NON-PARTIES AND ELECTRONIC DISCOVERY: LIMITING THE SCOPE AND COST OF RESPONDING TO INVASIVE RULE 45 SUBPOENAS

"[D]iscovery is by definition invasive [and] parties to a law suit must accept its travails as a natural concomitant of modern civil litigation."[1] But "[n]on-parties have a different set of expectations"[2] and discovery aimed at them is "limited to protect third parties from harassment, inconvenience, or disclosure of confidential documents."[3] Courts recognize that non-parties responding to Rule 45 subpoenas "are powerless to control the scope of litigation and discovery, and should not be forced to subsidize an unreasonable share of the costs of a litigation to which they are not a party."[4]

To balance the burden of discovery placed on non-parties, Rule 45 and Federal Courts empower non-parties to protect themselves from unduly burdensome and invasive discovery requests. Suppose a company receives a subpoena requesting production of "[a]ll electronically stored information and documents relating to or concerning the lawsuit from the time your company was founded to present, including but not limited to documents related to, or created by, the attached list of custodians," supplemented by a several page-long definition of the word "document" and a list of one-hundred employees spanning several states or countries. How can a non-party proactively respond to Rule 45 subpoenas with relevant information while narrowing the scope of the request and minimizing the costs and burdens imposed? How can a non-party manage its own preservation and privacy obligations when collecting and producing responsive documents? And what actions can a non-party take to seek court intervention to modify or quash a subpoena and shift the costs of discovery to the parties seeking discovery?

A. Narrowing the Scope of the Subpoena: Undue Burden on Non-Parties.

A non-party in receipt of a subpoena must initially decide whether to respond in full or whether the scope of the subpoena is so broad that a motion to modify or quash the subpoena should be filed. Courts must quash or modify a subpoena to a non-party if it imposes an "undue burden or expense on a person subject to the subpoena." Fed. R. Civ. Proc. 45(d). In fact, "a court may modify or quash a subpoena even for relevant information if it finds that there is an undue burden on the non-party."[5]

"Whether a subpoena poses an undue burden turns on a number of factors, including (1) relevance, (2) the party's need for the documents, (3) the breadth of the request, (4) the time period covered by the request, (5) the particularity with which the documents are

[1] *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 717 (1st Cir. 1998).
[2] *Id*.
[3] *Dart Indus. Co., Inc. v. Westwood Chem. Co., Inc.*, 649 F.2d 646, 649 (9th Cir. 1980).
[4] *United States v. Columbia Broad. Sys., Inc.*, 666 F.2d 364, 371 (9th Cir. 1982).
[5] *Gonzales v. Google, Inc.*, 234 F.R.D. 674, 683 (N.D. Cal. 2006).

described, (6) the burden imposed, and (7) the recipient's status as a non-party."[6] "[C]oncern for the unwanted burden thrust upon non-parties is a factor entitled to special weight in evaluating the balance of competing needs."[7]

Although a number of factors are considered by courts when determining whether to quash or modify a subpoena, the most frequent basis for a successful challenge to a subpoena focuses on the breadth of the request, the broad time period covered by the request, and the lack of particularity used to describe the sought after documents. For example, a subpoena seeking "any and all documents over a ten year or greater period" related generally to nationwide sales of pool covers imposed an undue burden.[8] Other examples of overly broad subpoenas to non-parties include:

- Subpoena directed to JPMorgan Chase Bank, N.A. requesting "All documents referring or relating to any criminal investigation within the past ten (10) years in which you or your employees may be subjects or targets arising in whole or in part from any transactions occurring within the Western District of Pennsylvania" was quashed for lack of specificity and undue burden.[9]

- Subpoenas to nonparties requesting "eighteen categories of documents relating to personal and financial information with no temporal limitation" were overly broad and unduly burdensome. One such request asked for all "credit card records, whether in your name or in the name of any entity in which you have had or had [sic] an ownership interest, including but not limited to such credit cards where you have signature authority but not issued in your name. Please construe this request in its *broadest* sense to include credit card statements documents evidencing proof of payment of credit card statements, invoices, etc."[10]

- A subpoena requesting "(1) all management letters related to any audits of Defendants' financial statements prepared by or on behalf of [the non-party], (2) all documents related to Defendants' internal controls, and (3) all documents related to any impairment analysis of Defendants' assets" presented an undue burden because they were "not limited by any reasonable restriction on time . . .

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[6] *Garden City Employees' Ret. Sys. v. Psychiatric Solutions, Inc.,* MISC.A. 13-238, 2014 WL 272088 (E.D. Pa. Jan. 24, 2014).

[7] *Cusumano*, 162 F.3d at 717 (1st Cir. 1998); *see also Precourt v. Fairbank Reconstruction Corp.,* 280 F.R.D. 462, 467 (D.S.D. 2011) ("When a non-party is subpoenaed, the court is particularly mindful of Rule 45's undue burden and expense cautions.").

[8] *Moon v. SCP Pool Corp.*, 232 F.R.D. 633, 637 (C.D. Cal. 2005); *see also RPM Pizza, LLC v. Argonaut Great Cent. Ins. Co*., CIV.A. 10-684-BAJ, 2014 WL 258784 (M.D. La. Jan. 23, 2014) (finding an undue burden where the party seeking discovery refused to narrow the areas of inquiry or the time frame).

[9] *United States v. Kubini*, CRIM. 11-14, 2013 WL 5963392 (W.D. Pa. Nov. 7, 2013).

[10] *Patel v. Snapp*, 10-2403-JTM, 2013 WL 5876435 (D. Kan. Oct. 31, 2013).

[n]or are they limited to any categories of documents relating to the [issues] at the heart of [the case]."[11]

- Requesting documents arising from "contacts" between more than 27 different parties was overbroad upon a showing that response would require attention of four to six staff members for a month.[12]

- Requesting all written, electronic, and other records created by a non-party from 1990 to present was unduly burdensome, particularly since non-party was a non-profit trade association with only eight employees.[13]

- Requesting "routine business documents" including all correspondence and orders was unduly burdensome where it would cost approximately $5,000 to $10,000 to respond.[14]

- Subpoenas directed to fourteen non-party insurance agents requesting "[a]ny and all documents (including email and documents in electronic format) touching on, relating to or concerning the use of consumer credit reports" within the past two years subjected the agents to an undue burden.[15]

- Requesting five years worth of emails spanning 23 post offices was unduly burdensome—*despite offer by party seeking discovery to pay for cost of discovery*—upon showing by IT employee that response would require eighteen weeks of manpower to reconstruct email accounts from backup tapes.[16]

What steps should a non-party follow to cost-effectively object to the scope of an overly broad subpoena? Initially, the non-party should cooperate and attempt to have a substantive discussion with the party seeking discovery to try to narrow the scope of the subpoena.[17] The parties and non-party should discuss issues such as proportionality, custodians, and timeframe. Where collaboration is not an option, the non-party should write a letter to the non-party, outlining its objections to the scope of the subpoena and indicating what information the non-party intends to produce, if any. The letter should also invite input from the party seeking discovery to help narrow the scope of responsive documents. When an agreement cannot be reached and a party persists in seeking additional discovery despite objections, the non-party should seek intervention from the court to quash or modify the subpoena with the benefit of having established a record showing an attempt to meet and confer. Where a party asserts that the scope of a subpoena is unduly burdensome, a court is likely to reflect favorably on affidavits

[11] *Turnbow v. Life Partners, Inc.*, 3:11-CV-1030-M, 2013 WL 1632795 (N.D. Tex. Apr. 16, 2013).
[12] *N. Carolina Right to Life, Inc. v. Leake*, 231 F.R.D. 49, 52 (D.D.C. 2005).
[13] *In re Auto. Refinishing Paint,* 229 F.R.D. 482, 496 (E.D. Pa. 2005).
[14] *Guy Chem. Co., Inc. v. Romaco AG*, 243 F.R.D. 310, 312 (N.D. Ind. 2007).
[15] *Braxton v. Farmer's Ins. Grp.*, 209 F.R.D. 651, 652 (N.D. Ala. 2002).
[16] *United States v. Amerigroup Illinois, Inc.*, 02 C 6074, 2005 WL 3111972 (N.D. Ill. Oct. 21, 2005).
[17] The Sedona Conference Commentary on Non-Party Production & Rule 45 Subpoenas at p. 5 (April 2008).

or other evidence supporting the burden.[18] The affidavit should include specific information, such as the hours of employee time necessary to comply with the requests,[19] the burdensome procedures required to collect and analyze the relevant information,[20] the complexities of the electronic systems containing potentially relevant information,[21] the number of potentially responsive documents,[22] and the total estimated cost of complying with the subpoena.[23] By contrast, asserting that a subpoena is unduly burdensome without a supporting affidavit[24] or with vague or speculative assertions[25] is not likely to succeed in quashing the subpoena.

B. Reach of Subpoena: What Documents Are Within a Non-Party's Custody or Control?

Rule 45 subpoenas may request documents that a non-party does not physically have, but may have some level of access to. For example, a subpoena may request documents maintained by a subsidiary, parent company, or third-party information management company. What documents are within a non-party's "possession, custody, or control" within the meaning of Rule 45?

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[18] *Amerigroup Illinois*, 02 C 6074 at *3 (relying on affidavit explaining the burden of restoring employee email accounts to find an undue burden).

[19] *In re CareSource Mgmt. Grp. Co.*, 289 F.R.D. 251, 253 (S.D. Ohio 2013) (quashing a subpoena seeking sixteen categories of documents and sixteen interrogatories based on an affidavit from the non-party's Corporate Compliance Officer estimating that it would take 1,000 hours of employee time to prepare the documents requested in the subpoena).

[20] *Amerigroup Illinois*, 02 C 6074 at *3 (quashing a subpoena based in part on an affidavit explaining the six-week process required to restore email accounts from off-site backup tapes storing one week's worth of emails per tape).

[21] *Whitlow v. Martin*, 263 F.R.D. 507, 512 (C.D. Ill. 2009) (modifying a subpoena requesting records related to 2,117 employees hired by the state of Illinois over the period of a year where the non-party established that a search for electronically stored information would include two Microsoft Exchange servers and 200 to 300 file servers in a Springfield office, eleven Microsoft Exchange servers and 50 file servers in a Chicago office, and slectronic sources in nine offices throughout the state of Illinois).

[22] *In re Application of Time, Inc.*, 99-2916, 1999 WL 804090 at *8 (E.D. La. Oct. 6, 1999) aff'd sub nom. *In re Matter of Time Inc.*, 209 F.3d 719 (5th Cir. 2000) (quashing a subpoena based in part on an affidavit estimating that the non-party had "potentially responsive records numbering in the hundreds of thousands").

[23] *Linder v. Calero-Portocarrero*, 183 F.R.D. 314, 320 (D.D.C. 1998) (modifying subpoenas issued to government agencies based on affidavits demonstrating that compliance would require thousands of man-hours and approximately $300,000.00 in costs to one of the agencies); *In re Motor Fuel Temperature Sales Practices Litig.*, 258 F.R.D. 407, 419 (D. Kan. 2009) rev'd in part, 707 F. Supp. 2d 1145 (D. Kan. 2010) (quashing subpoenas to trade associations based in part on a declaration contending that responding to the subpoenas would cost an estimated $575,000 for an association whose annual budget is $2 million).

[24] *Universitas Educ., LLC v. Nova Grp., Inc.*, 11 CIV. 1590 LTS HBP, 2013 WL 3328746 (S.D.N.Y. July 2, 2013) (finding the non-party failed to demonstrate a subpoena was unduly burdensome where it "failed to provide any affidavits to articulate the degree and scope of the burden posed").

[25] *Cory v. Aztec Steel Bldg., Inc.*, 225 F.R.D. 667, 672 (D. Kan. 2005) (overruling an unduly burdensome objection based on statements that compliance would require "numerous man hours"); *Seger v. Ernest-Spencer Metals, Inc.*, 8:08CV75, 2010 WL 378113 at *10 (D. Neb. Jan. 26, 2010) (overruling a motion to quash a subpoena where the affidavit failed to provide specific information about the burden associated with responding to the subpoena and instead speculated on the burden based on estimates of average user's email usage).

Much like a litigant, "for the purposes of a Rule 45 subpoena, a document is within a witness's 'possession, custody, or control' if the witness has the practical ability to obtain the document."[26,27] "[T]he actual physical location of the documents—even if overseas—is immaterial."[28] But "legal and practical inability to obtain the requested documents from the non-party, including by reason of foreign law, may place the documents beyond the control of the party."[29] Thus, a document is not within a non-party's control just because "a party could obtain a document if it tried hard enough."[30]The burden of demonstrating control lies with the party seeking discovery.[31]

Issues of "custody" or "control" with non-parties typically arise where a corporation is served with a Rule 45 subpoena seeking information from foreign subsidiaries, parent companies, or other related entities. Often, a non-party has "possession, custody, or control" over documents "sought from one corporation regarding materials which are in the physical possession of another, affiliated corporation."[32] Not surprisingly, "[c]ourts have found control by a parent corporation over documents held by its subsidiary."[33] A non-party may also have "custody" or "control" over documents in possession of a sister company[34] or a parent company.[35] For a subsidiary to have "control" over a parent company's documents, the "subsidiary need only be able to obtain the documents in question to 'control' them, and need not 'control' the parent that possesses the documents."[36] A variety of factors determine whether a subsidiary has "control" over a parent company's documents, including: "(1) the parent's ownership share in the subsidiary or affiliated corporation, (2) whether the corporations have interlocking management structures, (3) the degree of control exercised by the foreign parent over the subsidiary's directors, officers, and employees, (4) the foreign

[26] *Tiffany (NJ) LLC v. Qi Andrew*, 276 F.R.D. 143, 147 (S.D.N.Y. 2011).

[27] Depending on the Federal Circuit in which the underlying case is pending, a different definition of control may apply. *See Klesch & Co. Ltd. v. Liberty Media Corp.*, 217 F.R.D. 517, 520 (D. Colo. 2003) (defining "possession, custody or control," as "actual possession, custody or control of the materials" or "the legal right to obtain the documents on demand").; *see also United States v. Int'l Union of Petroleum & Indus. Workers*, AFL-CIO, 870 F.2d 1450, 1452 (9th Cir. 1989) ("Control is defined as the legal right to obtain documents upon demand.") (quoting Searock v. Stripling, 736 F.2d 650, 653 (11th Cir.1984));

[28] *Tiffany*, 276 F.R.D. at 147-8.

[29] *Tiffany*, 276 F.R.D. at 148.

[30] *In re Subpoena To Huawei Technologies Co., Ltd.*, 720 F. Supp. 2d 969, 977 (N.D. Ill. 2010).

[31] *Tiffany*, 276 F.R.D. at 148.

[32] *S.E.C. v. Credit Bancorp, Ltd.*, 194 F.R.D. 469, 472 (S.D.N.Y. 2000).

[33] *Credit Bancorp, Ltd.*, 194 F.R.D. at 472.

[34] *Credit Bancorp, Ltd.*, 194 F.R.D. at 472 (citing *Alimenta (U.S.A.) Inc. v. Anheuser–Busch Cos.*, 99 F.R.D. 309, 313 (N.D.Ga.1983)).

[35] *In re Subpoena Duces Tecum to Ingeteam, Inc.*, 11-MISC-36, 2011 WL 3608407 (E.D. Wis. Aug. 16, 2011) (holding that a wholly owned American subsidiary of a Spanish parent company had "control" over documents in possession of the parent company); *LG Display Co., Ltd. v. Chi Mei Optroelectronics Corp.*, 08CV2408-L(POR), 2009 WL 223585 (S.D. Cal. Jan. 28, 2009) (holding Sony had "control" over documents possessed by its foreign parent company).

[36] *Huawei Technologies,* 720 F. Supp. 2d at 976.

parent's connection to the transaction at issue, and (5) whether the foreign parent refusing production will receive a benefit from the litigation."[37]

The issue of "possession, custody, or control" is a "complex factual issue which is not easily determined."[38] Non-parties should analyze incoming subpoenas to determine the scope of the requests and the entities from which the subpoena seeks information. Where a non-party believes it is not able to obtain documents held by a separate entity, the non-party should contact the party seeking discovery and clearly identify the source or documents that are out of its control. If possible, an agreement should be reached as to the documents outside of the non-party's "custody" or "control." If an agreement cannot be reached, the non-party should be prepared to demonstrate the factual circumstances that place certain documents outside of its control in the context of a motion to quash.

C. Format for Production

A non-party is only required to produce ESI in response to a subpoena in "one form."[39] Rule 45(a)(1)(C) provides that "[a] subpoena may specify the form or forms in which electronically stored information is to be produced." Despite allowing the party seeking discovery to specify the format, most subpoenas do not specify a format for production.[40] If a subpoena fails to specify format, what format is acceptable? And if a subpoena does specify format, is a non-party obligated to produce the information as requested?

"If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms."[41] Fed. R. Civ. P. 45. Of subpoena that specify a format, a small study revealed that 50% of non-parties received subpoenas requesting production in "native format," while 36.7% of non-parties received subpoenas requesting a "TIFF/PDF" production and 20% of non-parties received subpoenas requesting a paper production.[42] If a subpoena specifies native format, and the non-party fails to produce the information as requested, a court will likely compel production as requested.[43] To avoid producing the information in the format requested, the non-party likely must show that the information is not reasonably accessible in the format requested.[44,45]

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[37] *In re Ingeteam*, 11-MISC-36, 2011 WL 3608407 (E.D. Wis. Aug. 16, 2011).
[38] The Sedona Conference Commentary on Non-Party Production & Rule 45 Subpoenas at p. 4 (April 2008)
[39] Fed. R. Civ. P. 45(e)(1)(C).
[40] The Sedona Conference Commentary on Non-Party Production & Rule 45 Subpoenas at pp. 9-10 (April 2008) (finding that "67.8% of the respondents reported that requesting parties 'occasionally (20-40%)' or 'seldom (less than 20%)' specified the production format in their subpoenas").
[41] Fed. R. Civ. P. 45.
[42] The Sedona Conference Commentary on Non-Party Production & Rule 45 Subpoenas at pp. 9-10 (April 2008).
[43] *Sundown Energy, L.P. v. Haller*, CIV.A. 10-4354, 2011 WL 5079329 (E.D. La. Oct. 26, 2011) (granting a motion to compel where the defendants requested production in native format and the non-party failed to produce the information as requested).
[44] Fed. R. Civ. P. 45(e)(1)(D).

What can a non-party do to produce responsive ESI in the least burdensome and costly method but prevent a dispute over the format of production? Initially, the non-party should notify the party seeking discovery of the format the ESI is stored in and how the non-party intends to produce it. Where a different format is requested by the parties, the non-party should evaluate the burden imposed by converting ESI to the requested format and work with the party to reach an agreement on format.[46] Where the proposed format imposes significant additional costs and an agreement cannot be reached, the non-party should consider moving the Court to quash the subpoena, or in the alternative modify it to a more reasonable format or shift the cost of reformatting ESI to the party seeking the discovery.

D. Non-Party's Preservation Obligation: Does it End with Production?

Litigants have a duty to preserve relevant evidence when they reasonably anticipate litigation.[47] By contrast, "[p]ersons who are not themselves parties to litigation do not have a duty to preserve evidence for use by others."[48] But what about non-parties receiving a subpoena requesting documents? Does a non-party have a duty to preserve relevant evidence? And does the non-party's duty extend past the date of production?

Whether the duty to preserve documents extends to non-parties is an unsettled question.[49] Some states, including California and New Jersey, find that a non-party has a duty to preserve relevant evidence if it agrees to do so or receives a "specific request" for preservation of evidence.[50] There, service of a Rule 45 subpoena on a non-party is considered a "specific request" sufficient to impose a duty to preserve relevant evidence in the non-party's possession."[51] At least one state has held the direct opposite—that a non-party does not owe a duty of preservation absent a specific agreement.[52] But, in holding there is no general duty of

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[45] *Sundown Energy*, CIV.A. 10-4354 at *4 (considering a non-party's argument that production in a native format was not reasonably accessible and therefore the cost should be shifted to the party seeking discovery).

[46] The Sedona Conference Commentary on Non-Party Production & Rule 45 Subpoenas at pp. 9-10 (April 2008) ("[A]ll parties should work together to reach an agreement on the production format.").

[47] *Fujitsu Ltd. v. Fed. Exp. Corp.*, 247 F.3d 423, 436 (2d Cir.2001).

[48] *Fletcher v. Dorchester Mut. Ins. Co.*, 437 Mass. 544, 548, 773 N.E.2d 420, 424 (2002).

[49] Gorelick, Jamie S., et al., Destruction of Evidence, § 4.14 --Duty Owed by Parties, Third Parties, or Both (Aspen Publishers 2013) ("Courts are divided on the question whether the duty to preserve evidence is limited to persons who are defendants or potential defendants in the underlying litigation, or whether the duty extends to third parties as well.").

[50] *Lewis v. J.C. Penney, Inc.*, 12 F. Supp. 2d 1083, 1087 (E.D. Cal. 1998) (finding that under California law, "a defendant charged with negligent spoliation has no duty to preserve evidence for the plaintiff's use against a third party absent a 'specific request' from the plaintiff to do so"); *Egan v. Alco-Lite Indus.*, CIV. 09-4878 WHW, 2011 WL 1205663 (D.N.J. Mar. 29, 2011) (finding that under New Jersey law, unless the non-party agrees to preserve evidence, the duty to preserve arises only if the non-party receives a "specific request" to preserve a particular item).

[51] *In re Napster, Inc. Copyright Litig*., 462 F. Supp. 2d 1060, 1068 (N.D. Cal. 2006) (acknowledging a common law duty to preserve based on receipt by a non-party of a subpoena).

[52] *Koplin v. Rosel Well Perforators, Inc.*, 241 Kan. 206, 208, 734 P.2d 1177, 1179 (1987) ("Absent some special relationship or duty rising by reason of an agreement, contract, statute, or other special circumstance, the general

preservation, the Kansas Supreme Court left open the possibility that a duty to preserve could be created by a "statute or other special circumstance," which may include a subpoena.[53] Yet another approach employed by state courts—one being New York—is to place the burden of preserving information owned by non-parties on the parties themselves.[54] There is not a unified approach to imposing the duty of preservation on non-parties. To minimize liability, non-parties in receipt of subpoenas should act as if they have a duty to preserve information until at least the information is produced to the parties. The non-party can then defend its actions from a position of not having disposed of potential information before producing the same, rather than disposing of potentially relevant information and having to defend its actions in hindsight.

If a non-party is under a duty of preservation, when is that duty satisfied? Few cases analyze the duration of a non-party's duty to preserve, but the Sedona Conference suggests that a non-party is not typically required "to continue to preserve materials after they have taken reasonable measures to produce responsive information."[55] But the duty to preserve created by a Rule 45 subpoena may also trigger a more broad preservation obligation if the subpoena causes the non-party to anticipate litigation against itself. Thus, if the subpoena notifies the non-party that it may become a party to litigation, a court will likely hold that the non-party has a duty to preserve evidence that extends past production of responsive documents.[56] The fact that a non-party is preserving documents to respond to a subpoena does not necessarily suggest that the non-party anticipates litigation against itself.[57]

So what actions can a non-party take to properly meet its preservation and production obligations after being issued a subpoena? The non-party should issue a litigation hold upon receipt of the subpoena to preserve responsive information. If possible, the non-party should reach an agreement regarding the scope of preservation with the party seeking discovery. If an agreement cannot be reached, or the non-party decides to challenge the scope of the subpoena, the litigation hold should be broad enough to ensure that no spoliation occurs before the challenge is resolved. Once the party produces the responsive documents, the duty to preserve information typically terminates. But the non-party should be careful to not lift a litigation hold immediately and instead should analyze the subpoena and its relation to the

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rule is that there is no duty to preserve possible evidence for another party to aid that other party in some future legal action against a third party.").

[53] *Id*.

[54] *MetLife Auto & Home v. Joe Basil Chevrolet, Inc.*, 1 N.Y.3d 478, 484, 807 N.E.2d 865 (2004) (placing the burden of preservation of a vehicle owned by a non-party on the party to the lawsuit that failed to make an effort to preserve the evidence by court order or agreement and finding no tort for spoliation against the non-party existed).

[55] The Sedona Conference Commentary on Non-Party Production & Rule 45 Subpoenas at p. 3 (April 2008).

[56] *Aviva USA Corp. v. Vazirani,* CV 11-0369-PHX-JAT, 2012 WL 71020 (D. Ariz. Jan. 10, 2012) (finding that a subpoena to a non-party—who was eventually named as a defendant—gave rise to a duty to preserve relevant documents from the date of the subpoena); *Veolia Transp. Servs., Inc. v. Evanson*, CV 10-01392-PHX-NVW, 2011 WL 5909917 (D. Ariz. Nov. 28, 2011) (subpoena to non-party triggered duty to preserve emails despite not being named a defendant in the initial complaint).

[57] *Napster*, 462 F.Supp.2d at 1068.

non-party. If the subpoena reasonably suggests future litigation against the non-party, the non-party should consider extending the litigation hold as necessary.

E. Is a Non-Party Obligated to Disclose Private Information?

"Non-party recipients of subpoenas must be mindful of the unique ownership and privacy issues posed by ESI."[58] For example, email and internet service providers maintain information about users' online searches, payment information, and potentially private communications.[59] How can non-parties simultaneously disclose responsive information and protect private customer and user information?

First, non-parties must be aware of the privacy statutes and regulations that prohibit disclosure of information in their possession, custody, or control. The following is a non-exclusive list of statutes imposing liability for disclosure of private information:

- The Electronic Communications Privacy Act prohibits electronic communication service providers from disclosing the "contents of a communication while in electronic storage by that service."[60] This prohibition applies to the contents of email and text message communications, not the subject lines, parties, or date of the communication, and applies notwithstanding the issuance of a subpoena.[61]

- 47 U.S.C.A. § 551(c) prohibits disclosure of "personally identifiable information concerning any subscriber" by a "cable operator." Disclosure is allowed pursuant to a subpoena provided the subscriber is notified of the subpoena first.[62]

- 45 C.F.R. § 164.512 prohibits disclosure of "protected health information." There are a few exceptions to disclosing protected health information, one of which is pursuant to a subpoena and after notice is provided to the individual that is the subject of the information.

A non-party can mitigate its risk related to privacy by having a clear policy related to responding to subpoenas requesting private information to define user expectations.[63] The policy should be crafted to achieve compliance with applicable privacy statutes prohibiting or

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[58] The Sedona Conference Commentary on Non-Party Production & Rule 45 Subpoenas at p. 4 (April 2008).

[59] *Special Markets Ins. Consultants, Inc. v. Lynch*, 11 C 9181, 2012 WL 1565348 (N.D. Ill. May 2, 2012) (quashing subpoenas to Yahoo and Verizon seeking text messages and emails because 18 U.S.C. § 2701 et seq. "forbids an e-mail provider from producing its customers' personal e-mails in a civil case" and likening text messages to emails).

[60] 18 U.S.C.A. § 2702 (West).

[61] *Doe v. City of San Diego*, 12-CV-0689-MMA DHB, 2013 WL 2338713 (S.D. Cal. May 28, 2013) (finding the Electronic Communications Privacy Act prohibited Verizon from responding to subpoenas seeking the content of text messages).

[62] 47 U.S.C.A. § 551(c)(2)(B).

[63] 4 E-Commerce and Internet Law 58.06[4][A] (2013-2014 update) (acknowledging that "service providers typically establish privacy policies, which should define user expectations if properly drafted and implemented").

authorizing disclosure.[64] Further, a policy can provide for notice to its users/consumers of potential disclosures to comply with applicable non-disclosure laws and allow the subject of the private information to act to protect their own privacy interests.[65] In fact, some statutes and regulations authorize disclosure of private information—and mitigate the risk of liability for disclosure—if the party affected by the disclosure is notified of the disclosure.[66]

If disclosure is not authorized by a statute, non-parties have several methods of protecting against a party seeking confidential or private information. Rule 45(d)(3)(A)(iii) affords a non-party the right to quash a subpoena that seeks "disclosure of privileged or other protected matter, if no exception or waiver applies." The party asserting a privacy interest as the basis to quash a subpoena bears the burden to show a privacy interest or other privilege applies.[67] The non-party responding to a discovery request may also seek a protective order from the court pursuant to Rule 26(c) of the Federal Rules of Civil Procedure.[68] A protective order "may forbid disclosure altogether, or, among other measures, limit the scope of disclosure or discovery to certain matters."[69] Whether a non-party attempts to quash the subpoena or obtain a protective order, the non-party should specify a statute, rule, regulation, or case providing the claimed protection.[70]

Non-parties may also satisfy their privacy concerns by redacting confidential information. Where a statute or regulation prohibits disclosure, the non-party may redact the confidential information, preferably with a court order authorizing the same.[71] However a non-party should be careful not to redact too much information, rendering the disclosure

[64] *See* 47 U.S.C.A. § 551(c)(2)(B) (authorizing disclosure of cable subscriber's personally identifiable information without consent pursuant to a court order so long as the subscriber is notified).

[65] *Elektra Entm't Grp., Inc. v. Does 1*-9, 04 CIV. 2289 (RWS), 2004 WL 2095581 at *5 (S.D.N.Y. Sept. 8, 2004).

[66] *See* 47 U.S.C.A. § 551(c)(2)(B); *see also* 45 C.F.R. § 164.512 (e)(1)(ii) (authorizing disclosure of protected health information pursuant to a subpoena so long as the individual who is the subject of the information has been given notice of the request).

[67] *Broadcort Capital Corp. v. Flagler Sec., Inc.*, 149 F.R.D. 626, 628 (D. Colo. 1993) (relying on *Centurion Industries, Inc. v. Warren Steurer & Assoc.*, 665 F.2d 323 (10th Cir.1981)).

[68] *Maverick Entm't Grp., Inc. v. Does 1-2*,115, 810 F. Supp. 2d 1, 10 (D.D.C. 2011) ("Although Rule 26(c) contains no specific reference to privacy or to other rights or interests that may be implicated, such matters are implicit in the broad purpose and language of the Rule."); *Mackey v. IBP, Inc.*, 167 F.R.D. 186, 196 (D. Kan. 1996) ("Confidentiality may occasion a protective order, pursuant to Fed.R.Civ.P. 26(c), to restrict the use of requested information.").

[69] *Maverick Entm't Grp.*,115, 810 F. Supp. at 10.

[70] *Broadcort Capital Corp. v. Flagler Sec., Inc.*, 149 F.R.D. at 628-9 (finding that Rule 45 did not provide the protections claimed and holding that "there [was] no legal basis for the subpoena duces tecum to be quashed"); *Maverick Entm't Grp.*,115, 810 F. Supp. at 10 (finding that the anonymous defendants' privacy interest in their identifying information pursuant to the First Amendment did not entitle them to quash subpoenas).

[71] *In re Rezulin Products Liab. Litig.*, CIV.00 CIV.2843 LAK, 2002 WL 24475 (S.D.N.Y. Jan. 10, 2002) (permitting a non-party to redact confidential medical information that Federal regulations prohibited the FDA from disclosing); *Davis v. Carmel Clay Sch.*, 286 F.R.D. 411, 412 (S.D. Ind. 2012) (ordering disclosure of reports of child abuse from a county prosecutor with the names of the reporters redacted to comply with state privacy laws).

inadequate.[72] An overzealous effort to redact information under the guise of confidentiality may cause a court to order that the non-party produce responsive documents again.[73]

If a non-party intends to respond to a subpoena with potentially private information, it should be mindful to provide notice to the subject of the private information. Notice requirements may arise from an internal policy, contractual agreement, or by law. Often, a non-party can rely on the litigant to assert and defend its own privacy interests. Although a litigant generally lacks standing to challenge a subpoena to a non-party, it may move to quash a subpoena if the party "has a claim of privilege attached to the information sought or [] it implicates a party's privacy interests."[74] A party's standing to quash a subpoena on the basis of privacy exists "even where the movant's privacy interest is minimal at best."[75] If the litigant fails to take action to protect private information, the non-party still has standing to move to quash the subpoena itself.[76]

F. Can a Non-Party Shift the Cost of a Subpoena to the Parties?

Rule 45(d) protects a non-party from having to respond to a subpoena if compliance would result in a "significant expense." One method courts use to assure non-parties do not incur significant expenses is to shift some or all of the cost of discovery to the party seeking information.[77] In fact, cost-shifting is considered "mandatory in all instances in which a non-party incurs significant expense from compliance with a subpoena."[78] So what steps can a non-party take to convince a court to shift costs associated with collecting and producing electronic information to the party seeking discovery?

To shift costs of responding to a subpoena at all, a court must first find that "the subpoena imposes significant expense on the non-party."[79] If the court finds that a "significant expense" would be imposed on the non-party, an award of cost-shifting in an amount necessary to render the cost "non-significant" is "mandatory."[80] As the following examples

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[72] *Bailey Indus., Inc. v. CLJP, Inc.*, 270 F.R.D. 662, 668-69 (N.D. Fla. 2010) (redaction of pricing structure, item description, and amount of items sold on invoices in the name of trade secrets rendered documents inadequate).

[73] *Id*.

[74] *Malibu Media, LLC v. John Does 1-14*, 287 F.R.D. 513, 516 (N.D. Ind. 2012) (relying on *Hard Drive Prods. v. Does 1–48*, No. 11 CV 9062, 2012 WL 2196038, at *3 (N.D.Ill. June 14, 2012)).

[75] *Malibu Media*, 287 F.R.D. at 516 (internal quotations omitted) (citing *Sunlust Pictures, LLC v. Does 1–75*, No. 12 C 1546, 2012 WL 3717768, at *2 (N.D.Ill. Aug. 27, 2012).

[76] *Jee Family Holdings, LLC v. San Jorge Children's Healthcare, Inc.*, CIV. 12-2021 FAB, 2014 WL 323939 (D.P.R. Jan. 29, 2014) ("The Non-parties, claiming that the records sought include their confidential financial information, have standing to object to the subpoenas.").

[77] *US Bank Nat. Ass'n v. PHL Variable Ins. Co.*, 12 CIV. 6811 CM JCF, 2012 WL 5395249 at *4 (S.D.N.Y. Nov. 5, 2012) ("Costshifting is particularly appropriate in the context of subpoenas, since Rule 45 directs courts to minimize the burden on non-parties.").

[78] *Legal Voice v. Stormans Inc.*, 738 F.3d 1178, 1184 (9th Cir. 2013) (relying on *Linder v. Calero–Portocarrero*, 251 F.3d 178 (D.C.Cir.2001)).

[79] *Legal Voice*, 738 F.3d at 1184.

[80] *Legal Voice*, 738 F.3d at 1184; *see also* Fed R. Civ. Proc. 45(d)(2)(B)(ii).

demonstrate, a court has discretion to determine how much of the costs to shift[81] based on "[1] whether the putative non-party actually has an interest in the outcome of the case, [2] whether it can more readily bear its cost than the requesting party; and [3] whether the litigation is of public importance." [82]

- Finding that "the most crucial factor" was the respondent's non-party status and shifting the costs of responding to a subpoena, approximately $7,200.00, to the party requesting discovery. In doing so, the Court stated: "it is not [the non-party's] lawsuit and they should not have to pay for the costs associated with someone else's dispute."[83]

- "No trouble" concluding that $20,000 was a "significant expense" and remanding for the trial court to determine the proper allocation of costs in lawsuit brought by pharmacists and a corporate pharmacy to enjoin regulations prohibiting "refuse and refer" practices with respect to birth control.[84]

- Finding that $14,720.00 and $16,127.00 in estimated costs for two non-parties to comply with subpoenas in an anti-competition suit were significant but shifting only fifteen percent of the estimated costs because the nonparties had an interest in the outcome of the litigation.[85]

- After a non-party incurred $130,000 in costs to collect and produce 40,000 documents, a court shifted only half of the cost of future custodian and keyword searches, estimated at $113,000 total, because "neither [the non-party] nor Defendants approached production of [the non-party's] ESI with a spirit of cooperation or efficiency" and "there was no dialogue to discuss specific search terms or data custodians to be searched in advance of the non-party conducting its searches."[86]

- Awarding $15,391.25 of $18,838.75 requested by a non-party for attorneys' fees and in-house costs to respond to subpoena seeking claims of personal injury from non-parties and medical records relating to an explosion and fire in a

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[81] *Arthrex, Inc. v. Parcus Med., LLC*, 1:11-MC-00107-SEB, 2011 WL 6415540 (S.D. Ind. Dec. 21, 2011) ("Rules 45(c) and 26(c) of the Federal Rules of Civil Procedure give trial courts considerable discretion in determining whether expense-shifting in discovery production is appropriate in a given case.").

[82] *Blue Cross Blue Shield of Michigan*, 10-CV-14155 at *2; *US Bank Nat. Ass'n v. PHL Variable Ins. Co.*, 12 CIV. 6811 CM JCF, 2012 WL 5395249 (S.D.N.Y. Nov. 5, 2012) (quoting *In re World Trade Center Disaster Site Litigation*, No. 21 MC 100, 2010 WL 3582921, at *1 (S.D.N.Y. sept.14, 2010)); *Magna Mirrors of Am., Inc. v. Pittsburgh Glass Works LLC*, 2:12-MC-359, 2012 WL 4904515 at * 3 (W.D. Pa. Oct. 15, 2012); *Linder v. Calero-Portocarrero*, 180 F.R.D. 168, 177 (D.D.C. 1998).

[83] *Guy Chem. Co., Inc. v. Romaco AG*, 243 F.R.D. 310, 313 (N.D. Ind. 2007).

[84] *Legal Voice*, 738 F.3d at 1184-85.

[85] *United States v. Blue Cross Blue Shield of Michigan*, 10-CV-14155, 2012 WL 4838987 at *2 (E.D. Mich. Oct. 11, 2012).

[86] *DeGeer v. Gillis*, 755 F. Supp. 2d 909, 928-29 (N.D. Ill. 2010).

manufacturing facility where the non-party had no interest in the outcome of the litigation and sought to protect confidential medical information of other non-parties.[87]

If possible, a non-party should attempt to discuss the costs associated with responding to the subpoena with the party seeking discovery before requesting cost-shifting from the court. This way, the party can limit its discovery knowing that the costs may be shifted and the Court can order cost shifting based on an established record.[88] Further, "[s]electing search terms and data custodians should be a matter of cooperation and transparency among parties and non-parties."[89] Absent cooperation from the party, the non-party should be clear in what actions it intends to take for the collection and production of ESI to establish a record of attempting to collaborate.[90]

G. Conclusion

Responding to Rule 45 subpoenas requires a transparent and proactive approach to narrow the scope of discovery requested by the non-party, to communicate the non-party's objections and issues of control, to agree to a format for production, to protect against disclosure of private information, and to cost-effectively manage the collection and production of documents.

[87] *Georgia-Pac. LLC v. Am. Int'l Specialty Lines Ins. Co.*, 278 F.R.D. 187, 190-93 (S.D. Ohio 2010).

[88] *Miller v. Ghirardelli Chocolate Co.*, C 12-4936 LB, 2013 WL 6774072 at *5 (N.D. Cal. Dec. 20, 2013).

[89] *DeGeer*, 755 F. Supp. 2d at 929 (shifting only half of the discovery costs where the non-party forced the party seeking discovery to file a motion to compel to obtain the nonparty's list of custodians and search terms).

[90] *DeGeer*, 755 F. Supp. 2d at 929 (finding a non-party "was in the best position to take the lead in selecting data custodians and search terms but it should have been up-front with defense counsel regarding its proposed custodians and search terms and then receptive to defense counsel's input").