syndicate 102 at Lloyd’s of London*, 549 F.3d 210 (2d Cir. 2008), which held that the FAA does not authorize arbitrators to compel prehearing document discovery from nonparties. The *Life Receivables Trust* court recognized a circuit split as to whether Section 7 of the FAA allows prehearing document discovery from nonparties: “The Eighth Circuit has held that it does, see *In re Arbitration Between Sec. Life. Ins. Co. of Am.*, 228 F.3d 865, 870–71 (8th Cir. 2000); the Third Circuit has determined that it does not, see *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 407 (3d Cir. 2004); and the Fourth Circuit has concluded that it may – where there is a special need for the documents, see *COMSAT Corp. v. Nat’l Sci. Found.*, 190 F.3d 269, 275 (4th Cir. 1999). Like the Third Circuit, we hold that section 7 does not enable arbitrators to issue pre-hearing document subpoenas to entities not parties to the arbitration proceeding . . . .” *Life Receivables Trust*, 549 F.3d at 212.

- v. Paine Webber Jackson & Curtis, Inc.*, 685 F. Supp. 1241 (S.D. Fla. 1988)). “What’s less likely is the possibility of subpoenaing a nonparty to appear for a deposition. *COMSAT Corp.* finds no authority in the FAA for doing so. Nor does *Integrity Insurance*. So this is a longshot at best.” *Id.*
- The article notes that the Eighth Circuit in *Security Life Insurance* “said that a subpoena for production of documents does not require compliance with Rule 45(b)(2)’s territorial limit. The reason? The burden of producing documents does not increase appreciably with an increase in distance. In other words, there is no territorial limitation on an arbitration panel’s authority to order production of documents.” *Id.*
  - A similar discussion of the *Security Life Insurance* case is presented in Susan A. Stone & Patricia M. Petrowski, *The More We Learn the Less We Know: The Continuing Uncertainty Regarding Nonparty Discovery in Arbitration*, 16 No. 21 ANDREWS INS. INDUS. LITIG. REP. 21 (2001), which notes that *Security Life Insurance* failed to address the competing line of authority regarding subpoenas in arbitration in *COMSAT*. The article also notes that “[t]he Eighth Circuit also sidestepped the territorial reach [of subpoenas in arbitration] issue, acknowledging that it presented a ‘thorny question indeed’ as respects witness testimony, but holding that the territorial limit did not apply to an order for production of documents.” *Id.* at n.2.
- *Third Circuit Differs on Arbitration Production*, 22 ALTERNATIVES TO HIGH COST OF LITIG. 74 (2004).
    - This article discusses the holding in *Hay Group Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404 (3d Cir. 2004), which held that Section 7 of the FAA cannot be used to issue nonparty document subpoenas. 22 ALTERNATIVES TO HIGH COST OF LITIG. at 74. The article notes that the *Hay Group* court disagreed with the Eighth Circuit view in *Security Life Insurance* that there was implicit power to subpoena documents, and disagreed with dicta by the Fourth Circuit in *COMSAT* that suggested that third-party subpoenas could be enforced under special circumstances. *Id.* at 74–75.
    - The article also notes that *Hay Group* rejected the argument that the subpoena was improper because production was sought beyond the district court’s jurisdiction. “The consulting firm’s argument revolved around F.R.C.P. 45(b)(2), which says that if a document request is separate from a subpoena for a witness’s attendance, then the materials’ subpoena must be issued from a federal district court ‘in which the production or inspection is to be made.’ The panel disagreed that this applies to arbitration, where it said that witnesses can be directed to bring documents that are beyond the federal rule’s territorial limits.” *Id.* at 75.
  - Don Zupanec, *Arbitration – Nonparties – Pre-Hearing Document Discovery*, 19 NO. 5 FED. LITIGATOR 10 (2004).
    - This article also discusses the holding in *Hay Group*. The article notes that the court’s “interpretation of § 7 is consistent with the way similar language in the pre-1991 version of F.R.C.P. 45 was interpreted. Prior to 1991, Rule 45(a) stated that

a subpoena ‘shall command each person to whom it is directed to attend and give testimony’ at a specified time and place. A subpoena ‘may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein.’ See Rule 45(a). This language was interpreted not to grant courts power to issue document-only subpoenas to nonparties.” *Id.* (citing FED. R. CIV. P. 45 Advisory Committee Notes (1991 amendments)).

- The article notes a split of authority regarding the availability of document subpoenas in arbitration: “The availability of compelled pre-arbitration nonparty document discovery remains a question in search of a definitive answer. This interpretation [in *Hay Group*] of § 7 is consistent with the Fourth Circuit’s. See *COMSAT Corp.*, *supra*. The Eighth Circuit takes the position that arbitrators have implied power under § 7 to order nonparties to produce documents for review prior to a hearing. See *In re Security Life Insurance Co. of Am.*, 228 F.3d 865 (8th Cir. 2000), 00 Fed Lit 302. So do a number of district courts. See, e.g., *Brazell v. American Color Graphics, Inc.*, 2000 WL 364997 (S.D.N.Y. 2000); *Meadows Indemnity Co., Ltd. v. Nutmeg Insurance Co.*, 157 F.R.D. 42 (M.D. Tenn. 1994).” *Id.*
- *Discovery Subpoena Issued by Arbitrator – Enforceability*, 10 No. 6 FED. LITIGATOR 172 (1995).
  - This article discusses *Amgen Inc. v. Kidney Center of Delaware County, Ltd.*, 879 F. Supp. 878 (N.D. Ill. 1995), which held that “[w]here the parties had agreed to arbitrate pursuant to the Federal Rules of Civil Procedure, a discovery subpoena issued by the arbitrator to a nonparty was valid, and was enforceable through the procedures provided for in F.R.C.P. 45(a)(3)(B).” 10 No. 6 FED. LITIGATOR at 172. The court dealt with a discrepancy between FAA § 7 and Rule 45. The court found that there is no territorial limitation on an arbitrator’s subpoena power under Section 7 of the FAA, but that there was an issue with where the subpoena could be enforced. While Section 7 provides for enforcement in the district where the arbitrator is located, Rule 45 requires a subpoena to issue from the district where the deposition is to take place. The difficulty was that the nonparty’s deposition was to be taken in the Eastern District of Pennsylvania, but under Section 7, only the Northern District of Illinois could determine the enforceability of the subpoena. *Id.* at 173. The court held that the arbitrator’s subpoena was enforceable because the parties had agreed to arbitrate under the Federal Rules, which provide for liberal, nationwide discovery. *Id.* However, attempts to enforce the subpoena in the Eastern District of Pennsylvania would fail because the Northern District of Illinois was the only place for enforcement under the FAA. *Id.* The court solved this dilemma by directing the requesting party’s attorney to issue a subpoena under Rule 45(a)(3)(B) that would be enforceable in the Eastern District of Pennsylvania under Rule 45(a)(2). *Id.*
  - The article notes: “The language of [§] 7 limiting enforceability to the district court for the district where the arbitrator is located is in fact incompatible with the requirement of Rule 45(a)(2) that a discovery subpoena issue from the court for the district where discovery is to take place. So if discovery is to occur in a district other than the one where the arbitrator is located, there does appear to be a crack through



which enforceability falls.” *Id.*

- Sean T. Carnathan, *Discovery in Arbitration? Well, it Depends . . .*, 10-APR BUS. L. TODAY 22 (2001).
  - This article notes conflicting authority as to whether FAA § 7 provides arbitrators with authority to compel pre-hearing discovery from third-party witnesses, but notes that “the weight of authority interprets the section to authorize subpoenas to compel pre-hearing document production.” *Id.* at 22 (citing *Am. Fed’n of Television & Radio Artists AFL-CIO v. WJBK-TV*, 164 F.3d 1004, 1009 (6th Cir. 1999)). The article notes that the primary authority to the contrary is in the Fourth Circuit, which has found that “a federal court may not compel a third party to comply with an arbitrator’s subpoena for pre-hearing discovery, absent a showing of special need or hardship,” but also notes that “[t]he Fourth Circuit has not developed a clear definition of ‘special need or hardship.’” *Id.* at 23–24.
  - With respect to deposition subpoenas, the article notes that “[g]iven the unsettled state of the law, you cannot be confident of your right to enforce a deposition subpoena during an arbitration proceeding.” *Id.* at 24–25. The author argues that “[a]s a policy matter, a rule declining to enforce such subpoenas seems unwise. It is easy for a court to recite the generalized bromide that an arbitration is designed for faster, less expensive dispute resolution and, therefore, refuse to enforce a subpoena. But not all arbitrations lend themselves to such a rule. Better judicial policy is to leave to the arbitrators the decision whether to issue the subpoena, then stand behind them once issued.” *Id.* at 25.
  - This article also discusses the *Amgen* case, which devised a remedy for enforcing subpoenas where witnesses are located outside the state of the arbitration. In *Amgen*, the arbitrator, who was located in Chicago, issued a deposition subpoena to a nonparty in Pennsylvania. When the nonparty refused to comply, *Amgen* moved to compel in Pennsylvania, but the Pennsylvania district court rejected the motion because the FAA requires that motions to compel be brought in the district where the arbitration is located. After the action was transferred to the Northern District of Illinois, *Amgen* again moved to compel compliance with the subpoena. The district court recognized the dilemma that the FAA requires enforcement of subpoenas in the district where the arbitration is located, but Rule 45(a)(2) requires that a subpoena issue from the district where the deposition is to be held. To get around this, the court ordered *Amgen*’s lawyer to issue a subpoena under FED. R. CIV. P. 45(a)(3)(B), which allows “an attorney authorized to practice in the court in which the trial is being held [to] issue and sign a subpoena on behalf of a court for a district in which a deposition or production is to take place.” *Amgen*, 879 F. Supp. at 883. The article explains: “Rule 45 would then permit *Amgen* to seek enforcement of the subpoena in Pennsylvania, if necessary, even though the Pennsylvania court had declined to enforce the arbitrator’s subpoena. Although under the FAA the Pennsylvania district court could not directly enforce a subpoena issued by the arbitrator, under the Federal Rules of Civil Procedure, the court could enforce a subpoena issued by a lawyer based on an FAA enforcement action in Illinois.” Carnathan, *supra*, at 25 (internal citation

omitted). The article argues that “[t]here is at least one major flaw in this reasoning” because “[t]he ‘problem’ the *Amgen* court identifies – a conflict between the procedure under FAA Section 7 and the procedure under Rule 45 – disappears if the court interprets the FAA to authorize the arbitrator to issue subpoenas for hearings only. If arbitration subpoenas are available only for hearings, the 100-mile enforcement limitation in Rule 45 harmonizes with the FAA provision that enforcement actions must be brought in the same district as the arbitration.” *Id.*

- Nonetheless, the article recognizes that “the modern trend clearly permits at least some discovery in arbitration,” and notes that “[o]ne commentator has suggested that the solution is to move the arbitration temporarily to the district where the discovery is sought.” *Id.* The article further notes that it is unclear how temporary transfer of the arbitration would occur and that it would likely require consent of all parties and the arbitrators. *Id.* The article concludes that “[o]n balance, the *Amgen* approach is likely the best alternative presented, and *Amgen* remains the leading case.”<sup>3</sup> *Id.* at 25–26.
- The article also notes that the *Amgen* case presents a potential jurisdictional issue regarding enforcement of arbitration subpoenas in federal courts, explaining that the Fourth Circuit has held that FAA Section 7 provides jurisdiction to the federal court in the district where the arbitration is located, but the Sixth Circuit had found that the FAA does not confer an independent basis for jurisdiction and that even the federal nature of underlying claims submitted to arbitration does not confer federal question jurisdiction in a suit to confirm an arbitration award. *Id.* at 26. The article concludes that “[t]he Fourth and Second Circuits likely have the right [view] of this issue,” finding that FAA Section 7 clearly confers jurisdiction. *Id.*
- Leslie Trager, *The Use of Subpoenas in Arbitration*, 62-JAN DISP. RESOL. J. 14 (2008).
  - This article notes a split of authority as to whether FAA § 7 allows nationwide service of process, explaining that while some earlier cases had approved of nationwide service of process, “[t]he more recent cases have held that documents can only be subpoenaed to a hearing at which one or more of the arbitrators are present, even though this hearing does not need to be on the merits but only on the admissibility of the documents.” *Id.* at 16. The article notes that the Eighth Circuit has held that

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<sup>3</sup> Not all courts have agreed with the *Amgen* approach. See, e.g., *Dynegy Midstream Servs. v. Trammochem*, 451 F.3d 89, 96 (2d Cir. 2006) (“We see no textual basis in the FAA for the *Amgen* compromise. Indeed, we have already held that Section 7 ‘explicitly confers authority only upon arbitrators; by necessary implication, the parties to an arbitration may not employ this provision to subpoena documents or witnesses.’”) (quoting *NBC v. Bear Stearns & Co.*, 165 F.3d 184, 187 (2d Cir. 1999)). The *Dynegy* court continued: “Moreover, we see no reason to come up with an alternate method to close a gap that may reflect an intentional choice on the part of Congress, which could well have desired to limit the issuance and enforcement of arbitration subpoenas in order to protect non-parties from having to participate in an arbitration to a greater extent than they would if the dispute had been filed in a court of law.” *Id.*

In addition, it is notable that the *Amgen* case was dismissed on appeal for lack of subject-matter jurisdiction because “[t]he FAA grants the federal courts powers to assist arbitration only where the district court would have jurisdiction over the underlying dispute.” Jerold S. Solovy & Robert L. Byman, *Arbitration Discovery*, 9/8/03 NAT’L L.J. 24, (Col. 1) (2003) (citing *Amgen Inc. v. Kidney Ctr. of Del. County Ltd.*, 95 F.3d 562 (7th Cir. 1996)).

arbitrators have the power to issue subpoenas for documents without holding a hearing and that there is nationwide jurisdiction to enforce this type of subpoena. *Id.* (citing *In re Security Life Ins. Co. of Am.*, 228 F.3d 865, 878 (8th Cir. 2000)). In addition, the article notes that “[t]he 4th Circuit has held that there is nationwide process in extraordinary circumstances – meaning that the party seeking the subpoena has shown special need or hardship.” *Id.* (citing *COMSAT Corp. v. Nat’l Sci. Found.*, 190 F.3d 269 (4th Cir. 1999)). However, the article notes that the Third Circuit has held that arbitrators do not have power to issue prehearing document subpoenas, but did find that “arbitrators could subpoena non-parties to appear before them for a pre-merit hearing and bring the documents with them to this hearing.” *Id.* (citing *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404 (3d Cir. 2004)). The article also notes that the *Hay Group* case held that “a document subpoena could be enforced only so long as the person being subpoenaed was subject to the district court’s jurisdiction.” *Id.* at 16–17. The article further notes that the Second Circuit held, “following *Hay Group*, that arbitral subpoenas do not have to be made returnable at a hearing on the merits,” and found that “a subpoena issued under § 7 could be made returnable before the arbitrators at a hearing for document production and authentication purposes only.” *Id.* at 17. The article also states that *Hay Group*’s holding on the territorial limits of a court in enforcing a subpoena was followed by the Second Circuit in *Dynegy Midstream Services, L.P. v. Trammochem*, 451 F.3d 89 (2d Cir. 2006), which held that “subpoenaed persons must be subject to the enforcing district court’s jurisdiction.” *Id.*

- The article concludes that “[t]he better reasoned and more recent cases hold that the FAA does not authorize nationwide service of subpoenas.” *Id.* The author proposes a solution: “To circumvent this issue, we should ask whether the arbitrator could hold a separate document production hearing in the district where the witness resides and have the subpoena made returnable to that hearing. If the witness did not appear, then the party requesting the subpoena could ask the district or state court in that location to enforce the subpoena and for purposes of § 7 of the FAA, the arbitrators would be ‘sitting’ in that district.” *Id.* The author suggests that the American Arbitration Association consider whether it is necessary to provide for such authority in the AAA Rules. *See id.* at 19.
- Mark D. Colley & Laura E. Gasser, *Federal, State Laws Govern Arbitration Subpoenas, Parties Located Elsewhere Must Follow a Myriad of Rules*, 11/18/96 NAT’L L.J. D7, (col. 1) (1996).
  - “Although the Federal Rules of Civil Procedure implicitly apply [to arbitration subpoenas], including Rule 45’s provision for attorney-issued subpoenas, the FAA does not articulate the specific procedures for obtaining enforceable deposition subpoenas in an arbitration when the witnesses are located outside of the arbitrator’s jurisdiction.” *Id.* (footnotes omitted).
  - The article discusses the *Amgen* case, where “the defendant challenged the validity of the Illinois arbitrators’ subpoena ordering a deponent to appear in Pennsylvania,” and the court found that “Section VII [of the FAA] does not provide for extraterritorial

service or extraterritorial enforcement.” *Id.* (citing *Amgen*, 879 F. Supp. at 883). “To cure this enforceability problem, the court directed the plaintiff to have an attorney issue a district court subpoena in the district of the deposition, per Federal Rule of Civil Procedure 45. That district court subpoena, rather than the arbitrator’s subpoena, would be enforceable by that district court.” *Id.*

- Jerold S. Solovy & Robert L. Byman, *Arbitration Discovery*, 9/8/03 NAT’L L.J. 24, (Col. 1) (2003).
  - This article notes many splits of authority regarding enforcement of arbitration subpoenas. The article explains that some courts allow a party to subpoena documents from nonparties prior to the arbitration hearing (*In the Matter of the Arbitration Between Security Life Ins. Co. of Am.*, 228 F.3d 865, 870 (8th Cir. 2000)); others do not allow such subpoenas except on a showing of special need or hardship made in a petition to the district court (*COMSAT Corp. v. Nat’l Sci. Found.*, 190 F.3d 269 (4th Cir. 1999)); and others allow it where the arbitrators find it appropriate, without the need for a federal court to determine special need (*Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 2003 U.S. Dist. Lexis 4909 (E.D. Pa. 2003)).<sup>4</sup> The article notes that some courts allow subpoenas for documents, but not depositions (*In the Matter of the Arbitration Between Integrity Ins. Co. v. Am. Centennial Ins. Co.*, 885 F. Supp. 69, 73 (S.D.N.Y. 1995));<sup>5</sup> and others find that the “FAA grants the implicit power to compel both testimony and documents prior to hearing” (*Amgen, Inc. v. Kidney Ctr. of Del. County Ltd.*, 879 F. Supp. 878, 880 (N.D. Ill. 1995)).
  - As for enforcement, the article notes that “[a] witness has no obligation to move to quash an arbitrator-issued subpoena, since the FAA imposes no such requirement. If the witness simply ignores the subpoena, you have to find a court to enforce it.” *Id.* (citing *COMSAT*, 190 F.3d at 276).

### **Use of Subpoenas After Discovery Deadline**

- Randolph Stuart Sergent, *Federal Document Subpoenas and Discovery Deadlines*, 34-OCT MD. B.J. 54 (2001).
  - This article notes that there is a divergence of views as to whether document subpoenas may be used to obtain documents from third-parties after the discovery deadline has passed, but finds that “the most recent decisions show an emerging consensus in favor of the most restrictive approach. This approach, which will be called the ‘majority rule,’ consists largely of cases decided since 1995, limits the use of pre-trial document subpoenas to the discovery period, and only allows documents to be sought by means of a trial subpoena where a ‘non-discovery’ purpose can be

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<sup>4</sup> The district court’s holding in *Hay Group* was later reversed by the Third Circuit. See *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404 (3d Cir. 2004) (holding that the FAA does not give arbitrators authority to issue document subpoenas to nonparties without summoning the nonparty to appear as a witness).

<sup>5</sup> The *Integrity Insurance Co.* holding was later abrogated by the Second Circuit. See note 2, *supra*.

articulated for those documents. In contrast, a few cases have adopted a ‘minority rule,’ and have held that a subpoena for documents from a third-party is not covered by the discovery deadlines.” *Id.* at 54.

- *Subpoena Duces Tecum – Nonparties – Discovery*, 18 NO. 3 FED. LITIGATOR 65 (2003).
  - This article discusses *Mortgage Information Services, Inc. v. Kitchens*, 210 F.R.D. 562 (W.D.N.C. 2003), which held that “[a] Rule 45 subpoena duces tecum may be used to obtain documents from parties as well as nonparties,” and that “a document subpoena is a discovery device and is subject to discovery deadlines.” 18 NO. 3 FED. LITIGATOR at 65. The court in *Mortgage Information Services* noted that Rule 45 does not expressly limit the use of subpoenas to nonparties and that subjecting Rule 45 subpoenas to discovery deadlines follows “from Rule 26’s inclusion of subpoenas in its definition of discovery.” *Id.*
  - The article notes that “Rule 45 subpoenas are sometimes viewed as limited to nonparties. Generally, however, they are considered a proper means of requesting documents from parties as well as nonparties.” *Id.* (internal citations omitted).
  - “There are also differing views as to whether document subpoenas constitute discovery and are subject to discovery deadlines. Some courts say no. Most say yes.” *Id.* at 66 (internal citations omitted).
  - “Depending on the purpose for seeking documents, a Rule 45 subpoena may be a way of obtaining documents even after the discovery cut-off date. Where copies of documents were produced during discovery, the originals may be subpoenaed to ensure their availability at trial. A trial subpoena may also be used to obtain documents to be used at trial for memory refreshment.” *Id.* (internal citation omitted).
- *Subpoenas – Discovery Deadline*, 11 NO. 5 FED. LITIGATOR 117 (1996).
  - This article discusses *Rice v. United States*, 164 F.R.D. 556 (N.D. Okla. 1995), where “[e]xpiration of the deadline for discovery precluded issuance of a subpoena duces tecum to obtain documents from a nonparty.” 11 NO. 5 FED. LITIGATOR at 117.
  - In the “Litigation Tips” section, the article states: “*Rice* does not mean that a subpoena can never issue to obtain information after a discovery deadline has expired. Whether a subpoena can issue will depend on the intended application of the discovery deadline. If the deadline is not intended to shut off all attempts to obtain information, it is possible that a subpoena may properly issue after the deadline has passed. If, however, as was the case here, the deadline is intended to bring an end to all attempts at obtaining information, it will apply to post-deadline subpoenas, at least if the subpoenaed documents were available during the discovery period.” *Id.* at 118 (internal citations omitted).
- *Subpoena Duces Tecum – Discovery Deadline*, 13 NO. 7 FED. LITIGATOR 194 (1998).
  - This article discusses *Marvin Lumber & Cedar Co. v. PPG Industries, Inc.*, 117 F.R.D. 443 (D. Minn. 1997), which held that “[a] Rule 45 subpoena duces tecum directed to a nonparty is subject to a scheduling order discovery deadline.” 13 NO.



7 FED. LITIGATOR at 194. The court held that formal discovery after the discovery deadline would detract from post-discovery case preparation and that the burden and cost of monitoring an opposing party's use of subpoenas can be high. *Id.*

- The article notes: "Not all courts look at the use of subpoenas this way. Some do not consider discovery deadlines to apply to subpoenas duces tecum directed to nonparties. In these jurisdictions subpoenas can be issued even after the deadline has passed. Post-deadline issuance may also be possible if the deadline applies to other forms of discovery but not specifically to subpoenas." *Id.* (internal citation omitted). "The more typical view is *Marvin's*: discovery deadlines apply to attempts to obtain information from nonparties by subpoena, therefore subpoenas cannot be used to circumvent discovery deadlines." *Id.* "Any subpoena issued before the discovery deadline with a return date prior to the deadline's expiration is timely, even if the return does not actually occur until after the deadline due to delay resulting from an attempt to have the subpoena quashed." *Id.* at 195.
- Don Zupanec, *Subpoena – Parties – Discovery Deadline*, 23 NO. 5 FED. LITIGATOR 11 (2008).
  - This article discusses *Thomas v. IEM, Inc.*, No. 06-886-B-M2, 2008 WL 695230 (M.D. La. Mar. 12, 2008), which held that "[a] Rule 45 subpoena may not be used to avoid the deadline for party discovery." 23 NO. 5 FED. LITIGATOR 11. In *Thomas*, the plaintiff served the defendant with a subpoena for documents and requested production within 15 days so that production would be within the discovery deadline. *Id.* The court denied a motion to compel, agreeing with the defendant that subpoenas are generally used to obtain discovery from nonparties, that the preferred means of obtaining documents available from parties is Rule 34, and that "[h]owever used, subpoenas are clearly not meant 'to provide an end-run around the regular discovery process under Rule[s] 26 and 34.'" *Id.* (citing *Burns v. Bank of Am.*, No. 03 Civ. 1685 (RMB)(JCF), 2007 WL 1589437 (S.D.N.Y. June 4, 2007)).
  - The "Litigation Tips" section of the article explains: "Nothing in the Federal Rules explicitly precludes use of Rule 45 subpoenas to obtain documents from parties. While courts sometimes limit subpoena use to nonparties, there is a good argument that document subpoenas can properly be served on parties as well as nonparties." *Id.* (internal citation omitted). A subpoena "must be served early enough to allow a response before the deadline. If a subpoena served on a party and seeking production of a document is viewed as functionally analogous to a Rule 34 discovery request, service must be made at least 30 days before the deadline because this is the time period for responding to a Rule 34 request." *Id.*
- Roger W. Kirst, *Filling the Gaps in Federal Rule 45 Procedure for Nonparty Nondeposition Document Discovery*, 205 F.R.D. 638, 645 (2002) ("[C]ases in which counsel attempted to use a nondeposition subpoena after the discovery deadline show that it may be wise to specifically state that this is a discovery procedure that cannot be used after the discovery deadline.") (citing *Grant v. Otis Elevator Co.*, 199 F.R.D 673 (N.D. Okla. 2001); *Alper v. United States*, 190 F.R.D. 281 (D. Mass. 2000); *Integra LifeSciences I, Ltd. v. Merck KGaA*,

190 F.R.D. 556 (S.D. Cal. 1999)).

### **Court's Authority to Transfer Motions to Quash or Compel**

- Victoria E. Briant, *Techniques and Potential Conflicts in the Handling of Depositions (Part I)*, 19 NO. 6 PRAC. LITIGATOR 27 (2008).
  - “The issuing court may transfer the motion to quash a subpoena to the trial court only when the non-party consents to transfer. The Federal Rules of Civil Procedure do not confer authority on a federal district court to transfer a motion to quash a subpoena issued from that court where the non-party has not consented to the transfer. *In re Sealed Case*, 141 F.3d 337 (D.C. Cir. 1998). Indeed, no rule of civil procedure authorizes a transferee court to ‘enforce or modify’ a subpoena issuing from a sister court.” *Id.* at 46–47. The article explains that “[a]ny controversies regarding discovery ‘from nonparty witnesses shall be decided in the court which issued the subpoena, unless the nonparty consents to determination elsewhere.’” *Id.* at 47 (quoting *Highland Tank & Mfg. Co. v. PS Int’l, Inc.*, 227 F.R.D. 374, 381 (W.D. Pa. 2005)).
  - “The language of Rule 45 strongly suggests that only the issuing court has the power to act on its subpoenas.” *Id.* at 47 (citing *Byrnes v. Jetnet Corp.*, 111 F.R.D. 68, 69 (M.D.N.C. 1986)).
  - However, the article notes that if the motion is filed in the presiding court, rather than in the court that issued the subpoena, the presiding court may hear the motion in certain circumstances: “In contrast, in *Static Control Components, Inc. v. Darkprint Imaging*, 201 F.R.D. 431 (M.D.N.C. 2001), the plaintiff subpoenaed the defendant’s trial counsel in the case. The non-party lawyers did not move to quash in the issuing court, but instead the defendants moved to quash in the presiding court. Over the objection of the plaintiff, who wanted to litigate the subpoena it issued in the issuing court, the presiding court ruled that it could resolve the issue because it had jurisdiction over the defendants, who made the motion to quash, and over the subpoenaed attorneys, who were admitted to the court pro hac vice in the underlying case.” *Id.*
  - “Even where the non-party consents to a transfer, the issuing court possesses unfettered discretion to deny the motion to transfer.” *Id.* (citing *United States v. Star Scientific, Inc.*, 205 F. Supp. 2d 482, 485 n.3 (D. Md. 2002)).
  - “District courts would much prefer to have the trial judge, who has more complete knowledge of the underlying case, decide whether the non-party discovery sought should proceed. Whether this is done by transfer or request for an advisory opinion, you should be prepared to present your positions with two courts in mind: the non-party’s home court and the trial court.” *Id.* at 48.
  - The article also notes that “it is axiomatic that the duty to minimize the burden imposed on a non-party under FED. R. CIV. P. 45(c)(1) requires a party to seek discovery materials from other parties in the litigation before seeking those materials from a non-party.” *Id.* at 46 (citations omitted).

- *Subpoena – Motion to Compel – Transfer*, 17 NO. 8 FED. LITIGATOR 203 (2002).
  - This article discusses the holding of *United States v. Star Scientific, Inc.*, 205 F. Supp. 2d 482 (D. Md. 2002), which held that “[a] district court issuing a discovery subpoena may transfer a motion to enforce the subpoena to the court where the underlying action is pending.” 17 No. 8 Fed. Litigator at 203. The court relied at least in part on the fact that the nonparty preferred to have the court where the case was pending decide the motion and on comity concerns. *Id.* at 204.
  - In the “Litigation Tips” section, the article notes: “Some courts recognize that nonparty discovery disputes may be transferred from the court where a subpoena issues to the court where an action is pending. Where this is the case, a nonparty who prefers raising objections to discovery in the court where the litigation is underway may simply move to transfer.” *Id.* (internal citations omitted). “Some courts, however, reject transfer of nonparty discovery disputes.” *Id.* “A nonparty preferring that court [where the case is pending] to decide [subpoena disputes] should move for a protective order in the issuing court and request a stay pending the filing of a similar motion in the court where the action is underway. A ruling by the latter court can be filed in the first court, which then issues its own consistent ruling.” *Id.* (citation omitted). “Another possibility, albeit more cumbersome, is to move the issuing court to request that the judge presiding over the underlying litigation be temporarily assigned to the district where the issuing court is located for the limited purpose of deciding the dispute.” *Id.* (citing 28 U.S.C.A. § 292(d)).
  
- *Subpoena – Motion to Quash – Transfer*, 13 NO. 6 FED. LITIGATOR 167 (1998).
  - This article discusses *In re Sealed Case*, 141 F.3d 337 (D.C. Cir. 1998), which held that “[a] district court from which a subpoena has issued does not have authority to transfer a motion to quash to the district where the underlying action is pending.” 13 NO. 6 FED. LITIGATOR at 167. The court found no authority in Rule 45 authorizing transfer, and that the direction in 45(c)(3)(A)(ii) to the issuing court to quash or modify a subpoena requiring a party to travel more than 100 miles would be inconsistent with a rule that would allow the issuing court to transfer the motion to quash to another district. *Id.* The court concluded that it could be true that “the court where an action is pending will be better able to handle discovery disputes,” but concluded that “the rules clearly sacrifice some efficiency in order to provide territorial protection for nonparties.” *Id.* The court also rejected the lower court’s reliance on the advisory committee note to Rule 26, which states that “[t]he court in the district where the deposition is being taken may, and frequently will, remit the deponent or party to the court where the action is pending.” *Id.* at 167–68.
  - The “Litigation Tips” section of the article states: “The argument that the Advisory Committee Note implies transfer authority is not entirely far-fetched. In fact, some courts have suggested that the Note implies authority to transfer discovery disputes involving non-parties, including motions to quash subpoenas. But nothing in Rule 45 either directly or indirectly authorizes transfer. Hence the conclusion that a motion to quash must be decided by the court from which the subpoena issued.” *Id.* at 168 (internal citations omitted).

- Don Zupanec, *Subpoena – Motion to Quash – Transfer*, 22 NO. 2 FED. LITIGATOR 12 (2007).
  - This article discusses *WM High Yield v. O’Hanlon*, 460 F. Supp. 2d 891 (S.D. Ind. 2006), which held that “[m]otions to quash subpoenas duces tecum issued in connection with litigation pending in a different district should not be transferred to that district for decision.” 22 NO. 2 FED. LITIGATOR 12.
  - In the “Litigation Tips” section, the article states: “Whether the district court that issued a nonparty discovery subpoena must rule on a motion to quash or compel compliance, or, when the underlying litigation is pending in a different district, may transfer the motion is unclear. There is a good reason for transfer: the transferee court’s familiarity with the litigation, which the issuing court presumably lacks. But nothing in Rule 45 authorizes transfer. Just the opposite in fact. Rule 45(c)(3)(A) states that the court with power to quash or modify a subpoena is ‘the court by which a subpoena was issued.’ Rule 45(c)(2)(B) allows enforcement of a subpoena following objections ‘pursuant to an order of the court by which the subpoena was issued.’ Rule 45(e) provides that failure to obey a subpoena may be deemed contempt ‘of the court from which the subpoena issued.’”

Nevertheless, a transfer request is not necessarily doomed. If the subpoenaed nonparty or the party serving the subpoena can make a convincing argument to the issuing court that the court presiding over the underlying litigation is in a better position to decide whether to enforce or quash the subpoena, the issuing court may be receptive to a transfer request.

Some courts categorically reject transfer of nonparty discovery disputes as lacking authority under Rule 45. So there is no assurance that even a strong argument for transfer will get very far.

A decision by the court where the underlying litigation is underway becomes a better possibility where, in response to a discovery subpoena, a nonparty moves for a protective order.”

*Id.* (internal citations omitted). The article notes that “[a]nother way of obtaining a decision on a subpoena by the court where an action is underway is to move for a protective order in the issuing court and request a stay pending the filing of a similar motion in the court overseeing the action. A decision by this court can be filed in the issuing court, which then issues a consistent decision.” *Id.* (citation omitted).

- Alan R. Friedman & Stephen M. Sinaiko, *When a Non-Party Moves to Challenge Discovery Subpoena*, 7/20/98 N.Y. L.J. S4, (col. 3) (1998).
  - This article notes a circuit split regarding whether a court may transfer a motion to quash to the district where the underlying action is pending. The article notes that the Seventh, Eighth, and Tenth Circuits, and a number of district courts, have allowed such transfers, but the D.C. Circuit has not. *Id.* The article discusses the D.C.

- Circuit’s decision in *In re Sealed Case*, 141 F.3d 337 (D.C. Cir. Apr. 14, 1998)).
- The article argues that not allowing transfer results in inefficiencies because the judge in the district from which the subpoena issued sees only a small slice of the case, and because piecemeal resolution of discovery disputes involves many judges, rather than one, and may result in inconsistent discovery decisions in a single case. 7/20/98 N.Y. L.J. S4.
  - The article notes that courts allowing transfers usually rely on the Advisory Committee Notes to Rule 26(c), which state that “[t]he court in the district where the deposition is being taken may, and frequently will, remit the deponent or party to the court where the action is pending.” *Id.* The article explains that *In re Sealed Case* rejected reliance on that Note, and was concerned that transfer could force nonparties to litigate motions to compel before courts lacking jurisdiction over them. *Id.*
  - The article asserts that *In re Sealed* reached the wrong decision, arguing that there are other contexts in which parties litigate rights before courts that do not have personal jurisdiction over them; that given that parties have the option to bring a motion for protective order in the court where the action is pending, it makes little sense to not allow transfers of motions to quash; that disallowing transfer is wasteful of judicial resources; and that disallowing transfer encourages forum shopping for discovery practice. *Id.*

### **Expert Issues**

- George James Bagnall, Comment, *Notes of the 1991 Advisory Committee for the Amendment of Federal Rules of Civil Procedure 45: Is the Compulsion to Testify of an Unretained Expert Witness a Taking?*, 83 OR. L. REV. 763, 793 (2004) (“The discretionary language of Rule 45(c)(3)(B)(ii) should be modified from may to shall to match that of Rule 45(c)(3)(A). As the advisory committee’s notes to the 1991 amendment of Rule 45 suggest, forcing an expert to testify amounts to a taking of his property.”).
- Don Zupanec, *Subpoena – Unretained Expert – Factual Information – Past Opinion*, 19 No. 3 FED. LITIGATOR 11 (2004).
  - This article discusses *Statutory Committee of Unsecured Creditors v. Motorola, Inc.*, 218 F.R.D. 325 (D.D.C. 2003), which held that “F.R.C.P. 45(c)(3)(B)(ii)’s protection for unretained experts applies to subpoenas seeking factual information and past opinions from such persons.” The article explains that “[a]ssuming the expert is able to show that the material does not describe ‘specific events or occurrences in dispute’ and is not the result of research undertaken at the request of a party to the litigation (*see* Rule 45(c)(3)(B)(ii)), the burden is on the subpoenaing party to establish a substantial need, the material’s unavailability from other sources without undue hardship, and, importantly, that the expert will be ‘reasonably compensated’ for producing it (*see* Rule 45(c)(3)(B)(iii)).” *Id.* The article discusses the factors relevant to making this showing.
- *Deposition Costs – Treating Physicians*, 13 No. 6 FED. LITIGATOR 171 (1998) (discussing *Fisher v. Ford Motor Co.*, 178 F.R.D. 195 (N.D. Ohio 1998), which held that treating



physicians who are subpoenaed under Rule 45 are entitled to the statutory rate of compensation as fact witnesses, not as expert witnesses).<sup>6</sup>

- Gregory P. Joseph, *Assessing Federal Rule 45*, 12/28/92 NAT'L L.J. 23, (col. 1) (1992).
  - “The extent to which a Rule 45 document subpoena may be used to obtain an adverse expert’s files is not entirely certain. In a recent case, the U.S. District Court for the Western District of Virginia held that Rule 45 cannot be used to obtain an opposing expert’s files because Rule 26(b)(4) now limits expert discovery to interrogatories, and that limitation evinces a policy judgment that expert disclosure is otherwise off limits.” *Id.* (citing *Marsh v. Jackson*, 141 F.R.D. 431 (W.D. Va. 1992)). However, this was before the 1993 amendments to Rule 26 regarding expert disclosures: “One might query whether that analysis [in *Marsh*] will retain vitality if the pending amendments to Rule 26 are adopted. Under proposed Rule 26(a)(3), which has been approved by the Judicial Conference, expert discovery in the future will include extraordinarily detailed expert reports and depositions as of right. That would appear to evince a different policy judgment – one that might be compatible with future use of Rule 45 document subpoenas to obtain adverse experts’ files.” *Id.*

#### **Trade Secrets/Confidential Information**

- Curtis Scribner, Note, *Subpoena to Google Inc. in ACLU v. Gonzales: “Big Brother” Is Watching Your Internet Searches Through Government Subpoenas*, 75 U. CIN. L. REV. 1273 (2007).
  - This article is focused on problems created by subpoenas for requests for information revealed on the internet, but most of the issues raised do not necessarily relate to Rule 45. However, with respect to trade secret protection, the article notes that “[t]he language of FRCP 45 states that the court ‘shall’ modify or quash a subpoena if it creates an undue burden. On the other hand if the subpoena requires exposure of a trade secret, the court ‘may’ modify or quash a subpoena. Obviously, the Rule’s use of the language ‘may’ gives the court discretion when deciding upon a subpoena which endangers trade secrets.” *Id.* at 1283.
- Don Zupanec, *Subpoena – Confidential Information – Reasonable Compensation*, 20 No. 11 FED. LITIGATOR 11 (2005).
  - This article discusses *Klay v. All Defendants*, 425 F.3d 977 (11th Cir. 2005), which held that “[w]hether a subpoenaed party is entitled to reasonable compensation for

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<sup>6</sup> Other courts have disagreed with this holding. See, e.g., *Wirtz v. Kan. Farm Bureau Servs., Inc.*, 355 F. Supp. 2d 1190, 1211 (D. Kan. 2005) (“To be certain, a number of courts have held that a treating physician testifying solely to his or her treatment of the patient is not entitled to anything above the fact witness fee. However, a more common view is that a treating physician responding to discovery requests and testifying at trial is entitled to his or her ‘reasonable fee’ because such physician’s testimony will necessarily involve scientific knowledge and observations that do not inform the testimony of a simple ‘fact’ or ‘occurrence’ witness.”) (footnotes omitted); *Coleman v. Dydula*, 190 F.R.D. 320, 323 (W.D.N.Y. 1999) (noting a split of authority, and determining that treating physicians were entitled to a “reasonable” fee for their deposition testimony, rather than the statutory rate).

disclosure of confidential information, and the amount of compensation, if any, depend on whether disclosure causes a loss to the party.” 20 No. 11 FED. LITIGATOR 11. The court noted that “Rule 45(c)(3)(B) protects subpoenaed parties from unnecessary expense in responding to a subpoena, and also from ‘unnecessary or unduly harmful disclosures of confidential information.’” *Id.* (quoting FED. R. CIV. P. 45 Advisory Committee Notes (1991 amendments)). “The Eleventh Circuit said that Rule 45(c)(3)(B) requires reasonable compensation for compelled use of confidential intellectual property.” *Id.* (citing FED. R. CIV. P. 45(c)(3)(B)(ii)). “The Eleventh Circuit said that compensation is required only when disclosure of confidential intellectual property or other confidential information causes ‘actual property loss’ to a subpoenaed party. The amount of compensation is measured by loss to the subpoenaed party from disclosure of the information, not by any gain to the subpoenaing party from obtaining the information. If disclosure causes no loss, the amount of compensation reasonably owed is zero. If loss is substantial, the amount of compensation will be, too, even if gain to the subpoenaing party is slight.” *Id.*

- In the “Litigation Tips” section, the article states: “This decision recognizes that under Rule 45(c)(3)(B)(i), (iii), the compensation requirement extends to compelled disclosure of intellectual property and confidential information by other than unretained experts. Assuming the subpoenaing party makes the threshold showing, it is up to the subpoenaed party to establish a basis for compensation and the amount of compensation that is reasonable. Under the approach adopted here – which is analogous to the method of determining ‘just compensation’ for the compelled taking of nonrivalrous real property – the subpoenaed party must (1) demonstrate that disclosure will result in a loss, and (2) quantify the loss. Compensation is not automatic.” *Id.*
- Don Zupanec, *Subpoena – Copying Computer Hard Drives – Trade Secrets*, 23 No. 9 FED. LITIGATOR 9 (2008).
  - This article discusses *Daimler Truck North America LLC v. Younessi*, No. 08-MC-5011RBL, 2008 WL 2519845 (W.D. Wash. June 20, 2008), which found that “[t]he presence of trade secrets or similar proprietary information on computer hard drives supports quashing a subpoena for copying the drives.” 23 No. 9 FED. LITIGATOR 9. The court found that discovery was warranted, but that a protective order was appropriate to allow the producing party to search for relevant documents that would not disclose trade secrets, rather than requiring production of the full hard drives. *See id.*
  - The article notes that while nonparties subject to subpoenas are not required to produce electronically stored information that is not reasonably accessible, sometimes information may be reasonably accessible but still place an undue burden on the subpoenaed party. The article explains: “Addition of Rule 45(d)(1)(D) expanded the possible protective responses to nonparty subpoenas for electronically stored information. But the Rule’s ‘not reasonably accessible’ requirement limits its applicability. Other responses, not specific to requests for ESI, may provide a better

chance of resisting a subpoena.” *Id.*

- Gregory P. Joseph, *Assessing Federal Rule 45*, 12/28/92 NAT’L L.J. 23, (col. 1) (1992).
  - “Rule 45(c)[(3)](B)(i) authorizes, but does not require, the court to protect a person whose trade secrets or other proprietary information have been subpoenaed. Two recent cases . . . conclude that once the competitive sensitivity of the information has been demonstrated, the burden shifts to the party issuing the subpoena to demonstrate a need for the information that is greater than the harm caused by its disclosure.” *Id.* (citing *Stanley Works v. Newell Co.*, No. 92 C 20157, 1992 WL 229652 (N.D. Ill. Aug. 27, 1992); *Westinghouse Elec. Corp. v. Carolina Power & Light Co.*, Civ. A. No. 91-4288, 1992 WL 300796 (E.D. La. Sept. 22, 1992)).

### **Requirement to Meet and Confer**

- *Certification Requirement – Nonparty Discovery – Applicability*, 18 NO. 2 FED. LITIGATOR 42 (2003).
  - This article discusses *Medical Components, Inc. v. Classic Medical, Inc.*, 210 F.R.D. 175 (M.D.N.C. 2002), which found that “a local rule requiring that a motion to compel discovery be accompanied by an attestation that an attempt was made to resolve the dispute informally applies to discovery from nonparties as well as parties.” 18 NO. 2 FED. LITIGATOR at 42.
  - “A mandatory attempt to settle discovery disputes informally before requesting court intervention is implicit, the court said, in Rule 45(c)’s requirement that subpoenaing parties take ‘reasonable steps to avoid imposing undue burden or expense’ on nonparties served with discovery subpoenas.” *Id.* at 43.
  - In the “Litigation Tips” section, the article notes: “Many districts have local rules comparable to M.D.N.C. Local R. 26.1(c). While they may not explicitly require a movant to certify that an effort was made to resolve a discovery dispute with nonparties, their applicability to Rule 45 discovery should be assumed. In some districts, the certification requirement explicitly applies to all discovery, including discovery from nonparties.” *Id.*
- *Sedona Commentary, supra.*
  - “[C]ourts have not resolved such questions as whether the party and non-party must meet and attempt to resolve disputes prior to proceeding to court for a motion to compel or motion to quash. Nothing in Rule 45 requires such a conference. Nor does anything in Rule 45 require the parties to confer with each other or with the nonparty prior to serving a subpoena. Furthermore, courts have not addressed the question of whether cost shifting would be allowed for the costs imposed on the non-party during the preservation process.” *Id.* at 200 (footnotes omitted).
  - Under suggested Best Practices, the *Sedona Commentary* states: “While the Federal Rules do not require that the parties ‘meet and confer’ with the non-party recipients of a subpoena, local rules or judges’ personal rules may contain broad requirements encompassing all parties – even non-party recipients of subpoenas. Even in the absence of such a requirement, prior to issuing a subpoena to a non-party, the issuing

party should, when feasible, contact the non-party to discuss burden, form of production, cost, retention of important information, scope, and duration of a litigation hold. This is particularly important if the party and the non-party have a preexisting business relationship.” *Id.* at 201.

- Another suggested Best Practice is that “[w]henver possible, parties and non-parties should consider stipulating to extend the 14 days in Rule 45(c)(2)(B) for the non-party to serve an objection to facilitate and allow meaningful dialogue.” *Id.*
- Another suggested Best Practice is: “[I]f the parties anticipate serving non-party subpoenas that may call for production of privileged ESI, the parties should address, as part of the Rule 26(f) conference, a reasonable timetable for a party to assert a Rule 45(d)(2)(B) objection. In the absence of such an agreement, the reasonableness of the timing of any such objection will likely simply be another matter for dispute.” *Id.* at 202.

### **Privilege Claims and Privilege Logs**

- Thomas M. Cunningham, *Impact the Discretion of the Court, Examining Privilege Log Descriptions in Federal Litigation*, 46 No. 10 DRI FOR DEF. 51 (2004).
- “Persons responding to a subpoena *duces tecum* must act more quickly in asserting the person’s claim of privilege on a privilege log. Under Federal Rule 45(c)(2)(B), a person commanded to produce and permit inspection of documents must comply within 14 days after service of the subpoena, or before the time specified for compliance if such time is less than 14 days after service of the subpoena. Alternatively, the responding person must serve any written objections to the subpoena within that time. The text of the rule expressly conditions the service of an objection to a subpoena *duces tecum* upon compliance with the rule requiring express claims of privilege. FED. R. CIV. P. 45(c)(2)(B). In other words, a person objecting to compliance with a subpoena *duces tecum* on grounds of privilege must produce a privilege log at or within the time the person serves objections to the subpoena under the literal terms of the rules.

Some courts have characterized the language of Rule 45(d)(2) as unclear as to when the privilege log must be produced, *e.g.*, *Goodyear Tire & Rubber Company v. Kirk’s Tire & Auto Servicer of Haverstraw, Inc.*, 211 F.R.D. 658, 661 (D. Kan. 2003) (citing cases). Some courts have permitted a subpoenaed non-party to produce the information requested by Rule 45(d)(2) after filing objections under Rule 45(c)(2)(B) or a motion to quash, *e.g.*, *Minnesota Sch. Bds. Ass’n Ins. Trust v. Employers Ins. Co. of Wausau*, 183 F.R.D. 627, 629 (N.D. Ill. 1999). Several circuits hold that a full privilege log under Rule 45(d)(2) will be considered timely if provided within a ‘reasonable time’ as long as objections are asserted within the 14-day time frame, including an objection on the grounds that certain specified documents will be withheld on the basis of an articulated privilege. *In re DG Acquisition Corp.*, 151 F.3d 75, 81 (2d Cir. 1998); *Tuite v. Henry*, 98 F.3d 1411, 1416 (D.C. Cir. 1996).”

*Id.*

- *Subpoena – Privilege Objection – Timeliness*, 12 NO. 3 FED. LITIGATOR 78 (1997).
  - This article discusses *Tuite v. Henry*, 98 F.3d 1411 (D.C. Cir. 1996), which held that “[t]o raise a privilege objection to a subpoena requiring production of documents, a written objection stating the claim of privilege must be made within 14 days after the subpoena is served,” but that a privilege log can be served within a reasonable time. 12 NO. 3 FED. LITIGATOR at 78. The *Tuite* court held that “Rule 45(c)(2)(B)’s 14-day requirement applies to both the objection itself and the privilege claim.” *Id.* at 79. “In the court’s view, Rule 45(c)(2)(B)’s ‘subject to’ language does not relieve the objecting party from asserting the privilege claim within 14 days of being served. The language, it said, merely clarifies the type of information that eventually must be provided to support a privilege claim.” *Id.* While the claim of privilege must be made within 14 days, a privilege log can be provided within a “reasonable time,” which “will depend on the amount of time the subpoenaed party needs to evaluate the documents fully, and the amount of time the subpoenaing party needs to contest the claim if it chooses to do so.” *Id.*
  - In the “Litigation Tips” section, the article notes: “It is possible to interpret Rule 45(c)(2)(B) and 45(d)(2) as permitting a privilege objection to be delayed until the deadline for complying with the subpoena. The prudent procedure, though, is the one described here: assert the privilege claim at the same time objection is made to the subpoena. Do this within 14 days of the date the subpoena is served, or before the time for complying with the subpoena, if this is less than 14 days after service.” *Id.*
  
- *Subpoena – Privilege Objection – Timeliness*, 13 NO. 11 FED. LITIGATOR 309 (1998).
  - This article discusses *In re DG Corp.*, 151 F.3d 75 (2d Cir. 1998), where it was held that “[a] privilege objection to a subpoena requiring production of documents must be made within 14 days after the subpoena is served,” but that when a constitutional privilege is involved, such as the 5th Amendment privilege against self-incrimination, the court has discretion in determining whether later assertion constitutes a waiver. 13 NO. 11 FED. LITIGATOR at 309.
  - The article summarizes the law in the “Litigation Tips” section: “One, privilege claims should be asserted at the same time objection is made to a subpoena calling for production of documents. Written objection should be made, and the privilege claim asserted, within 14 days after the subpoena is served, or before the time specified for compliance, if less than 14 days after service. It’s not necessary to provide a privilege log at the time the objection is made. The log may be furnished after the subpoenaed documents have been examined and a determination is made regarding which ones are privileged, as long as this is done within a reasonable time.” *Id.* at 310.
  
- *In Camera Inspection of Documents Claimed To Be Privileged Requires No Showing of Need*, 15 NO. 4 FED. LITIGATOR 89 (2000).
  - This article discusses *Avery Dennison Corp. v. Four Pillars*, 190 F.R.D. 1 (D.D.C. 1999), where parties served with a subpoena *duces tecum* objected on privilege grounds, did not produce a privilege log, and then refused to produce the documents for in camera inspection by the magistrate judge, arguing that the subpoenaed party



had not made a showing of need for the documents. 15 NO. 4 FED. LITIGATOR at 89. The magistrate judge held: “To require the party seeking enforcement to prove need before the court is even permitted to order the material produced for in camera inspection would . . . add to Rule 45 a requirement it does not contain.” *Id.* at 90.

### **Timeliness of Motion to Quash**

- *Privilege Against Disclosing Subpoenaed Data Is Waived When Documents Are Furnished for Inspection Even If No Copies Made*, 36 NO. 8 GOV’T CONTRACTOR P 120 (1994).
  - This article discusses *Tutor-Saliba Corp. v. U.S.*, 30 Fed. Cl. 155 (1993), which evaluated the timeliness of a motion to quash under Court of Federal Claims Rule 45, which was similar to Federal Rule 45. The court found that “(a) its Rule 45(c)(2)(B) states that a person ordered to produce and permit inspection and copying may file a written objection to that order within 14 days after service of the subpoena, and (b) Rule 45(c)(3)(A) states that a subpoena requiring disclosure of privileged material shall be quashed in response to a ‘timely motion.’” 36 NO. 8 GOV’T CONTRACTOR P 120. “Reading these two rules together, the Court holds that requests to quash a subpoena must be filed within the specified 14-day period. Because the subcontractor’s request did not meet this requirement, it must be denied as untimely.” *Id.*
  - The article notes that the “timely motion” language in the Court of Federal Claims Rule 45(c)(3) was adopted shortly after a similar modification went into effect in Federal Rule 45 in 1991. “In view of the recent nature of the change [in FED. R. CIV. P. 45], there have not yet been many decisions interpreting it. Of these few, one that takes a position similar to that of the Court in *Tutor-Saliba* is *In re Ecam Publications, Inc.*, . . . 131 [B.R.] 556 (Bankr. S.D.N.Y. 1991). But compare *Winchester Capital Management Co. v. Manufacturers Hanover Trust Co.*, 144 F.R.D. 170 (D. Mass. 1992), ruling that a claim of attorney-client privilege may be asserted at the time for compliance with a subpoena, even if that time is more than 14 days after the subpoena was served.” *Id.*

### **Waiver of Objections**

- Don Zupanec, *Subpoena – Motion to Quash – 100-Mile Rule – Waiver*, 21 NO. 11 FED. LITIGATOR 9 (2006).
  - This article discusses *Estate of Ungar v. Palestinian Authority*, 451 F. Supp. 2d 607 (2006), where the court found that “[f]ailing to raise F.R.C.P. 45(c)(3)(A)(ii)’s 100-mile rule in a timely motion to quash a subpoena does not waive asserting it as a defense with the subpoena.” 21 NO. 11 FED. LITIGATOR 9. In *Ungar*, the subpoenaed witnesses timely moved to quash, but did not raise their 100-mile rule objection until after the return date. “Because no timely motion raising violation of the [100-mile] rule had been made, the court was not bound by Rule 45(c)(3)(A)’s requirement that the subpoenas be quashed or modified. In the court’s view, the appropriate action was nevertheless to order their modification – but not entirely eliminate the testimonial aspect.” *Id.*
  - In the “Litigation Tips” section, the article states: “Failing to object on a timely basis,

or omitting grounds from an objection, ordinarily operates as a waiver.” *Id.* (citation omitted). “There are two possible exceptions to the waiver rule. One applies where circumstances are unusual and good cause exists for failing to make a timely objection. This is generally limited to the following circumstances: (1) a subpoena is overbroad on its face; (2) the person subpoenaed is a nonparty acting in good faith; or (3) counsel for the person subpoenaed and counsel for the party serving the subpoena were in contact concerning compliance with the subpoena prior to the time objection was made.

The other exception applies to privilege objections. Failing to object on the basis of privilege before Rule 45(c)(2)(B)’s 14-day deadline does not result in waiver, as long as objection is made within a ‘reasonable period.’ This is a narrowly recognized exception.”

*Id.* (internal citations omitted).

- David D. Siegel, *Federal Subpoena Practice Under the New Rule 45 of the Federal Rules of Civil Procedure*, 139 F.R.D. 197, 231 (1992) (“It has been held that a post-compliance application for costs is permissible, at least when the nonparty has reserved, in the course of the earlier proceedings, the right to make the later application; that to hold otherwise might very well interrupt the parties’ discovery proceedings by compelling costs motions before costs can even be reasonably estimated; and that the seeking of costs should therefore not be restricted to the pre-compliance context of a motion to compel or quash.”) (citation omitted).

### **Subpoenas to Unnamed Plaintiffs in a Class Action**

- *Current Decisions Survey*, 26 NO. 5 CLASS ACTION REP. 73 (2005).
  - This article summarizes *In re Publication Paper Antitrust Litigation*, No. 3:04 MD 1631(SRU), 2005 WL 1629633 (D. Conn. July 5, 2005). The article notes that “[t]he general rule is that discovery is not permitted from absent class members as ‘parties,’ ” but that some courts have allowed discovery against absent class members under Rule 23(d). The article explains that Rule 45 cannot be used to avoid the limitations of Rule 23(d): “The source of discovery requested in this case is Rule 45, not Rule 23, in that the defendants are not seeking []party discovery but third-party discovery pursuant to subpoena. This procedural difference does not, however, have any practical effect. Under both Rules, courts are permitted to deny discovery under the ‘undue burden’ standard. Otherwise, proponents could use Rule 45 to avoid the limitations of Rule 23(d).”

### **Subpoenas to Government Agencies**

- Don Zupanec, *Subpoena – “Person” – Federal Government*, 21 NO. 1 FED. LITIGATOR 10 (2006).
  - This article discusses *Robinson v. City of Philadelphia*, 233 F.R.D. 169 (E.D. Pa. 2005), which held that “[f]ederal agencies and employees are not ‘persons’ under F.R.C.P. 45, authorizing subpoenas for discovery from nonparties.” 21 NO. 1 FED.

LITIGATOR 10.

- In the “Litigation Tips” section, the article states: “This is the latest in a recent series of rulings that the federal government and federal agencies are not ‘persons’ within the meaning of Rule 45(a)(1)(C).” *Id.* (citing *Lerner v. District of Columbia*, No. Civ. A. 00-1590 GK, 2005 WL 2375175 (D.D.C. 2005); *United States ex rel. Taylor v. Gabelli*, 233 F.R.D. 174 (D.D.C. 2005); *Yousuf v. Samantar*, No. MISC. 05-110 (RBW), 2005 WL 1523385 (D.D.C. May 3, 2005)<sup>7</sup>). However, the article notes that a party is not precluded from seeking discovery from a nonparty government agency by issuing a subpoena, but because enforcement may be limited under Rule 45, “[t]he likely means of enforcement, assuming denial was pursuant to an agency regulation, is an action against the agency under the Administrative Procedures Act (APA).” *Id.* (citations omitted). The article notes that “[a] simple motion to enforce may also be possible.” *Id.* (citing *United States Env’tl. Prot. Agency v. Gen. Elec. Co.*, 197 F.3d 592 (2d Cir. 1999)). “What’s significant is the standard of review under the APA of an agency’s decision not to respond to a subpoena. The decision will be upheld unless ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’” *Id.* (citations omitted).
- Don Zupanec, *Appellate Jurisdiction – Judicial Review – Federal Agency Subpoena*, 22 No. 5 FED. LITIGATOR 18 (2007).
  - This article discusses *Watts v. Securities and Exchange Commission*, 482 F.3d 501 (D.C. Cir. 2007), where it was held that “[a] decision by the Securities and Exchange Commission not to comply with a subpoena issued in a civil lawsuit is not initially reviewable in an appeals court.”
  - In the “Litigation Tips” section, the article explains: “There are two procedures for obtaining judicial review [of an agency’s decision not to comply with a subpoena]: a motion to compel under F.R.C.P. 45 or an independent action against the agency under the APA (*see* 5 U.S.C.A. 702). In the D.C. Circuit’s view, a motion to compel is the proper procedure. . . . The D.C. Circuit said that a challenge to an agency’s refusal to comply with a subpoena may proceed as a Rule 45 motion to compel. The Second Circuit agrees.” 22 No. 5 FED. LITIGATOR 18 (citing *United States Env’tl. Prot. Agency v. Gen. Elec. Co.*, 197 F.3d 592 (2d Cir. 1999)). “While the D.C. and Second Circuits agree on this, they part company with respect to the appropriate standard of review. The APA requires upholding agency decisions unless they are arbitrary, capricious, or in excess of the agency’s authority. Under Rule 45, a subpoena may be quashed if complying would cause an ‘undue burden.’ The Second Circuit applies the APA’s ‘arbitrary and capricious’ standard. The D.C. Circuit opts for Rule 45’s ‘undue burden’ standard – but emphasizes that in determining whether a subpoena is unduly burdensome on an agency, district courts must be particularly

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<sup>7</sup> The district court’s decision in *Yousuf* was overruled on appeal. *See Yousuf v. Samantar*, 451 F.3d 248, 250 (D.C. Cir. 2006) (“[W]e hold the United States is a ‘person’ within the meaning of Rule 45 – as it has been held to be under every Rule thus far litigated.”).

sensitive to both the fact that the agency is not a party to the litigation and the effect that complying with third-party subpoenas will have on its operations.” *Id.* (internal citations omitted).

- Don Zupanec, *Discovery Subpoenas – “Person” – United States*, 21 NO. 7 FED. LITIGATOR 13 (2006).
  - This article discusses *In re Vioxx Products Liability Litigation*, 235 F.R.D. 334 (E.D. La. 2006), which held that “[t]he United States is a ‘person’ within the meaning of F.R.C.P. 45(a)(1)(C), authorizing issuance of discovery subpoenas, even though not a party to litigation.” 21 NO. 7 FED. LITIGATOR 13. The court concluded that the presumption that the government is not a person does not apply to Rule 45. *Id.* The court noted that the government is considered a “person” when it is a party and that Rule 45 contains no language distinguishing between when the government is a party or nonparty, and found that “person” in Rule 45 should include the government. *Id.* The court also found that Rule 30(a)(1) “allows taking the testimony of any ‘person’ by deposition,” and that “Rule 30(b)(6) permits naming a government agency as a deponent in a notice of deposition and a subpoena,” and concluded that “read in conjunction, these two rules allow deposing a governmental agency, whether a party or not, and compelling attendance at a deposition by means of a Rule 45 subpoena.” *Id.* The court found that “[i]nterpreting ‘person’ as used in Rule 45 to exclude governmental agencies would conflict with Rule 30.” *Id.* The court also noted that “Rule 4(i)(3)(A) refers to federal agencies and corporations as ‘persons required to be served’ in actions governed by Rule 4(i)(2)(A),” and concluded that “[u]nder a consistent construction of ‘person’ as used in Rule 45 and ‘persons’ as referred to in Rule 4(i), federal agencies are persons.” *Id.*
  - In the “Litigation Tips” section, the article states: “As we recently noted . . . , a series of decisions, principally in the District of Columbia Circuit, have construed the term ‘person’ as used in Rule 45(a)(1)(C) not to include the federal government and federal agencies. The conclusion reached [in *Vioxx*] – that the United States is a ‘person’ – treats governmental and nongovernmental entities the same even when the government or a federal agency is not a party to litigation.” *Id.*
  - “The construction of ‘person’ does not necessarily shortcut the discovery process when information is sought from a nonparty federal agency. What it does is maintain the possibility of a motion to compel as a way of enforcing a subpoena. Otherwise, enforcement presumably requires an action against the agency under the Administrative Procedures Act, at least where a decision not to comply with a subpoena is pursuant to agency regulation.” *Id.*
- Taxpayers Against Fraud Education Fund, *Recent False Claims Act & Qui Tam Decisions*, 42 FALSE CL. ACT AND QUI TAM Q. REV. 7 (2006).
  - This article discusses *U.S. ex rel. Pogue v. Diabetes Treatment Centers of America, Inc.*, 235 F.R.D. 521 (D.D.C. 2006), in which the “court refused to grant a defendant’s motion to compel the United States to respond to a subpoena in a non-intervened FCA qui tam action.” 42 FALSE CL. ACT AND QUI TAM Q. REV. 7.

“Dissecting the language of Rule 45, the court ruled that the government was not a ‘person’ within the meaning of the rule, for the government was not a real party in interest when, as in this case, the government had elected not to intervene.” *Id.* “[T]he court noted that any dispute that the agency’s response to the subpoena was not in conformity with its own regulations must be brought under the Administrative Procedure Act (APA).” *Id.* (citing 5 U.S.C. §§ 701 *et seq.*; *Yousuf v. Samantar*, No. MISC. 05-110 (RBW), 2005 WL 1523385, at \*4 n.10 (D.D.C. 2005)).

- Thomas L. McGovern III, Daniel P. Graham & Stuart B. Nibley, *A Level Playing Field: Why Congress Intended the Boards of Contract Appeals To Have Enforceable Subpoena Power Over Both Contractors and the Government*, 36 PUB. CONT. L.J. 495 (2007).
  - “DOJ . . . began to raise and litigate the issue [of whether the United States is a “person” under Rule 45] and obtained a number of district court rulings that found that the United States was not a ‘person’ under Rule 45. . . . [T]hese courts based their rulings on the ‘longstanding interpretative presumption that person does not include the sovereign.’ Other decisions, however, rejected the Government’s position and held that the United States is a ‘person’ under Rule 45.” *Id.* at 504 (footnotes omitted).
  - The article then discusses the case of *Yousuf v. Samantar*, 451 F.3d 248 (D.C. Cir. 2006), which concluded that Rule 45 does apply to the Government, finding that its application to the government “would work no ‘obvious absurdity,’” that “[t]he Rules were designed to provide a ‘liberal opportunity for discovery,’” and that ‘there is no indication the Government should be exempt from the obligation of a nonparty to provide its evidence pursuant to subpoena.’” *Id.* at 505 (footnotes omitted). The court also “observed that the term ‘person’ in Federal Rules of Civil Procedure 4 and 30 expressly includes the Government and that the term as used in Rules 14, 19, and 24 has been interpreted to include the Government.” *Id.* at 506 (footnote omitted). Finally, the court noted that “DOJ has a long history of complying with Rule 45 subpoenas and this was strong evidence of a consistent and longstanding ‘executive interpretation’ of Rule 45.” *Id.* “[T]he *Yousuf* court concluded that ‘the ‘purpose, the subject matter, the context, [and] the . . . history [of Rule 45] . . . indicate an intent, by the use of the term [‘person’], to bring [the government] within the scope’ of the Rule.’” *Id.* (footnote omitted).
- *Discovery from Federal Government – Authority of Agency Head To Deny Discovery Request*, 10 NO. 1 FED. LITIGATOR 11 (1995).
  - This article discusses *Exxon Shipping Co. v. United States Dept. of Interior*, 34 F.3d 774 (9th Cir. 1994), which found that “[f]ederal discovery rules apply to requests for discovery from the federal government, whether the government is a party to the action or not, and federal agency heads may not conclusively determine whether government employees may refuse to comply with proper discovery requests.” 10 NO. 1 FED. LITIGATOR at 11. The court “expressed confidence, however, in the ability of district courts to balance the interest in full and complete discovery reflected in the discovery rules with the government’s interest in ensuring the efficiency of its



operations.” *Id.* at 12. The article notes that the case “provides grounds for arguing that discovery requests to government officials, when the government is not a party to the underlying litigation, should not be treated any differently than other discovery requests.” *Id.*

- Robert R. Vieth & Tara M. Lee, *Can a Third Party Subpoena the Feds? D.C. Circuit Concludes that an Agency Is a “Person” Under Rule 45*, 8/21/2006 LEGAL TIMES 40 (2006).
  - This article notes a circuit split as to whether a government agency is required to comply with a subpoena. The article notes the D.C. Circuit’s decision in *Yousuf v. Samantar* that the government is a “person” under Rule 45 and subject to the federal subpoena power of federal courts, but explains that other circuits have reached different results. *See id.* “The 4th Circuit, for example, has stated that ‘when an agency is not a party to an action, its choice of whether or not to comply with a third-party subpoena is essentially a policy decision about the best use of the agency’s resources. In another case the 3rd Circuit reasoned that the Environmental Protection Agency ‘did not abuse its discretion or otherwise err in preventing [an agency employee] from using agency time to give deposition testimony, . . . in private litigation.’ The 7th Circuit has construed [*United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951)] as ‘part of an unbroken chain of authority that supports the Department’s contention that a federal employee cannot be compelled to obey a subpoena, even a federal subpoena, that acts against valid agency regulations.’ Although each of these quotations is arguably dicta, a party would be well served to try to avoid serving a document subpoena in these circuits.” *Id.*
  - The article argues that the government’s argument that it is not subject to federal subpoenas is flawed for several reasons. The article asserts that “it is not clear that the APA supplies the applicable waiver of sovereign immunity,” and argues that the suggestion that refusal to comply with a subpoena is subject only to arbitrary and capricious review is erroneous because “the APA empowers a court to decree unlawful agency action that is ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’” *Id.* The article notes that “[f]or these and other reasons, the 9th and D.C. circuits have rejected the government’s traditional argument and reasoned that the government is subject to a valid federal court subpoena.” *Id.* (citing *Houston Business Journal, Inc. v. Office of Comptroller of the Currency, United States Dep’t of Treasury*, 86 F.3d 1208 (D.C. Cir. 1996)).
  - The article notes that in one case, the D.C. Circuit ruled that the government is not a “person” under a federal statute authorizing district courts to issue subpoenas to any “person” in connection with foreign judicial proceedings, and that the D.C. Circuit later stated in *Linder v. Calero-Portocarrero*, 251 F.3d 178 (D.C. Cir. 2001), “that although many courts had long ‘assumed’ that the government was subject to a subpoena, that ‘assumption may need to be re-examined in light of *Al-Fayed v. CIA*, 229 F.3d 272 (D.C. Cir. 2000).” 8/21/2006 LEGAL TIMES 40. The article notes that “[b]y January 2006, a number of district judges within the circuit had declined to enforce subpoenas against federal agencies on the grounds that the government is not subject to a [Rule 45] subpoena,” but that “[f]or now, at least, *Yousuf* has put an end

to this trend, as the D.C. Circuit rejected the government’s argument that it is not a ‘person’ under [Rule 45].” *Id.*

- The article argues that the result in *Yousuf* is correct for several reasons, including that the government has not previously raised the objection that it is not a “person” in many decades of practice under the federal rules; that many other civil rules use the term “person” and have been interpreted to include the government; that “countless agency regulations recognize that subpoenas may be served on the agencies”; that there is a need to enforce separation of powers; and that practical reasons support the decision. *Id.*
- *Civil Procedure – Subpoena Power – Ninth Circuit Rejects Authority of Non-Party Federal Agencies To Prevent Employees from Testifying Pursuant to a Federal Subpoena – Exxon Shipping Co. v. United States Dep’t of Interior*, 34 F.3d 774 (9th Cir. 1994), 108 HARV. L. REV. 965 (1995).
  - This article discusses *Exxon Shipping*, which “held that neither [*United States ex rel. Touhy v. Ragen*] nor the [Federal] Housekeeping Act itself allows non-party federal agencies to forbid agency employees from complying with a court’s subpoena.” *Id.* at 965. “The [*Exxon Shipping*] court asserted that *Touhy* stood only for the narrow proposition that an individual agency employee cannot be held in contempt for his or her refusal to produce papers in response to a subpoena *duces tecum* when the employee is acting pursuant to valid agency ‘housekeeping’ regulations,” *id.* at 966, but that it had not reached “the ultimate ‘question of the agency head’s power to withhold evidence from a court without a specific claim of privilege,’” *id.* (quoting *Exxon Shipping*, 34 F.3d at 776). “*Exxon Shipping* is the first decision in which a U.S. court of appeals has held that the Housekeeping Act does not grant agency officials the authority to withhold subpoenaed documents or employee testimony in a civil action to which the government is not a party,” but “its holding does not deprive the Housekeeping Act of all significance in the area of employee subpoenas” because “[t]he legitimate governmental interest in centralizing decision-making can still justify regulations that preclude individual employees from testifying or from producing records until a determination whether to assert an evidentiary privilege or claim of burdensomeness is made by responsible officials within the agency.” *Id.* at 967–68 (footnotes omitted).
  - The article recognizes a circuit split regarding applying subpoenas to government agencies: “The Ninth Circuit’s approach differs significantly from the deferential standard of review applied by other circuits in similar cases. For example, in *Davis Enterprises v. EPA*[, 877 F.2d 1181 (3d Cir. 1989)] and *Moore v. Armour Pharmaceuticals Co.*[, 927 F.2d 1194 (11th Cir. 1991)], the Third and the Eleventh Circuits, respectively, approved agency decisions not to comply with subpoenas for employee testimony under an ‘arbitrary, capricious, or abuse of discretion’ standard of review. In large part, those courts measured the degree of arbitrariness or capriciousness of each agency’s conduct with reference to the agency’s own housekeeping standards, which plainly seek to promote the agency’s own interests without regard for a litigant’s need for disclosure.” *Id.* at 968 (footnotes omitted).

- The article also notes that even after *Exxon Shipping*, there are difficulties in directing subpoenas to government agencies because “under *Touhy*, agency employees who refuse compliance with a subpoena until given permission by a superior are still immunized from contempt proceedings,” *id.* at 969, and that even in a subpoena directed to the agency, a litigant who “is refused testimony must pursue a costly and time-consuming collateral suit to obtain relief” under the APA, *id.* The article further notes that while the *Exxon Shipping* court thought its decision would solve these problems, “[t]hat assumption . . . may not be fully borne out, because, under the Federal Rules, it is the employee and not the agency who would be required by a subpoena to appear initially at a deposition or before a court and at any subsequent contempt proceeding.” *Id.* The article concludes that “the agency would remain, absent an independent action, beyond the court’s reach, and *Touhy* immunity from contempt would protect an unresponsive employee.” *Id.* (footnote omitted).

### **Territorial Reach of Subpoenas - Generally**

- David D. Siegel, *Federal Subpoena Practice Under the New Rule 45 of the Federal Rules of Civil Procedure*, 139 F.R.D. 197 (1992).
- “Rule 45 speaks at one point about serving the subpoena ‘within 100 miles’ from the site of the trial or of a deposition. Subdivision (b)(2). At another point, however, it insists that subpoena take the subpoenaed person no farther than 100 miles from that person’s residence or place of employment. Subdivision (c)(3)(A)(ii). And at yet another it imposes a 100-mile restriction without prescribing at all the point from which the 100 miles is to run. Subdivision (c)(3)(B)(iii). These provisions, moreover, are not independent ones governing different things; they interplay, and dependence on one may create difficulty if not negotiated alongside the other. In some situations when one consults Rule 45 for guidance about the territorial reach of a subpoena and starts to hop back and forth among the several provisions just cited, the rule comes off like a Tower of Babel, an inferno with shrill voices jabbering simultaneously in a confusion of tongues.” *Id.* at 209.
- “If the witness’s residence or employment is more than 100 miles from the place of trial but nevertheless within the state in which the trial court sits, the court can ‘command’ the witness, pursuant to subdivision (c)(3)(A)(ii), to appear for the trial. But that takes a court order. If the subpoena is simply ignored by the witness, it would appear that no contempt punishment would lie under subdivision (e).

For these reasons, the geographical reaches of ‘service’, as prescribed in subdivision (b)(2), may be misleading. If the subpoena is captioned out of the district court of the trial district, and is served on a transient witness within the district, all in conformity with subdivision (b)(2), the subpoena can apparently be disregarded by the witness nevertheless, and safely, if it turns out that the witness lives and works more than 100 miles from the courthouse. The reason once again is that if the witness disobeys the subpoena, contempt will apparently not lie under subdivision (e). And if a motion is made under subdivision (c)(3)(A)(ii) to ‘quash or modify’ the subpoena, the court, according to that provision, ‘shall’ grant the motion.

Perhaps the ‘shall’, if used in conjunction with the ‘modify’ in that situation, would give the court, even in a district more than 100 miles away from the witness’s residence or employment, at least some measure of leverage to exact performance from the witness with a court order. (If a court order issues and is disobeyed, presumably the order will not be subject to the restrictions on the contempt punishment that subdivision (e) imposes on direct disobedience of the subpoena.)”

*Id.*

- “Dwelling on subdivision (c)(3)(A)(ii) for a moment, note that it speaks of the witness having to travel more than 100 miles ‘from the place where that person resides, is employed or regularly transacts business’. The word ‘or’ in that quotation was probably intended to be ‘and’. It was probably intended to say that if the courthouse is within a 100-mile radius of any of those places, compliance is mandatory.” *Id.* at 213.
- “Rule 45 is a daily fundamental in civil trial practice, and yet it sometimes appears to require at least a college minor in mathematics just to figure out safely what court to issue the subpoena ‘from’ and where to effect its service with some assurance that the subpoena will be backed by the contempt sanction if it should be disobeyed.” *Id.* at 214; *see also id.* (discussing multiple cross-references within Rule 45 to determine the proper place for issuance and enforcement of a trial subpoena addressed to a witness). “The attorney who effects service of the subpoena within the surroundings of the trial court instead of the witness’s residence or employment, or who has any uncertainty for any other reason about whether the witness will show up at the courthouse, had best have taken the precaution of deposing the witness before trial. And if the witness is truly a key one, but also an uncooperative one, the attorney, even before commencing the action, would do well to consider, under 28 U.S.C.A. § 1391, whether the venue of the action might be set in a district in which, or within 100 miles of which, the witness’s residence or employment lies.” 139 F.R.D. at 214.
- The article argues that for pretrial subpoenas, Rule 45 must be construed to allow service on the witness anywhere, when the site for deposition or production has been set within the boundaries of subdivision (b)(2) as measured from the witness’s home and employment. *See id.* at 216. “Any other construction would stultify Rule 45 and its geography altogether by enabling a peripatetic witness to avoid the subpoena just by remaining outside the witness’s home state and beyond 100 miles from the witness’s own residential and employment base. That was manifestly not the intention of subdivision (c)(3)(A)(ii), which is referred to explicitly by subdivision (b)(2).” *Id.* at 216–17. “A balancing of all relevant provisions together, in other words, suggests that it is really not subdivision (b)(2) that sets the boundaries for service. In reality, there are no boundaries on service, at least not as long as service is made in the United States. The most meaningful boundaries are the residential and business boundaries that enclose the site of the deposition or production – the boundaries contained in subdivision (c)(3)(A)(ii). If that site is properly selected, it should make little difference where the witness may be reached with the subpoena. A construction any more rigid than that would allow subdivision (b)(2) to undermine rather than

implement the aims of subdivision (c)(3)(A)(ii).” *Id.* at 217. “Trying to set the site so as to pick out the issuing court under subdivision (a)(2), figure out where to make the service under subdivision (b)(2), and satisfy the ultimate requirement of seeing to it that the site selected does not exceed the witness’s convenience limitations set by subdivision (c)(3)(A)(ii), creates a circle from which escape is difficult.” *Id.* The article further argues that subdivision (b)(2) may be superfluous, noting that subdivision (b)(2)’s cross-reference to subdivision (c)(3)(A)(ii) “seems to do nothing so much as cancel out subdivision (b)(2)’s own pronouncement in deference to the geographical pronouncement of subdivision (c)(3)(A)(ii).” *Id.* at 219.

- James B. Sloan & William T. Gotfryd, *Eliminating the 100 Mile Limit for Civil Trial Witnesses: A Proposal to Modernize Civil Trial Practice*, 140 F.R.D. 33 (1992).
  - This article proposes that “Rule 45(b)(2) should be amended to eliminate the 100 mile Rule in favor of national subpoena power with built-in protections against possible abuses.” *Id.* at 34.
  - The proposed revision of Rule 45(b)(2) is: “At the request of any party, subpoenas for attendance at a hearing or trial shall be issued by the clerk of the District Court for the district in which the hearing or trial is held. A subpoena requiring the attendance of a witness at a hearing or trial and production of documents or other materials in the possession of the witness may be served at any place within the United States. The court may condition the enforceability of such subpoena upon the payment to the witness of fair and reasonable expenses for travel, lodging and adequate payment for time spent by the witness in giving testimony, including lost compensation, prior to the date upon which the witness has been required to attend. The court may also enter such other orders, including protective orders under Rule 26(c), as may be just and reasonable to prevent abuses in the pretrial or trial process. On timely motion, or on the court’s own motion, the court may quash or modify the subpoena if it fails to allow reasonable time for compliance.” *Id.* at 40.
  - The article suggests that the proposed amendment will have many benefits, including that it would: “[e]liminate arbitrary distinctions based upon the geographical location of the witnesses”; “[e]liminate any artificial distinctions between the federal government and any other civil litigants”; “[c]larify the ability of parties to compensate witnesses for any adverse economic impact of their being compelled to testify”; “[c]onfer upon the trial court the power to dramatically limit the breadth of deposition discovery, without a procedural due process issue arising over lack of effective trial subpoena opportunities”; and “[e]nable the court to limit depositions for both sides of the litigation to the extent to which specific depositions serve the interests of justice and may be expected to expedite the cases.” *Id.* at 41.
  - The article recognizes that there are several possible objections to elimination of the 100-mile rule for trial witnesses, including the potential for abuse of witnesses, the promotion of a return to the traditional trial with more risks for both sides, and the encouragement of trials at a time when courts are attempting to advance mediation of disputes. However, the article argues that these concerns do not outweigh the benefits of the proposal and that “[t]he federal courts already have substantial power



to prevent abuses by rule as well as their inherent power to control the proceedings.” *Id.* at 44 (footnote omitted). The article also recognizes that the proposed change to Rule 45 would have a collateral impact on other rules of procedure, which would need to be worked out. *Id.* at 44–46.

- Don Zupanec, *Subpoena – Issuing Court – Documents Located in Another District*, 19 NO. 1 FED. LITIGATOR 11 (2004).
  - This article summarizes the decision in *Crafton v. U.S. Specialty Insurance Co.*, 218 F.R.D. 175 (E.D. Ark. 2003), where the court held that “[a] subpoena served on a nonparty corporation’s registered agent in one state is not effective to require production of documents located in another state simply because the corporation has sufficient contact with the state where the agent is located to be subject to jurisdiction there.”
  - The article notes that a subpoena should issue from the court in the district where the documents apparently are located for two reasons: “Rule 45(a)(2) requires that a subpoena for production or inspection issue from the court for the district ‘in which production or inspection is to be made.’ A court in the district where an action is pending does not have authority to enforce a subpoena requiring a nonparty to produce documents located in another district. The other reason is that a subpoena is subject to being quashed or modified if it creates an ‘undue burden.’ A subpoena requiring production in one district of documents located outside the district may be viewed as creating an undue burden on the subpoenaed party. This leaves it vulnerable to being quashed or modified.” *Id.*
- C. Evan Stewart, *International Business Raises Jurisdictional Issues*, 3/16/92 NAT’L L.J. S11, (col. 1), at n.5 (1992) (“Interestingly, the jurisdictional limitations on trial subpoenas, issued per Rule 45, seldom are litigated to a reported decision.”).

### **Designation of Issuing Court**

- *Subpoena for Attendance at Deposition – Designation of Issuing Court*, 9 NO. 7 FED. LITIGATOR 204 (1994).
  - This article discusses *Kupritz v. Savannah College of Art & Design*, 155 F.R.D. 84 (E.D. Pa. 1994), where it was held that “[a] subpoena directing attendance at a deposition is invalid if the court designated on the subpoena form as the issuing court is not the court for the district in which the deposition is to be taken.” 9 NO. 7 FED. LITIGATOR at 204. In *Kupritz*, the requesting party had listed the Southern District of Georgia as the issuing court on a subpoena for a deposition to take place in Pennsylvania. “The court said that under the express language of Rule 45(a)(2), the subpoena was required to issue from the District Court for the Eastern District of Pennsylvania. Since the District Court for the Southern District of Georgia was designated as the issuing court, the court held that it lacked jurisdiction to enforce the subpoena or hold the witness in contempt for failing to appear.” *Id.*
  - In the “Litigation Tips” section, the article states: “Usually, a motion to quash a subpoena requiring attendance at a deposition should be made in the court for the

district in which the deposition is to take place, because that is the court in whose authority the subpoena should issue. Where, as here, another court is designated as the issuing court, the motion may be made in the issuing court, and probably in the court in the district where the deposition would occur.” *Id.* at 205 (citation omitted).

### **Measuring 100 Miles**

- Jerold S. Solovy & Robert L. Byman, *Discovery Measuring a Subpoena’s Reach*, 4/12/99 NAT’L L.J. B19, (col. 1) (1999).
  - This article discusses the question of whether the 100-mile limit in Rule 45 is “measure[d] by crow or by car,” and concludes that “[t]he weight of authority appears to favor the crows, but that authority is neither voluminous nor overwhelmingly persuasive.” *Id.*
  - The article discusses *SCM Corp. v. Xerox Corp.*, 76 F.R.D. 214 (D. Conn. 1977), which adopted “a straight-line, crow’s-flight approach to Rule 45,” noting that “since 1963, when Federal Rule of Civil Procedure 4(f) was adopted, every court interpreting the 100-mile limit for service of process has used a straight line, crow’s-flight measurement,” and that “it would be anomalous for there to be different standards for the territorial reach of the court for jurisdiction over the parties and for the power to compel nonparties to attend discovery and trial.” 4/12/99 NAT’L L.J. B19. The article disagrees with the *SCM Corp.* court’s holding because: “Rule 4 was not designed to be, and clearly is not, coextensive with Rule 45,” and because “Rule 4 addresses the court’s reach as to parties while Rule 45 addresses the inconvenience to nonparties[, a]nd if it was not already questionable, the logic of treating parties and nonparties equally was seriously undercut with the 1991 amendments to Rule 45.” *Id.* Although the *SCM Corp.* court had “observed that the 100 mile limit dates back all the way to 1789, when modern phenomena such as traffic jams were not an issue,” the article notes that “[w]hen the 100-mile provision was adopted in the 18th century, 100 miles was a formidable distance, which likely could not be traversed in a single day.” *Id.* The article argues: “Clearly, when the limit was originally imposed, no one was thinking about straight-line or crow’s-flight measurements, since the technology did not exist to make such measurements meaningful. The drafters of the 100-mile limit clearly intended that the distance be measured by the actual route of travel because there was no other way to travel.” *Id.*
  - The article further notes a lack of clarity as to whether the burden rests with the nonparty to object to a subpoena violating the 100-mile limit or the subpoenaing party to move for enforcement. “Rule 45(c)(3)(A)(ii) states that a court may, on timely motion, quash or modify a subpoena that requires a person not a party to travel more than 100 miles. So the rule puts the burden on the subpoenaed individual to seek relief. But not so fast. There is a structural anomaly in Rule 45. Rule 45(e) provides a contempt remedy against any person who without adequate excuse fails to obey a subpoena. But ‘an adequate excuse for failure to obey exists when a subpoena purports to require a nonparty to attend or produce at a place not within the [100-mile] limits.’ So subsec. (e) trumps the requirement of the filing of a motion to quash seemingly required by subsec. (c). A nonparty who is served with a subpoena

requiring production beyond the territorial limits can simply ignore the subpoena and need not file a motion.” *Id.* (citing *McAuslin v. Grinnell Corp.*, No. Civ. A. 97-775, 97-803, 1999 WL 24617 (E.D. La. Jan. 19, 1999)) (internal paragraph structure omitted).

- The article further points out an issue with the time for measuring the 100-miles, arguing that the difference between the time for measurement in Rule 4 and the time for measurement in Rule 45 is another reason that the *SCM Corp.* court’s reasoning is flawed. “Under Rule 4, the 100 miles is measured at the time service is made. A served defendant cannot defeat jurisdiction by moving. But the 100-mile measurement for nonparty witnesses is not made at the time of the service of the subpoena, but rather at the time for compliance with the subpoena.” *Id.* The article notes one case that found that where a subpoenaed party was served while he lived within the district, but moved to Hong Kong before the return date, the nonparty was not required to comply with the subpoena. *Id.* The authors caution, however, that a nonparty may not simply avoid a subpoena by moving before the return date, noting that in the case that had excused compliance, the move had been previously scheduled and had nothing to do with avoiding the subpoena. *Id.*
- Finally, the article notes that if the subpoenaing party wins the case, the travel expenses for nonparty subpoenas may be included in the bill of costs, and further notes that a party “may even be able to recover costs beyond the 100-miles limit (no matter how it’s measured).” *Id.* (citing *Smith v. Bd. of Sch. Comm’rs of Mobile County*, 119 F.R.D. 440 (S.D. Ala. 1988); *Oetiker v. Jurid Werks GmbH*, 104 F.R.D. 389 (D.D.C. 1982)).
- David D. Siegel, *Federal Subpoena Practice Under the New Rule 45 of the Federal Rules of Civil Procedure*, 139 F.R.D. 197 (1992).
  - “When subdivision (c)(3)(A)(ii) seeks to have the court relieve a nonparty from having to travel ‘more than 100 miles from the places where that person resides [etc.]’, what exactly does it mean? Does it mean to assume that the person will be starting out from home to go to the site of the deposition (production, etc.)? That is apparently its assumption, or else we have another calculus to go through, measuring distances not from residence or employment, as the cited provision does, but from the point of actual service or from yet some other point.” *Id.* at 220.
- David D. Siegel, Practice Commentaries, in FED R. CIV. P. 45 (“The better rule is that the 100 miles should be measured by air rather than by surface transportation with its twists and turns, *i.e.*, that it should be measured ‘as the crow flies’. The more recent decisions so hold.”).

### **Using Rule 45 to Compel Officers to Testify in Distant Fora**

- *Second Federal Vioxx Trial Underway Before MDL Judge in LA*, 10 No. 3 ANDREWS DRUG RECALL LITIG. REP. 3 (2006).
  - This article notes that the judge in the Vioxx litigation denied a request to quash a subpoena forcing one of Merck’s former officers to testify at trial. The court rejected Merck’s theory that the subpoena was improper because it required the officer to

travel more than 100 miles from his home to testify. “Judge Fallon said he agreed with the PSC’s inverse argument that Rule 45(b)(2) ‘empowers the court with the authority to subpoena Mr. Anstice, an officer of a party, to attend a trial beyond the 100 mile limit.’” The article also notes: “Judge Fallon said the [100-mile] limit is based on a centuries-old British law designed to prevent witness harassment in a time when such a journey could be an onerous task.” In addition, the article notes: “Enforcement of the rule in today’s era of global travel and multidistrict litigation, the judge said, ‘actually inhibits the truth-seeking purpose of litigation.’” Finally, the article notes that the judge explained that “‘the majority of courts that have been faced with the same issue have ruled likewise.’”

- *Depositions – Corporate Officer*, 12 NO. 7 FED. LITIGATOR 200 (1997).
  - This article discusses *Stone v. Morton Int’l, Inc.*, 170 F.R.D. 498 (D. Utah 1997), where the court held that “[a] party who wants to take the deposition of a particular officer, director, or managing agent of a corporate party must first attempt to obtain information from a representative designated by the corporation under F.R.C.P. 30(b)(6), or by some other form of discovery.” 12 NO. 7 FED. LITIGATOR 200. The court found that “[w]hile Rule 45 requires an officer of a corporate party to appear for a deposition in a distant location, it does not expressly state that a subpoena is the way to obtain the attendance of a nonparty officer of a corporate party for deposition.” *Id.* “In the court’s view, these rules provide neither direct nor concrete support for Stone’s contention that a corporate party is obligated, if given specific Rule 30(b)(1) notice of another party’s wish to depose a particular nonparty corporate officer, director, or managing agent, to produce that person for a deposition. The court considered the rules to be ‘inconsistent’ or at least ‘blurred.’” *Id.*
  - Despite the court’s holding, the article notes: “Utilizing the procedure provided for in Rule 30(b)(6) is not generally viewed as a prerequisite to noticing the deposition of a particular corporate officer, director, or managing agent. A party seeking to depose a corporation has two alternatives. One is to notice the deposition of a specific officer, director, or managing agent pursuant to Rule 30(b)(1). The other is to follow the Rule 30(b)(6) procedure by naming the corporation as the deponent and allowing it to designate someone to testify on its behalf.” *Id.* (citation omitted).
- Don Zupanec, *Subpoena – Appearance at Trial – Officer of Party*, 21 NO. 9 FED. LITIGATOR 11 (2006).
  - This article discusses *In re Vioxx Products Liability Litigation*, 438 F. Supp. 2d 664 (E.D. La. 2006), which held that “[a] district court has authority under F.R.C.P. 45 to compel attendance at trial of a party or an officer of a party served by subpoena more than 100 miles from the place of trial.” 21 NO. 9 FED. LITIGATOR 11. “Rule 45(b)(2)’s 100-mile restriction is expressly limited by Rule 45(c)(3)(A)(ii), which mandates quashing a subpoena requiring ‘a person who is *not a party or an officer of a party*’ to travel more than 100 miles to attend a trial.” *Id.* The language of Rule 45(c)(3)(A)(ii) supported the “inference that Rule 45(b)(2) authorized subpoenaing the witness, an officer of a party, to attend trial more than 100 miles from where he

resided.” *Id.* “The court acknowledged that nothing in the history of either Rule 45(b)(2) or Rule 45(c)(3)(A)(ii) suggests any intention to alter the 100-mile rule. Nevertheless, in its view, they allowed subpoenaing the witness to appear at trial.” *Id.*

- The article notes that the court’s ruling “is the predominant interpretation of Rule 45(c)(3)(A)(ii)’s ‘a person who is not a party or an officer of a party’ language and its consequences for a district court’s subpoena power under Rule 45(b)(2).” *Id.* “A 1991 amendment to Rule 45 added paragraph (c), as well as the reference in Rule 45(b) to subparagraph (c)(3)(A). The Advisory Committee Notes describe subparagraph (c)(3)(A) as essentially restating ‘the former provisions with respect to the limits of mandatory travel.’ However, prior to the amendment, Rule 45 did not distinguish between parties and nonparties.” *Id.*
- The article notes a split of authority: “In making Rule 45(b)(2)’s 100-mile limitation applicable to ‘a person who is not a party or an officer of a party,’ subparagraph (c)(3)(A) may reasonably be interpreted as excluding parties and officers of parties from the limitation. Quite a few courts have so interpreted it, at least implicitly, in finding that parties and officers of parties may be subpoenaed to appear at trial more than 100 miles from where they are located. . . . Not unexpectedly, there are a few courts whose interpretation differs.” *Id.* (citations omitted).
- The article also points out that “the reason for the [100-mile] limitation no longer makes much sense, given the relative ease of travel.” *Id.*
- Don Zupanec, *Subpoena – Attendance at Trial – Geographic Limitation – Parties and Officers*, 23 NO. 9 FED. LITIGATOR 13 (2008).
  - This article discusses *Johnson v. Big Lots Stores, Inc.*, 251 F.R.D. 213 (E.D. La. 2008), which held that “F.R.C.P. 45(c)(3)(A)(ii) does not expand courts’ power to subpoena attendance at trial of parties and officers of parties beyond Rule 45(b)(2)’s geographical limits.” 23 NO. 9 FED. LITIGATOR 13. The court found that “[t]o read the ‘subject to Rule 45(c)(3)(A)(ii)’ clause [in Rule 45(b)(2)] as *expanding* the geographical scope of subpoena authority ignores the ordinary meaning of ‘subject to.’ (court’s emphasis). That a rule or statute defining judicial power or a legal right is ‘subject to’ some other rule or statute ordinarily means that the power or right is *limited* by the referenced provision (court’s emphasis).” *Id.* The court concluded that “[t]he better reading of Rule 45 is to view subdivision (b)(2) as defining the geographical scope of a court’s subpoena power, subject to the limitations described in subdivision (c)(3)(A)(ii). Thus, to compel attendance at trial, a subpoena must be served in one of the places listed in Rule 45(b)(2) *and* not be entitled to the protection of Rule 45(c)(3)(A)(ii), which applies to nonparty witnesses but not parties or party officers.” *Id.* “The court did not view the 1991 amendments to Rule 45, which added subdivision (c) as well as the reference in Rule 45(b) to subdivision [(c)(3)(A)], as authorizing nationwide service. The amendment did not alter the geographical limitations on proper service but subjected courts’ subpoena power to subdivision (c)’s protections. Nothing in the Advisory Committee’s Notes to the amendments suggests a scheme of nationwide service. The Notes make clear that subdivision (c)



enlarges and clarifies protections for subpoenaed persons. In light of the widespread pre-1991 understanding that courts' subpoena powers are geographically limited, if the amendments created a system of nationwide service, it would be reasonable to expect they would say so directly." *Id.*

- In the "Litigation Tips" section, the article states: "This is not the predominant view of the interplay between Rules 45(b)(2) and 45(c)(3)(A)(ii). These provisions are generally interpreted as authorizing compelled attendance at trial by means of subpoena served on a party or an officer of a party outside the district where the issuing court is located and beyond Rule 45(b)(2)(B)'s 100-mile limit." *Id.* (citations omitted). "Interestingly, while this remains the predominant view, several courts have recently rejected it, concluding instead that Rule 45(b)(2) specifies requirements for proper service of a subpoena to compel attendance while Rule 45(c)(3)(A)(ii) sets forth circumstances under which a subpoena must be quashed, but does not alter the requirements for proper service." *Id.* (citations omitted). "Under the predominant view, a subpoena to compel trial attendance of a party or party officer need not be served in accordance with Rule 45(b)(2)'s geographical limitations. Under the minority interpretation, it is necessary to serve the subpoena in one of the places listed in Rule 45(b)(2). The subpoena is effective only if Rule 45(c)(3)(A)(ii) does not apply, *i.e.*, only if the person subpoenaed does not reside or work more than 100 miles from the district court's location – unless the person is a party or a party officer." *Id.*
- The article notes that "[n]o appeals court has yet weighed in on the interplay between Rules 45(b)(2) and 45(c)(3)(A)(ii). The proper interpretation remains an open question." *Id.*

### **International Issues**

- Christopher Joseph Borgen, *International Legal Developments in Review: 1998*, 33 INT'L LAW. 424, 428 (1999) (noting that in *First Am. Corp. v. Price Waterhouse LLP*, 1998 WL 474196 (S.D.N.Y. Aug. 13, 1998),<sup>8</sup> the court had "concluded that the fact that the foreign non-party did business in New York through an agent was insufficient to permit a deposition in New York" because "'the place' where [Price Waterhouse U.K.] and its partners and employees 'reside,' are 'employed,' or 'regularly transact[s] business in person' is not New York," but that if "the deposition were to be conducted in England, the subpoena could not be issued from New York, as Rule 45 contemplated that the subpoena issue from the district in which the witness was and that [the] district be no more than 100 miles from the witness's residence, employ, or place in which he or she regularly transacts business") (footnote omitted).

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<sup>8</sup> This particular citation does not appear to be available on Westlaw, but I believe the referenced case is also located at *Price Waterhouse LLP v. First American Corp.*, 182 F.R.D. 56 (S.D.N.Y. 1998).

- Lawrence W. Newman & Michael Burrows, *Extraterritorial Reach of Rule 45 Subpoena*, 4/16/92 N.Y. L.J. 3, (col. 1) (Apr. 16, 1992).
  - This article addresses “whether a subpoena duces tecum issued pursuant to Rule 45 and served on a domestic branch of a corporation with branches outside the United States may properly reach documents in the custody or control of the corporation located outside the United States,” and concludes that the answer is uncertain under the text of Rule 45. The article notes that prior to the 1991 amendments to Rule 45, there was a split of authority as to the extraterritorial reach of a subpoena. The Fifth Circuit, in *Cates v. LTV Aerospace Corp.*, 480 F.2d 620, 624 (5th Cir. 1973), held that “a court cannot order production of records in the custody and control of a non-party located in a foreign judicial district.” 4/16/92 N.Y. L.J. 3 (quoting *Cates*, 480 F.2d at 624). However, the article notes that while some courts agreed with the *Cates* holding, others determined the issue differently. For example, in *Ghandi v. Police Dept. of City of Detroit*, 74 F.R.D. 115 (E.D. Mich. 1977), the court held that “pursuant to 45(d)(1) a deponent must ‘produce for inspection and copying the documents within its custody named in the subpoena regardless of where the documents are actually located.’” 4/16/92 N.Y. L.J. 3 (citing *Ghandi*, 74 F.R.D. at 120–22). The article notes that “[t]he reach of a subpoena duces tecum issued pursuant to old Rule 45 was extended overseas in *In re Jee*[, 104 B.R. 289 (Bankr. C.D. Cal. 1984)].” *Id.*
  - The article finds that amended Rule 45(a)(2) has not yet been clarified by the courts. “The sole guide available is the Notes of the Advisory Committee that declare with regard to Rule 45 that ‘Paragraph (a)(2) makes clear that the person subject to the subpoena is required to produce materials in that person’s control whether or not the materials are located within the district or within the territory within which the subpoena can be served.’” *Id.* The article argues that the text of Rule 45(a)(2) is unclear: “Unfortunately, the actual language of subparagraph (a)(2) does not ‘make clear’ that this amendment stands for the proposition attributed to it by the Advisory Committee. There is no logical connection between the words of Rule 45(a)(2) and the power attributed to it: No cases are cited, no explanation is given by the Advisory Committee, and no mention is made of the dispute between the *Cates* and *Ghandi* courts.” *Id.* The article notes that a court faced with deciding this issue will have three choices: “the narrow position set forth in *Cates*, the ‘expansionist’ position set forth in *Ghandi* or a wholly new course, perhaps a compromise between the aforementioned extremes.” *Id.* The article concludes that “[i]n light of what appears to be a conscious, long-term effort to pattern Rule 45 discovery procedures after those in Rule 34, it is logical that subparagraph (a)(2) authorizes the production of documents and other tangibles located overseas, since some courts have held that such documents come within the scope of a document request made pursuant to Rule 34.” *Id.* The article notes that a court faced with this issue might come up with an entirely new approach, concluding that the wholesale revision of Rule 45 in 1991 renders previous case law less persuasive. *See id.*

- Gregory P. Joseph, *Assessing Federal Rule 45*, 12/28/92 NAT'L L.J. 23, (col. 1) (1992).
  - “The person subpoenaed for documents under Rule 45 must produce all documents that are in his or her custody or control, even if they are outside the district in which the subpoena is served. . . . [For] example, the lawyer appearing before the District of Minnesota is empowered to subpoena a New York company for documents that the company controls in Africa or Europe.” *Id.* (footnote omitted).
- C. Evan Stewart, *International Business Raises Jurisdictional Issues*, 3/16/92 NAT'L L.J. S11, (col. 1) (1992).
  - This article examines this question: “Can a civil litigant, be it a private party or a federal agency, compel a U.S. subsidiary of a foreign corporation to produce documents of its parent company, or produce its parent company’s officers to give testimony, when there is no jurisdictional authority over the parent or its officers?” *Id.* The article concludes that “[t]he answer relates to the ability of the subsidiary to control its parent,” citing to one case that had found that a U.S. subsidiary was not required to produce information in the possession of its parent company because it did not control the parent and did not have possession, custody, or control of the information, and to another case that held that a plaintiff was required to produce a former officer for deposition because the former officer continued to be associated with corporate entities in which the plaintiff had a majority controlling interest and the plaintiff had the power to produce him. *Id.*
  - Noting that often a foreign parent will place one of its officers as a director of its U.S. subsidiary, and that this subjects these individuals to being called to testify in civil litigation, the article suggests that this can be avoided by seeking protective orders under Rule 26(c) or by relying on certain courts’ standing orders, such as one that provides that “any officer, director or managing agent of a corporate party can submit an affidavit in response to a deposition notice or subpoena, stating that he or she has no knowledge regarding the dispute or controversy.” *Id.*
- David D. Siegel, *Federal Subpoena Practice Under the New Rule 45 of the Federal Rules of Civil Procedure*, 139 F.R.D. 197, 215 (1992) (“Service of a U.S. subpoena on an alien outside the country is a nullity, but service outside the country on a United States citizen is permissible under a special, albeit rarely used, statute, 28 U.S.C.A. § 1783.”).

### **Production Format**

- *Sedona Commentary, supra*, at 204 (“Although Rule 45 was amended to clarify the right to ask for a specific production format, it is not yet clear that those serving subpoenas are taking advantage of this change.”).

### **Necessity of Subpoena for Party Deposition**

- C. Evan Stewart, *International Business Raises Jurisdictional Issues*, 3/16/92 NAT'L L.J. S11, (col. 1) (1992) (“To compel a person to be a deponent, *regardless of party or non-party status*, a subpoena under Rule 45 is necessary.”) (emphasis added).