Subpoenas: Responding to a Subpoena

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A Practice Note outlining the key issues to consider when responding to a subpoena in federal civil litigation. Specifically, this Note covers how to comply with a subpoena, the various ways one can object to (or move to quash) a subpoena and how to appeal a decision compelling or denying the discovery sought by a subpoena. It also explains the consequences of failing to timely object to (or comply with) an otherwise valid subpoena.

Subpoenas are commonly used in civil litigation to obtain evidence from individuals, corporations and other entities who are not parties to a lawsuit. This Note outlines the key issues to consider when responding to a subpoena under Rule 45 of the Federal Rules of Civil Procedure (FRCP), which was amended on December 1, 2013. Counsel should carefully review the amended rule before responding to a subpoena in a federal lawsuit, as both the rule's substance and subdivision lettering has changed.

FIRST STEPS IN RESPONDING TO A SUBPOENA

As soon as the recipient is served with a subpoena, several preliminary steps should immediately be taken to ensure proper and timely compliance. These steps are set out below.

ALERT ALL NEED-TO-KNOW EMPLOYEES

A corporate recipient must first alert those individuals who need to know that the company has been served with a subpoena. These may include:

- The general counsel.
- Other in-house lawyers.
- Certain corporate officers.
- In certain circumstances, outside lawyers.

CALENDAR DEADLINES

Once the subpoena has been received, the recipient should identify and calendar when it must respond to the subpoena (commonly referred to as the return date. If necessary, the recipient's lawyer may need to quickly contact the issuing party to negotiate an extension. Any extensions should be in writing.

SPECIAL CONSIDERATIONS FOR DOCUMENT SUBPOENAS

Once the recipient is served or knows that it will be served with a subpoena seeking the production or inspection of documents or other tangible items (document subpoena or subpoena duces tecum), it needs to take immediate steps to ensure that it is in a position to fully comply with the subpoena. This section of the Note explains what the recipient of a document subpoena must do as soon as possible to fully comply with FRCP 45 in responding to, serving timely objections to, or moving to quash the subpoena.

Issue a Litigation Hold and Begin Document Collection and Review

The recipient of a document subpoena has a duty to identify and preserve responsive documents (see *In re Napster, Inc. Copyright Litig., 462 F. Supp. 2d 1060, 1068 (N.D. Cal. 2006)*). The recipient should therefore immediately take the following steps to ensure that all responsive documents are identified, collected and preserved:

- Issue a written litigation hold notice requiring employees to preserve all potentially responsive documents and other information, including e-mails, backup tapes and any other electronically stored information (ESI) in addition to hard copy documents.
- Identify all potential custodians of responsive document, including IT personnel and employees who may possess relevant information.
- Instruct employees on how to search for and collect responsive documents and other information, and oversee the search and collection process. Alternatively, it may be preferable to have outside counsel or discovery vendors conduct the search and collection efforts. Employees should be notified if outside counsel or discovery vendors are conducting the search and collection efforts.

- Monitor employee (or third-party) document preservation and collection efforts to ensure they comply with the notice and the company's discovery obligations.
- Review collected documents for responsiveness, privilege and confidentiality.

(See *Chin v. Port Authority, 685 F.3d 135 (2d Cir. 2012)*, *Nat'l Day Laborer Org. Network v. U.S. Immigration and Customs Enforcement Agency, No. 10-cv-3488, 2012 WL 2878130 (S.D.N.Y. July 13, 2012)* and *Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 431-34 (S.D.N.Y. 2004)*; see also *Practice Note, Implementing a Litigation Hold (http://us.practicallaw.com/8-502-9481)*.)

Preserve Documents Held Outside the Issuing Court's Jurisdiction

Generally, the recipient of a subpoena must produce all responsive documents within its possession, custody or control, regardless of where those documents are located (*Hay Grp., Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404, 412-13 (3d Cir. 2004)* and *In re Auto. Refinishing Paint Antitrust Litig., 229 F.R.D. 482, 494-95 (E.D. Pa. 2005)* (compelling production of documents held overseas)). The recipient must therefore ensure that any potentially responsive documents are preserved, no matter where they are located.

Preserve Documents Regardless of Location

A company served with a document subpoena must produce all responsive documents within its control, even if those documents are in the physical possession of another, affiliated company (see *Practice Note, Subpoenas: Using Subpoenas to Obtain Evidence: Indirect Non-party Discovery (http://us.practicallaw.com/0-503-1893)*). If a company reasonably believes that responsive information is in the possession of one (or more) of its corporate affiliates, it should alert those affiliates about the subpoena to ensure they also take the proper steps to identify and preserve all relevant documents in their possession.

For further analysis of the issues that courts consider in determining whether a corporation controls documents held by an affiliate, see *Article, Protecting Foreign Corporations from US Discovery (http://us.practicallaw.com/6-502-5304)*.

Preserve Documents Even if the Subpoena May Be Challenged

The recipient's duty to preserve is triggered regardless of whether it believes that the subpoena is objectionable. Ultimately, it is the court (not the recipient) that determines the subpoena's validity. If the recipient fails to take reasonable steps to preserve relevant evidence, the recipient may be held in contempt (*FRCP 45(g)*), or even face the possibility of spoliation sanctions, depending on the circumstances.

SPECIAL CONSIDERATIONS FOR DEPOSITION OR TRIAL SUBPOENAS

If a subpoena commands one or more company representatives to appear at a deposition, hearing or trial, the proper witness(es) must be identified and notified. If the subpoena commands an appearance for purposes of providing testimony in an area that is not sufficiently specified, both a meet and confer between the parties and an interview of corporate employees may be necessary to identify the appropriate witness.

If the proper witness is unavailable to testify on the date specified in the subpoena, the company must indicate this fact as part of a written response to the subpoena. Alternatively, the recipient may contact the issuing party directly (or through outside counsel) and negotiate a different mutually convenient appearance date.

DETERMINE POTENTIAL RESPONSE OPTIONS

The recipient of a subpoena may respond in several ways. Depending on the circumstances of the case, the recipient may:

- Comply with the subpoena and provide the requested testimony or documents, or both (see *Complying with the Subpoena*).
- Serve written objections to a document subpoena (see *Written Objections*).
- Move to quash (or modify) the subpoena (see *Motion to Quash or Modify: Procedural Issues*, *Mandatory Grounds for Quashing or Modifying*, *Permissive Grounds for Quashing or Modifying*, and *Other Grounds for Quashing or Modifying*).
- Move for a protective order (see *Motion for a Protective Order*).
- Contact the party who served the subpoena in an attempt to informally resolve the issue (see *Informally Contact the Issuing Party*).
- Contact an adverse party (that is, a party to the litigation whose interests are adverse to those of the party that issued the subpoena) in an attempt to have the adverse party exercise its rights against the party who issued the subpoena (see *Informally Contact the Adverse Party*).

DECIDE WHETHER TO COMPLY WITH OR RESIST THE SUBPOENA

Several considerations impact the decision of whether to comply with (or resist) a subpoena, including:

- The time, effort and cost of compliance or resistance.
- Whether or not sound legal and practical arguments to support non-compliance are available under the circumstances.
- The likelihood that arguments in support of non-compliance may be successful.

DECIDE WHETHER TO ENGAGE OUTSIDE COUNSEL

The recipient of a subpoena must quickly decide whether to enlist outside counsel in formulating and initiating its response.

A company may want to engage outside counsel if the subpoena requests the production of sensitive or proprietary information, if large volumes of documents are sought or if an appearance is required in a jurisdiction where in-house counsel is not admitted.

However, companies may wish to handle the response internally if the subpoena calls for only a few documents, the stakes involved are relatively low and in-house counsel is admitted in the relevant jurisdiction in the event a court appearance is necessary.

COMPLYING WITH THE SUBPOENA

Complying with a subpoena may be the most appropriate course in some cases. This section of the Note covers the main points to consider when complying with a subpoena seeking:

- The production of documents (see *Document Subpoenas*).
- Testimony (see *Subpoenas Seeking Testimony*).

DOCUMENT SUBPOENAS

It takes more to comply with a document subpoena than just simply boxing up the responsive documents and sending them off to the requesting party. For example, a recipient corporation must ensure that it produces responsive documents and ESI that are physically in the possession of subsidiaries, affiliates, divested entities and other third parties under the control of the subpoenaed entity. The recipient also cannot haphazardly throw the production together, but instead must ensure the production is either organized to correspond to the specific requests or is produced as the documents are held in the ordinary course of business. These and other key points that the subpoena's recipient must consider are outlined below.

Produce Documents within Possession, Custody or Control

A party who chooses to comply with a document subpoena must produce all materials in its possession, custody or control, regardless of their location (*FRCP 45(a)(1)(A)(iii)*). For example, a California corporation served with a subpoena issued by a California federal court commanding the production of documents at a specified place within the state of California must produce all responsive documents even if those documents are located in its New York office (assuming the subpoena is not otherwise objectionable). A company may also be required to produce documents that it "controls," even if those documents are in the physical possession of a corporate affiliate (see *Subpoenas: Using Subpoenas to Obtain Evidence: Indirect Non-party Discovery (http://us.practicallaw.com/0-503-1893)*).

Review for Privilege and Responsiveness

Once the recipient of a document subpoena identifies all of the places where potentially responsive materials are located, the recipient must review those documents and other materials to determine whether they are actually responsive to the subpoena's requests.

The recipient should also review all potentially responsive documents to determine whether they may be withheld from production based on the attorney-client privilege, work product doctrine or some other recognized privilege or protection. Depending on the scope of the production, corporate recipients may want to have either in-house counsel or outside litigation counsel conduct the pre-production document review.

Only those non-privileged documents that fall within the scope of the subpoena should be produced. Under most circumstances, materials withheld on privilege grounds will require the creation of a privilege log, absent agreement or court order. For more on privileged documents and creating a privilege log, see *Practice Note: Asserting the Attorney-Client Privilege and Work Product Protection (http://us.practicallaw.com/8-515-4489)*.

Form of Production

For hard copy documents, the recipient of a document subpoena generally does not need to produce the original documents. Photocopies often suffice. For large-scale document productions, parties typically scan the requested hard copy documents onto a DVD and send only the DVD (containing scanned images of the documents) to the requesting party. To keep track of the production, the recipient should place Bates numbers or control numbers on each document or image produced. The recipient should also place a label on each DVD (or box, if paper copies are being produced) containing the range of Bates or control numbers relevant to the documents contained in each box.

Organizing the Production

The documents may be produced as they are kept in the ordinary course of business, or they can be organized and labeled to correspond with the categories in the demand contained in the subpoena (*FRCP 45(e)(1)(A)*). The recipient may choose the manner in which to produce the documents and can even produce them in some hybrid form. For example, the recipient may produce documents responsive to certain requests by category of document request and documents responsive to other requests in the manner in which they are maintained in the ordinary course of business.

Inspection as Alternative to Production

Under certain circumstances, the recipient may offer inspection as an alternative to actually producing documents, ESI and other materials. Moreover, where the recipient chooses to comply with a subpoena by producing copies of documents, the issuing party may also seek to inspect, copy, test or sample the original documents or materials, unless the recipient formally objects (*FRCP 45(a)(1)(D)*).

Producing Electronically Stored Information

Document subpoenas often request the production of e-mails and other ESI. If a subpoena does not specify a form for producing ESI, the recipient must produce responsive materials in the form (or forms) in which they are ordinarily maintained or in a reasonably usable form (or forms) (*FRCP 45(e)(1)(B)*). The recipient does not, however, need to produce the same ESI in more than one form (*FRCP 45(e)(1)(C)*). For example, if the recipient is instructed to produce the documents in native format, there is no additional obligation to also produce them in TIFF format or hard copy. Further, the subpoenaed party may object to producing ESI in a specified format.

The recipient does not need to provide ESI from sources that are not reasonably accessible because of undue burden or cost, such as electronic data stored on backup tapes (*FRCP 45(e)(1)(D)*). The burden of making this showing (whether in a response to a motion to compel or in a motion for a protective order) is on the party claiming that the information is not reasonably accessible because of undue burden or cost (*FRCP 45(e)(1)(D)*). The court may still order discovery from these sources if the requesting party shows good cause (*FRCP 45(e)(1)(D)*). The court may also specify conditions for the discovery (*FRCP 45(e)(1)(D)*).

Method of Production

The recipient only needs to deliver the documents to the location stated in the subpoena. It does not need to serve the documents on every party to the underlying action. Although FRCP 45 does not identify the acceptable methods of production, the responding individual or entity may arrange for service of responsive documents by any of the service methods set out in FRCP 5 other than service through the court's Case Management/Electronic Case Filing (CM/ECF) system. Service through the CM/ECF system results in a court filing and these types of discovery documents are not normally filed with the court (*FRCP 5(d)(1)*; see also *2000 Advisory Committee Notes to FRCP 5(d)*).

Timing of Production

The subpoena's recipient should ensure that the requested documents arrive at the location stated in the subpoena on or before the return date. The recipient should not wait until the return date to mail the documents to the requesting party, as this may technically violate

the terms of the subpoena (subpoenas typically require documents to be "produced" at a specified date, time and place).

Preparing the Proof of Service

After delivering the documents to the required destination, the person who physically served the documents should prepare an affidavit (or declaration) of service setting out:

- The server's identity.
- A general description of the documents delivered (along with the Bates ranges or control numbers for those documents).
- The identity of the person receiving the documents.
- The method, time, date and place of delivery.
- Any other relevant details.

The party responding to the subpoena should retain this proof of service in its files and present it to the court if the issuing party claims that the recipient did not comply with the subpoena's demands.

Producing Documents under an Existing Confidentiality Agreement

In some instances, a subpoena may seek documents containing sensitive business information or other private information (such as trade secrets, private health information and social security numbers) that cannot be produced without some assurance of confidentiality.

In these circumstances, the recipient may wish to withhold the documents until the parties enter into a confidentiality agreement that is "so ordered" by the court. A confidentiality agreement may also provide that the attorney-client privilege (or other applicable protection) is not waived when privileged or protected documents are inadvertently produced in litigation (*FRE 502(d)*; see also *Standard Clause, Privilege Waiver Clause with Claw-Back Provision (http://us.practicallaw.com/2-501-4958)*).

The court where the lawsuit is pending has authority to enter a protective order governing the disclosure of documents sought in a subpoena even if compliance with the subpoena must be enforced in another jurisdiction (*FRCP 26(c)(1)*).

If a "so ordered" confidentiality agreement has already been entered by the court where the lawsuit is pending, it may include a provision (in place of a free-standing protective order) that automatically controls the treatment of any documents produced by non-parties in response to a subpoena.

Alternatively, if the terms of an existing confidentiality agreement (which does not contemplate non-party productions) are otherwise acceptable to the producing party, it may be possible to simply enter a stipulation expanding the scope of the existing agreement to cover any documents produced in response to the subpoena.

What if There is No Confidentiality Agreement?

Where no confidentiality agreement exists (or none that is acceptable to the recipient), the recipient should seek to enter into an agreement with the issuing party after asserting timely written objections to producing the sensitive information. If the negotiations reach an impasse, the recipient can move in the court where the action is pending for a protective order (*FRCP 26(c)(1)*). The burden of persuasion for entry of a protective order is borne by the moving party (see *Jones v. Hirschfeld, 219 F.R.D. 71, 74-75 (S.D.N.Y. 2003)*).

Informing the Other Side if the Recipient Has No Responsive Documents

If the recipient determines that it does not possess any responsive documents, it must still respond to the issuing party in writing stating that fact. The response must be served no later than the return date, although prudent counsel may wish to serve the response no later than the date on which written objections must be served (see *Written Objections*). This timeline may be modified informally through negotiation between the parties, but the responding party must ensure that it formally conveys that it does not have responsive materials in its possession, custody or control.

SUBPOENAS SEEKING TESTIMONY

The steps taken to properly comply with a subpoena seeking testimony are different from those required to comply with a document subpoena. This section of the Note outlines the main points to consider when preparing a witness to testify in response to a subpoena.

Timely Compliance Required

If the recipient decides to comply with a subpoena seeking testimony, he must timely arrive at the place where the deposition, hearing or trial is being held on the return date. Otherwise, he risks being held in contempt (see *Francois v. Blandford, No. 10-cv-1330, 2012 WL 777273, at *3 (E.D. La. Mar. 7, 2012)*).

Corporate Liability for Witness' Non-compliance

Where the testimony of a corporate officer, director or managing agent is sought, the corporation must ensure that the appropriate witness appears to testify. Courts treat the failure of a corporate officer, director or managing agent to attend a deposition as the corporation's failure (see *Intl. B'hood of Elec. Workers, Local 474 v. Eagle Elec. Co., Inc., No. 06-2151-M1, 2007 WL 622504, at *4 (W.D. Tenn. Feb. 22, 2007)*). In contrast, a corporation generally cannot be sanctioned when its low-level employees fail to appear for their depositions, at least where the corporation did not take any steps to prevent the appearance or aid in the employee's non-compliance (see *Intl. B'hood of Elec. Workers, Local 474, 2007 WL 622504, at *4*).

Witness Preparation: General Issues

Before producing a company witness to testify, the witness must be adequately prepared on the issues that will likely come up during the deposition, hearing or trial. It is usually advisable to have experienced outside litigation counsel direct the company's witness preparation efforts. Outside litigation counsel will typically be better positioned to prepare the company witness thoroughly and efficiently. In addition, outside counsel's involvement may further support any assertions of privilege that the company wishes to make regarding communications and other information related to the witness preparation process.

The process of preparing a witness to testify can be rather involved and is beyond the scope of this Note. However, there are a couple of points worth mentioning here. Specifically:

- Counsel should have the witness review documents that relate to the witness's testimony and which opposing counsel is likely to use at the deposition, hearing or trial. However, the witness normally should not review privileged documents when preparing to testify, as this could waive the privilege (compare *Ehrlich v. Howe, 848 F. Supp. 482, 493-94 (S.D.N.Y. 1994)* (privilege waived when

deponent reviews privileged documents to refresh recollection) with *In re Rivastigmine Patent Litig., 486 F. Supp. 2d 241, 243-44 (S.D.N.Y. 2007)* (no waiver when review of privileged documents did not have an impact on the witness' testimony)).

- Counsel should explain the deposition process to the witness during her prep sessions and conduct a mock direct and cross-examination to help the witness deal with anticipated lines of questioning.

Witness Preparation: FRCP 30(b)(6) Depositions

Under FRCP 30(b)(6), a party may seek to depose a corporation (or other organization) by naming it as the deponent in the subpoena. If a corporation chooses to comply with this type of subpoena, it must produce a company witness who is knowledgeable about the topics stated in the subpoena. In other words, there is an affirmative duty to educate the 30(b)(6) witness(es) regarding the noticed topics. For more on preparing an FRCP 30(b)(6) witness, see *Practice Note, How to Prepare for and Successfully Defend a Rule 30(b)(6) Deposition (http://us.practicallaw.com/9-504-9935)*.

Arrange for Legal Representation and Reimbursement of Travel Expenses

The company should arrange for a lawyer to represent a FRCP 30(b)(6) witness or other high-ranking corporate officer at the deposition, hearing or trial. The company may also wish to hire a lawyer for lower-level employees if their testimony has the potential to affect the rights or interests of the company. In addition, the company should arrange for the requesting party to reimburse the witness for all travel expenses authorized by law (see *Subpoenas: Using Subpoenas to Obtain Evidence: Witness Fees (http://us.practicallaw.com/0-503-1893)*).

WRITTEN OBJECTIONS

If the recipient takes exception to a document subpoena, it may serve written objections on the issuing party (*FRCP 45(d)(2)(B)*). This section of the Note outlines the key points to consider when preparing and serving written objections in response to a document subpoena.

Contrast with Motion to Quash

The recipient of a document subpoena does not need to formally move to quash the subpoena. It can rest on its written objections until the issuing party serves a motion to compel compliance with the subpoena.

In contrast, the recipient may not simply serve written objections in response to a subpoena seeking testimony. If the recipient does not want to comply with a testimonial subpoena, it must make a formal motion to quash or modify under FRCP 45(d)(3), or, in some cases, a motion for a protective order under FRCP 26(c) (see *Aetna Cas. and Sur. Co. v. Rodco Autobody, 130 F.R.D. 2, 3 (D. Mass. 1990)*).

FORM OF WRITTEN OBJECTIONS

FRCP 45 does not set out any required form for written objections served in response to a document subpoena. Unless the relevant court has a specific rule on this issue, the recipient may draft its objections like written formal responses to a document request under FRCP 34, containing a caption and other information required by the FRCP and local rules of the court where the action is pending (the issuing court). Alternatively, the issuing court's practice may allow a non-party to assert its objections in a letter to opposing counsel.

However the response is formatted, it should:

- Clearly state the legal grounds for any asserted objection to compliance separately for each request contained within the subpoena.
- Be signed by the recipient's attorney (*FRCP 26(g)(1)*).

METHOD OF SERVICE

The recipient may serve written objections on the requesting party under any of the acceptable methods of service set out in FRCP 5(b), except that it should not serve the objections through the court's CM/ECF system. Serving through CM/ECF results in a court filing, and these types of documents are not normally filed with the court (*FRCP 5(d)(1)*; see also *2000 Advisory Committee Notes to FRCP 5(d)*).

The recipient does not need to serve every party in the underlying action with its objections. Instead, it may choose to serve only the issuing party (*FRCP 45(d)(2)(B)*). The recipient should retain its original objections and only serve a copy in case the recipient needs to produce the original to the court.

PROOF OF SERVICE

The person who physically serves the written objections should draft an affidavit (or declaration) of service that:

- Identifies:
  - the server; and
  - the person served.
- Provides:
  - the title of the document(s) served;
  - the time, date, place and manner of service; and
  - any other relevant information.

The recipient should retain the original proof of service in case the requesting party claims that it did not receive the written objections. The proof of service does not need to be served on the other parties or filed with the court unless it is being used in connection with a court filing, such as an opposition to a motion to compel.

TIMING OF SERVICE

Timing is critical when serving written objections. This section of the Note explains when the recipient must serve its written objections and the potential consequences for failing to timely object.

Time to Object under FRCP 45(d)(2)(B)

Absent an agreement or court order stating otherwise, written objections must be served on the party or attorney designated in the subpoena before the earlier of:

- The subpoena's return date.
- 14 days after the subpoena is served.

(*FRCP 45(d)(2)(B)*.)

This is significant because it is different than serving written objections to requests for documents served under FRCP 34, which are generally due 30 days from service (*FRCP 34(b)(2)(A)*).

Because the issuing party sets the return date, and FRCP 45 does not set a minimum time period within which compliance with the subpoena may be commanded, the recipient may be required to

serve objections in less than 14 days. The chart below provides examples of how the specified return date may impact the date by which objections must be served:

Return Date	Objections Due
10 days	10 days
14 days	14 days
30 days	14 days

The recipient's objections only need to be served (not necessarily received by the issuing party) on or before the earlier of 14 days after service or the return date. When the recipient sends its objections by mail, for example, those objections are deemed served as soon as they are placed in the mailbox, even if the issuing party does not receive them until several days later (*FRCP 5(b)(2)(C)*; see also *Aetna Cas. & Sur. Co., 130 F.R.D. at *3*).

Time to Assert Privilege Objections

A recipient who objects to a document subpoena on attorney-client privilege or work product grounds must identify each withheld document and explain why those documents are protected from disclosure (*FRCP 45(e)(2)(A)*). Generally this is done by serving a privilege log on the issuing party. Depending on the scope of the subpoena, however, it may be impossible for the recipient to conduct a proper privilege review within the time frame that objections must be served under FRCP 45(d)(2)(B).

In this situation, most courts are of the view that the responding party may assert general privilege or work product objections within the time allowed by FRCP 45(d)(2)(B) and provide a detailed privilege log within a "reasonable time" afterwards (see *In re DG Acquisition Corp., 151 F.3d 75, 81 (2d Cir. 1998)* and *Tuite v. Henry, 98 F.3d 1411, 1416 (D.C. Cir. 1996)*). A smaller number of courts hold that the recipient has until the return date to object on privilege grounds (including providing a detailed privilege log) regardless of whether the recipient served general objections before the time set for compliance (see *Winchester Capital Mgt. Co., Inc. v. Mfr's Hanover Trust Co., 144 F.R.D. 170, 175-76 (D. Mass. 1992)*).

Consequences for Not Timely Objecting

The failure to timely comply with a subpoena without adequate excuse may constitute contempt of court (*FRCP 45(g)*). All objections may also be deemed waived if the recipient fails to serve its objections in a timely fashion (see *United States ex rel. Schwartz v. TRW, Inc., 211 F.R.D. 388, 392 (C.D. Cal. 2002)* and *Application of Sumar, 123 F.R.D. 467, 472 (S.D.N.Y. 1988)*).

Court May Excuse Untimely Objections

Courts may excuse untimely objections in certain circumstances. For example, the court may forgive the recipient's failure to timely serve written objections where the recipient and the issuing party attempted to negotiate an extension of time for compliance or where the subpoena:

- Is overbroad on its face.
- Imposes a significant burden on a non-party witness.
- Sets a return date that does not allow for sufficient time for compliance.

(See *Semtek Intern., Inc. v. Merkuriy Ltd., No. 3607, 1996 WL 238538, at *2 (N.D.N.Y. May 1, 1996)*.)

GROUNDS FOR OBJECTING

There are many grounds for objecting to a document subpoena, including that the subpoena:

- Does not allow sufficient time to comply.
- Seeks irrelevant evidence.
- Requires disclosure of privileged or other protected information.
- Subjects the recipient to undue burden or expense.
- Requires disclosure of a trade secret or other confidential business information.
- Requires disclosure of an unretained expert's opinion or information.
- Contains requests that are so vague and ambiguous that it is unreasonable or even impossible for the recipient to comply.
- Was improperly served.
- Was issued out of the wrong court (only the court where the action is pending may properly issue a subpoena under amended FRCP 45).

These objections are essentially the same as those that can be made in a motion challenging the subpoena's validity and are therefore addressed in this Note's section on motions to quash or modify subpoenas (see *Mandatory Grounds for Quashing or Modifying, Permissive Grounds for Quashing or Modifying* and *Other Grounds for Quashing or Modifying*).

EFFECT OF SERVING WRITTEN OBJECTIONS

By serving written objections, the recipient suspends its obligation to comply with the subpoena until (and unless) the court later orders compliance or an agreement is reached between the recipient and the issuing party. If the recipient and the issuing party cannot reach an agreement, the issuing party may attempt to force compliance by making a motion to compel (*FRCP 45(d)(2)(B)(i)*).

The recipient is still under a duty to preserve responsive documents and other information both before and after it serves its objections. The duty to preserve does not evaporate until (and unless) the court quashes the subpoena or the parties agree otherwise (assuming there is no independent duty to preserve).

COST-SHIFTING ALLOWED

If the court determines that compliance with a document subpoena will impose an undue expense on the recipient, the court may shift the cost of compliance to the issuing party (*FRCP 45(d)(2)(B)(ii)*). The costs may be fixed in advance of production or assessed after the documents have been produced (*United States v. CBS, Inc., 666 F.2d 364 (9th Cir. 1982)*).

In deciding whether to shift the cost of compliance, courts consider:

- The non-party's interest in the outcome of the case.
- The non-party's ability to bear the costs, as compared to the requesting party's.
- Whether the litigation is of public importance.

(See *Miller v. Allstate Fire & Cas. Ins. Co., No. 07-cv-0260, 2009 WL 700142, at *5 (W.D. Pa. Mar. 17, 2009)*.)

BENEFITS OF SERVING WRITTEN OBJECTIONS

While serving written objections may not necessarily prevent the

disclosure of the requested documents (the requesting party may ultimately succeed on a motion to compel), it may still provide the recipient with several advantages. For example:

- By serving written objections, the recipient can effectively shift the burden of proof to the party that issued the subpoena by requiring the issuing party to file a motion to compel. In contrast, the burden of proof would be on the recipient if the recipient were to make a motion to quash the subpoena. Note, however, that the recipient continues to bear the burden of proof for objections based on the claimed inaccessibility of ESI (*FRCP 45(e)(1)(D)*).
- If enforcing compliance with a subpoena is required in a court other than the issuing court, the requesting party must spend the time and resources commencing a new action in the court for the district where compliance is required (the compliance court) to enforce the subpoena. This effort is borne by the recipient if the recipient moves to quash the subpoena.
- Asserting objections within the time period required by FRCP 45(d)(2)(B) can help ensure that the recipient's objections are not waived. Asserting objections also affords the recipient additional time in the event the recipient is ultimately obligated to comply with the demands in the subpoena.

MOTION TO QUASH OR MODIFY: PROCEDURAL ISSUES

If the recipient does not wish to comply with a subpoena seeking documents or testimony, it may move to quash or modify the subpoena (*FRCP 45(d)(3)*). This section of the Note outlines the key procedural points to consider when moving to quash or modify.

REVIEW THE RELEVANT RULES

Before making any motion, including a motion to quash, counsel for the moving party should review the relevant rules to ensure that all of the required procedures are observed. Specifically, counsel should look at:

- FRCP 45.
- The court's local rules dealing with formatting, timing, motion practice, service and filing issues.
- The court's CM/ECF rules.
- Relevant standing orders.
- The judge's individual practice rules, if any.
- Any other standing orders of the issuing court or individual judge.

Failure to follow these rules may result in the motion being rejected by the court.

PRE-MOTION MEET AND CONFER

Depending on the court, the recipient's lawyer may be required to meet and confer with the issuing party's attorney before moving to quash under FRCP 45 (compare *Travelers Indem. Co. v. Metro. Life Ins. Co., 228 F.R.D. 111, 115 (D. Conn. 2005)* (meet and confer not required for FRCP 45 motions) with *C.D. Cal. L.R. 45-1* (meet and confer required for *FRCP 45* motions)).

If the court requires a pre-motion meet and confer, the movant's lawyer likely will need to indicate somewhere on its motions papers that counsel for both sides conferred in good faith (albeit, unsuccessfully) to resolve their dispute without court intervention. If the non-moving party resists engaging in a meet and confer and effectively stonewalls the party seeking to quash the subpoena, the moving party may want to attach an affidavit (or declaration) to the motion indicating its good faith efforts to resolve the dispute without court intervention.

Failure to follow these rules may result in the motion being denied on procedural grounds. Significantly, these prerequisite steps also may lead to a cost-effective resolution of the dispute. Regardless of whether the court's rules require a pre-motion meet and confer, it is usually advisable to first reach out to the issuing party's attorney in an attempt to resolve the dispute without engaging in potentially expensive motion practice.

BURDEN OF PROOF

The burden of persuasion on a motion to quash is borne by the recipient of the subpoena (see *Sea Tow Intl., Inc. v. Pontin, 246 F.R.D. 421, 424 (E.D.N.Y. 2007)* and Jones, 219 F.R.D. at 74-75).

IMMEDIATE EFFECT OF MOTION TO QUASH OR MODIFY

The immediate effect a motion to quash has on the recipient's obligation to respond to a subpoena may depend on the type of subpoena that was served:

- Some courts have held that the recipient may refuse to comply with a document subpoena until its motion to quash or modify has been decided (see *Pennwalt Corp. v. Durand-Wayland, Inc., 708 F.2d 492, 494 (9th Cir. 1983)*). Of course, the recipient must still continue to preserve all responsive evidence sought by the subpoena, at least until the motion to quash is granted or the parties reach an agreement.
- Other courts have held that filing a motion to quash in response to a testimonial subpoena does not relieve the recipient of its duty to appear. In this situation, the recipient should also move to stay the deposition pending the outcome of its motion to quash (see *Stephen L. LaFrance Hold., Inc., v. Sorensen, 278 F.R.D. 429, 436 & n. 40 (E.D. Ark. 2011)*).

In addition, some courts may have local rules providing for the automatic stay of discovery once a motion to quash has been filed (see, for example, *D. Kan. Rule 26.2(b)*).

If the court's rules (and controlling precedent) are not clear on whether the mere filing of a motion to quash temporarily excuses compliance with a subpoena pending the court's ruling, the recipient should consider also seeking a temporary stay of discovery.

WHERE TO MAKE THE MOTION

A motion to quash or modify a subpoena must be filed with the compliance court (*FRCP 45(d)(3)(A)*). If the subpoena recipient is located in the jurisdiction of the issuing court (see *FRCP 45(a)(2)*), the compliance court will be the same as the issuing court. However, if the subpoena recipient is located outside the issuing court's jurisdiction, a motion to quash or modify must be filed in the court for the district in which the subpoena recipient is located.

PROCEDURE FOR MAKING THE MOTION

The procedure for making a motion to quash can vary significantly depending on whether it is made in the court where the underlying action is pending or some other court. This section of the Note explains the general procedure for filing a motion to quash in either of these courts.

Motion Made in Court Where Underlying Action is Pending

The procedure for making a motion to quash is relatively straightforward if compliance is required in the court where the underlying action is pending. In this situation, the recipient serves and files its motion in that court according to the rules applicable to other filings in the case.

Keep in mind that the recipient's attorney typically must be admitted to practice in the court, or at least admitted in the case on a *pro hac vice* basis, before he can sign papers or otherwise appear in the court. If the recipient's attorney is not already admitted in the issuing court, he will need to file a *pro hac vice* motion. Depending on the court's local rules, the recipient's attorney may need to retain local counsel to file the *pro hac vice* motion. Moreover, in many courts, attorneys admitted *pro hac vice* must use local counsel for the duration of the case. Because attorney admissions rules (including rules on *pro hac vice* admission) tend to vary from court-to-court, counsel should consult the issuing court's local rules on this issue.

Counsel will also likely be required to file the motion to quash electronically through the court's CM/ECF system. To e-file using CM/ECF, a login and password must be obtained from the court. Courts typically give CM/ECF logins and passwords to attorneys who are admitted to, and remain in good standing with, the courts' bar. Many (but not all) courts also give CM/ECF logins and passwords to non-member attorneys admitted *pro hac vice*. If the recipient's lawyer is not a member of the issuing court's bar and the court does not allow *pro hac vice* attorneys to e-file, the recipient's lawyer must retain local counsel to e-file on his behalf. Information on how to obtain a CM/ECF login and password should be posted on the relevant court's website.

Motion Not Made in Court Where Underlying Action is Pending

The process can be more complicated when compliance with a subpoena is commanded in a district other than the district where the underlying action is pending. In this situation, the recipient must commence a miscellaneous action in the compliance court and serve and file its motion papers in that action.

For example, if the plaintiff in a lawsuit pending in the Southern District of New York issues a subpoena directed to a non-party witness located in the Northern District of California, the non-party witness must commence a miscellaneous action in the Northern District of California if it wants to move to quash the subpoena.

In addition to resolving the attorney admissions and CM/ECF issues outlined above, the recipient's lawyer must also determine how to properly commence a miscellaneous action in the compliance court. The procedure for commencing a miscellaneous action in connection with a motion to quash is essentially the same procedure that the issuing party must follow when commencing a miscellaneous action in connection with a motion to compel compliance. For more on this issue, see *Subpoenas: Using Subpoenas to Obtain Evidence: Motion Not Made in Court Where Underlying Action is Pending (http://us.practicallaw.com/0-503-1893)*.

Transferring the Motion

A motion to quash filed in the compliance court may be transferred to the issuing court if either:

- The person subject to the subpoena consents to the transfer.
- The compliance court finds exceptional circumstances, which must be established by the party seeking transfer.

(*FRCP 45(f)*; see also *2013 Advisory Committee Notes to FRCP 45(f)*.)

Transfer of subpoena-related motions should be "truly rare." For example, transfer may be appropriate to avoid disrupting the issuing court's management of the underlying litigation, such as when the issuing court has already ruled on a previous discovery motion made before it that raised the same issues as a motion filed in the compliance court, or the same issues are likely to arise as a result of subpoenas issued in many districts within a single lawsuit (see *2013 Advisory Committee Notes to FRCP 45(f)*).

If the attorney for a person subject to a subpoena is authorized to practice in the compliance court, the attorney may (after transfer) file papers and appear on the motion as an officer of the issuing court (*FRCP 45(f)*). Under the rule, no separate *pro hac vice* admission is required in the issuing court.

If the issuing court orders further discovery as a result of the motion, the issuing court may then re-transfer the matter to the compliance court to enforce the order (see *2013 Advisory Committee Notes to FRCP 45(f)*).

TIME TO MAKE THE MOTION

Generally, a motion to quash or modify a subpoena must be made before the subpoena's return date (see *Estate of Ungar v. Palestinian Authority, 451 F. Supp. 2d 607, 610 (S.D.N.Y. 2006)*; but see *Hartz Mountain Corp. v. Chanelle Pharm. Veterinary Products Mfg. Ltd., 235 F.R.D. 535, 536 (D. Me. 2006)* (questioning whether a motion to quash a subpoena must be made within the 14-day period to serve written objections under Rule 45).

Courts may excuse delay for the same reasons that justify delay in serving written objections, including where the parties engaged in communications that may have otherwise avoided the need for a motion to quash or modify (see *Hartz Mountain Corp., 235 F.R.D. at 536* and *Concord Boat Corp. v. Brunswick Corp., 169 F.R.D. 44, 48, 51-52 (S.D.N.Y. 1996)*; see also *Court May Excuse Untimely Objections*)).

Delay may also be excused where the time between the subpoena's service and return date is very short, which then prevents the moving party from reasonably being able to file its motion before the return date (see *U.S. ex rel. Pogue v. Diabetes Treatment Centers of America, Inc., 238 F. Supp.2d 270, 278 & n. 6 (D.D.C. 2002)*).

REQUIRED DOCUMENTS

Depending on the court, the recipient will likely have to serve and file the following documents in connection with its motion to quash:

- A notice of motion.
- A memorandum of law.
- Supporting affidavits (or declarations).
- A proposed order.
- Proof of service.

The recipient's attorney may also need to serve and file:

- A corporate disclosure statement, if the client is a corporation or other organization (*FRCP 7.1*).
- A notice of appearance, if counsel is already admitted to practice in the court.

- A *pro hac vice* motion, if counsel is not admitted to practice in the court. This requirement is equally applicable to in-house and outside counsel.
- A civil cover sheet and other documents required by the court's local rules, if the motion to quash is being filed in a miscellaneous action (see *Subpoenas: Using Subpoenas to Obtain Evidence: Motion Not Made in Court Where Underlying Action is Pending (http://us.practicallaw.com/0-503-1893)*).

MANDATORY GROUNDS FOR QUASHING OR MODIFYING

On a timely motion, the compliance court must quash or modify a subpoena that:

- Fails to allow a reasonable time to comply (*FRCP 45(d)(3)(A)(i)*; see *Failure to Allow Reasonable Time to Comply*).
- Requires a person to appear for a trial, hearing, or deposition beyond FRCP 45(c)(1)'s geographic limits (*FRCP 45(d)(3)(A)(ii)*; see *Travel in Excess of 100 Miles*).
- Requires the production of documents, ESI, or tangible things at a place beyond 100 miles of where the subpoena recipient lives, works, or regularly transacts business in person (*FRCP 45(c)(2)(A)*; *FRCP 45(d)(3)(A)(ii)*; see *100-mile Limit Applies to Document Subpoenas*).
- Requires inspection of premises other than the at the premises to be inspected (*FRCP 45(c)(2)(B)*; *FRCP 45(d)(3)(A)(ii)*).
- Requires disclosure of privileged or other protected matter, if no exception or waiver applies (*FRCP 45(d)(3)(A)(iii)*; see *Disclosure of Privileged Information*).
- Subjects the recipient to undue burden (*FRCP 45(d)(3)(A)(iv)*; see *Undue Burden*).

FAILURE TO ALLOW REASONABLE TIME TO COMPLY

FRCP 45 does not prescribe a minimum or maximum amount of time for compliance with a subpoena (see *Timing of Service*). Therefore, a motion to quash based on insufficient notice usually depends on the facts of the specific case (see *Parrot, Inc. v. Nicestuff Distributing Intl., Inc., No. 06-cv-61231, 2009 WL 197979, at *4 (S.D. Fla., Jan. 26, 2009)*).

However, the issuing court's local rules may provide a minimum time period for compliance (see, for example, *E.D. Va. L. Civ. R. 45(E)* (14-day minimum notice for trial subpoena); see also *E.D. Va. L. Civ. R. 45(F)* (11-day minimum notice for deposition subpoena)). In these courts, the minimum time provided by local rule should normally be dispositive on the issue of timeliness.

TRAVEL IN EXCESS OF 100 MILES

Under FRCP 45, a motion to quash or modify generally must be granted if a subpoena requires a person to travel to a deposition, hearing or trial beyond 100 miles from where that person lives, works, or regularly transacts business in person, regardless of whether the person is a party or non-party (*FRCP 45(c)(1)* and *FRCP 45(d)(3)(A)*). However, certain exceptions exist. This section of the Note explains the exceptions to the rule's prohibition against requiring witnesses to travel outside the 100-mile limit described in FRCP 45(c).

Testimonial Subpoenas: Non-parties

FRCP 45's 100-mile limit may be expanded for **trial** subpoenas to include the entire state where a **non-party** witness lives, works or regularly transacts business in person, so long as the non-party will not incur substantial travel expense to attend the trial (*FRCP 45(c)(1)(B)(ii)*). Even if travel to trial would cause the non-party to incur substantial expense, the issuing party may generally avoid having a subpoena quashed on these grounds by agreeing to pay for the recipient's travel expenses.

Testimonial Subpoenas: Parties and Party Officers

FRCP 45's 100-mile limit may also be expanded for **trial**, **hearing**, and **deposition** subpoenas to include the entire state where the **party** or **party officer** lives, works or regularly transacts business in person (*FRCP 45(c)(1)(B)(i)*). This rule differs from the rule applicable to non-parties in that the state-wide expansion for non-parties is limited to trial subpoenas, and only if the non-party would not incur substantial expense.

Under the pre-2013 version of FRCP 45, courts were split on whether a party or party officer could be compelled to travel across the country to attend trial. The amendments to FRCP 45(c) now make clear that parties and their officers cannot be compelled to attend trial outside the 100-mile or state-wide limits prescribed by FRCP 45(c)(1) (*2013 Advisory Committee Notes to FRCP 45(c)*).

Measuring the 100 Miles

In deciding whether to grant a motion to quash, courts generally measure the 100 miles as a straight line between the place from which the witness travels and the place of attendance, not by the surface route taken or total mileage traveled (see *Palazzo ex rel. Delmage v. Corio, 204 F.R.D. 639 (E.D.N.Y. 1998)*).

Relevant Business Transactions

To the extent the issuing party relies on the witness' business transactions to support the subpoena's validity, the issuing party must present evidence of **substantial in-person** trips to the jurisdiction of the issuing court (see *Halliburton Energy Services, Inc. v. M-I, LLC, No. 06-mc-0053, 2006 WL 2663948, at *2 (S.D. Tex. Sept. 15, 2006)*). Sporadic visits or business transactions done over the phone do not qualify (see *M'Baye v. New Jersey Sports Production, Inc., 246 F.R.D. 205, 207-08 (S.D.N.Y. 2007)*).

100-mile Limit Applies to Document Subpoenas

A subpoena for documents may not command production at a place more than 100 miles from where the subpoena recipient lives, works, or regularly transacts business in person (*FRCP 45(c)(2)(A)*). A subpoena that commands production beyond this limit must be quashed (see *FRCP 45(d)(3)(A)(ii)* (requiring that a subpoena be quashed or modified if a subpoena violates any of the geographic restrictions in FRCP 45(c))). However, Rule 45 does not require the recipient of a subpoena for documents to travel or to appear to produce documents, and nothing prevents the parties from agreeing to produce documents by any of the service methods set out in FRCP 5, including by mail or electronically (*FRCP 45(d)(2)(A)* and *2013 Advisory Committee Notes to FRCP 45(c)*).

DISCLOSURE OF PRIVILEGED INFORMATION

The court must quash a subpoena that seeks privileged or other protected information, such as an attorney's work product. Whether or not information may be withheld on attorney-client privilege grounds

is determined by either federal or state substantive law, depending on whether the underlying cause of action arises from alleged violations of federal or state law. Work product claims, on the other hand, are determined under federal law. For more information on claiming privilege or work product protection in response to a subpoena, see *Claiming Privilege or Protection*.

UNDUE BURDEN

"Undue burden" is a broad, catch-all provision which allows the court to quash or modify a subpoena that imposes extreme hardship on the recipient because of the time, effort or expense required to comply. Challenges based on undue burden or expense typically arise where a subpoena seeks the production of documents, not where it seeks testimony.

What is an Undue Burden?

Determining whether the claimed burden is "undue" requires the court to weigh the issuing party's needs against the recipient's burden (see *Positive Black Talk Inc. v. Cash Money Records, Inc., 394 F.3d 357, 377 (5th Cir. 2004)*, abrogated on other grounds by *Reed Elsevier, Inc. v. Muchnick, 130 S. Ct. 1237 (2010)*). In balancing these competing interests, courts usually look at the:

- Relevance of the sought-after evidence.
- Issuing party's need for the evidence.
- Breadth of the request.
- Time period covered by the request.
- Adequacy of the description of the evidence sought.
- Burden imposed.

(See *Concord Boat Corp., 169 F.R.D. at 49*.)

However, these factors are not exclusive. For example, courts may also consider whether compliance with the subpoena implicates privacy interests and whether the sought-after evidence is more readily available from another source (see *Northwestern Memorial Hosp. v. Ashcroft, 362 F.3d 923, 927-32 (7th Cir. 2004)*; see also *Graham v. Casey's General Stores, 206 F.R.D. 251, 254 (S.D. Ind. 2002)*).

Sanctions for Imposing Undue Burden on Recipient

The issuing party and its attorney could face sanctions if the court determines that compliance with the subpoena would impose an undue burden or expense on the witness who is subject to the subpoena. These sanctions can include paying the recipient's lost earnings and reasonable attorneys' fees (*FRCP 45(d)(1)*).

PERMISSIVE GROUNDS FOR QUASHING OR MODIFYING

In addition to the grounds under which a court must quash or modify a subpoena, FRCP 45 also sets out grounds under which a court may quash or modify a subpoena. Specifically, a court may quash or modify a subpoena that requires:

- The recipient to disclose a trade secret or other confidential research, development or commercial information (see *Disclosure of Confidential Information*).
- The recipient to disclose an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party (see *Unretained Expert's Opinion*).

(*FRCP 45(d)(3)(B)(i)-(ii)*.)

This section of the Note covers the key issues to consider when invoking FRCP 45's permissive grounds for quashing or modifying a subpoena.

DISCLOSURE OF CONFIDENTIAL INFORMATION

Courts generally may quash or modify a subpoena that seeks trade secret or other confidential commercial information only where the recipient shows that the disclosure of this information would cause substantial economic harm to its competitive position (see *Stewart v. Mitchell Transport, No. 01-cv-2546, 2002 WL 1558210, at *8 (D. Kan. July 8, 2002)*).

Objections to a subpoena requiring the disclosure of trade secret or other confidential information can often be resolved by using a confidentiality agreement that has either previously been entered into in the litigation or that is later negotiated between the recipient and the issuing party (see *Producing Documents under an Existing Confidentiality Agreement*).

The confidentiality agreement may, for example:

- Provide that documents produced can only be used for the purpose of the litigation.
- Place an "attorneys' eyes only" limit on who can view the documents.
- Require:
  - the documents to be filed under seal (if used in connection with a court proceeding); and
  - the prompt return or destruction of the documents at the conclusion of the lawsuit.

Depending on the practice of the issuing court, it may be preferable or even required to have the court "so order" the confidentiality agreement.

UNRETAINED EXPERT'S OPINION

FRCP 45 prohibits a party from attempting to extract expert testimony from a non-party witness who has not been retained by a party in the litigation (*FRCP 45(d)(3)(B)(ii)*). The concern here is that a party may seek to force an expert to provide testimony without compensating the expert for his opinion (*1991 Advisory Committee Note to former FRCP 45(c)(3)(B)(ii)*).

However, a court may order an unretained expert to comply with a subpoena if the issuing party demonstrates substantial need for the testimony and ensures that the subpoenaed person will be reasonably compensated (*1991 Advisory Committee Notes to former FRCP 45(c)(3)(B)(ii)*). In determining the issuing party's need for an expert's testimony, courts may consider various factors, including the:

- Degree to which the expert is being called because of the expert's knowledge of facts relevant to the case rather than to give opinion testimony.
- Difference between testifying to a previously formed or expressed opinion and forming a new one.
- Possibility that the witness is a unique expert.
- Extent to which the issuing party can show the unlikelihood that any comparable witness will willingly testify.
- Degree to which the witness can show that he has been oppressed by having to testify continually.

(*1991 Advisory Committee Notes to former FRCP 45(c)(3)(B)(ii)*, citing *Kaufman v. Edelstein, 539 F.2d 811, 822 (2d Cir. 1976)*.)

Of course, an expert witness who has already been retained by a party to testify at trial may be deposed by any other party to the litigation (*FRCP 26(b)(4)(A)*). An unretained expert may also be subpoenaed as a **fact witness** for the purpose of eliciting testimony regarding specific events or facts in dispute (see *Gaujacq v. Electricite De France Intl. North America, Inc., 06-mc-0042, 2006 WL 1489256, at *2 (N.D. Tex. May 26, 2006)*).

COURT MAY SHIFT COST OF COMPLIANCE TO ISSUING PARTY

In those circumstances where the court may quash or modify a subpoena, the court can instead shift the cost of compliance to the issuing party (*FRCP 45(d)(3)(C)*). In deciding whether to shift the cost of compliance to the party seeking discovery, courts typically consider:

- The non-party's interest in the outcome of the case.
- The non-party's ability to bear the costs (as compared to the requesting party's).
- Whether the litigation is of public importance.

(See *Miller, No. 07-cv-0260, 2009 WL 700142, at *5*.)

OTHER GROUNDS FOR QUASHING OR MODIFYING

The grounds for quashing or modifying a subpoena are not limited to those set out in FRCP 45(d). The recipient may have many other valid grounds for objecting to a subpoena, including:

- The subpoena was improperly served (see *Subpoenas: Using Subpoenas to Obtain Evidence: Method of Service (http://us.practicallaw.com/0-503-1893)*).
- No witness fees were tendered at the time of service (see *Subpoenas: Using Subpoenas to Obtain Evidence: Witness Fees (http://us.practicallaw.com/0-503-1893)*).
- Lack of subject matter jurisdiction over the lawsuit (see *United States Catholic Conference v. Abortion Rights Mobilization, Inc., 487 U.S. 72, 76 (1988)*).
- Technical defects on the face of the subpoena, such as the failure to include the text required under FRCP 45 (see *Anderson v. Virgin Islands, 180 F.R.D. 284, 289-90 (D.V.I. 1998)*).

RELIEF AVAILABLE ON MOTION TO QUASH OR MODIFY

Before the recipient serves a motion to quash or modify a subpoena, it should understand precisely what relief is available under the rules. This section of the Note explains what relief the court can order when it grants a motion to quash or modify under FRCP 45.

COURT MAY QUASH OR MODIFY SUBPOENA

If the recipient of a subpoena prevails on a motion to quash or modify, the court can either quash the subpoena in its entirety or modify the objectionable portions (see *Ghandi v. Police Dept. of City of Detroit, 74 F.R.D. 115, 117 (E.D. Mich. 1977)*). Assuming the subpoena is not one that must be quashed under FRCP 45(d)(3)(A), the decision whether to quash or modify a subpoena is left to the discretion of the trial court (see *Arista Records LLC v. Does 1-27, 584 F. Supp. 2d 240, 253 (D. Me. 2008)*).

If the court quashes the subpoena, the issuing party may generally, absent court order to the contrary, serve another subpoena on the recipient that cures the original subpoena's defects. For discovery subpoenas, however, re-service is generally only permitted if the discovery period is still open.

COURT MAY ORDER COMPLIANCE ON SPECIFIED CONDITIONS

In situations where the issuing court may quash or modify a subpoena, the court has the discretion instead to order an appearance or production under specified conditions if the requesting party both:

- Shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship.
- Ensures that the subpoenaed person will be reasonably compensated.

(*FRCP 45(d)(3)(C)*.)

For example, the court may condition a document production on entry of a protective order or require the issuing party to compensate a subpoenaed witness before ordering the witness to appear for a deposition.

DENIAL OF MOTION TO QUASH MAY NOT NECESSARILY REQUIRE COMPLIANCE

A question sometimes arises about what effect the denial of a motion to quash has on the recipient's obligations, specifically where the court order denying the motion to quash does not direct compliance within a specified time period. Although the denial of a motion to quash can also be interpreted as an order compelling compliance, at least one court has suggested otherwise (see *Pennwalt Corp, 708 F.2d at 494*). To avoid this uncertainty, issuing parties sometimes cross-move to compel compliance in response to a motion to quash a subpoena.

MOTION FOR A PROTECTIVE ORDER

In response to a discovery subpoena, the recipient may make a motion for a protective order under FRCP 26(c) instead of (or in combination with) a motion to quash or modify. This section of the Note covers the key issues to consider when moving for a protective order under FRCP 26(c).

PRE-MOTION MEET AND CONFER REQUIRED

A motion for a protective order under FRCP 26(c) must include a certification that the moving party has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action (*FRCP 26(c)(1)*). Counsel should also check whether the court and the presiding judge have specific rules on this issue. These rules may, for instance, indicate how and when to conduct the pre-motion conference.

AVAILABLE RELIEF

The court may for good cause issue an order to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense by doing one or more of the following:

- Forbidding the disclosure or discovery.
- Specifying terms, including time and place, for the disclosure or discovery.
- Prescribing a discovery method other than the one selected by the party seeking discovery.
- Forbidding inquiry into certain matters or limiting the scope of disclosure or discovery to certain matters.

- Designating the persons who may be present while the discovery is conducted.
- Requiring that a deposition be sealed and opened only on court order.
- Requiring that a trade secret or other confidential research, development or commercial information not be revealed or be revealed only in a specified way.
- Requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

(*FRCP 26(c)(1)(A)-(H)*.)

Although the relief ordered under FRCP 26(c) may to some extent be duplicative of what could be obtained in a motion to quash or modify under FRCP 45(c), there are situations when the subpoena's recipient should move only under FRCP 26(c).

For example, if the recipient objects to the videotaping of the deposition, he cannot move to quash the deposition on that ground alone. However, the recipient may be able to obtain a protective order under FRCP 26(c) limiting the use of that recording or seeking a change in the recording format (*2005 Advisory Committee Notes to former FRCP 45*).

BURDEN OF PROOF

As with a motion to quash, the recipient of the subpoena bears the burden of proof in seeking a protective order under FRCP 26(c) (see *Parrot, Inc., No. 06-cv-61231, 2009 WL 197979, at *3*).

STANDARD FOR OBTAINING A PROTECTIVE ORDER

As noted above, a protective order may only be granted for good cause. To demonstrate good cause, the party seeking a protective order must show that the sought-after disclosure will cause a clearly defined and serious injury (see *Glenmede Trust Co. v. Thompson, 56 F.3d 476, 483 (3d Cir. 1995)*).

Courts may consider several non-exclusive factors in determining whether "good cause" exists for a protective order, including whether:

- Disclosure will violate any privacy interests.
- The information is being sought for a legitimate purpose or for an improper purpose.
- Disclosure of the information will cause a party embarrassment.
- Confidentiality is being sought over information important to public health and safety.
- The sharing of information among litigants will promote fairness and efficiency.
- A party benefitting from the order of confidentiality is a public entity or official.
- The case involves issues important to the public.

(See *Glenmede Trust Co., 56 F.3d at 483*.)

IMMEDIATE EFFECT OF MOTION FOR A PROTECTIVE ORDER

Courts have held that the mere filing of a motion for a protective order under FRCP 26(c) does not automatically stay the recipient's discovery obligations pending resolution of the motion (see *Versage v. Marriott Intl., Inc., No. 05-cv-0974, 2006 WL 3614921, at *7 (M.D. Fla. Dec. 11, 2006)*).

However, some courts have enacted local rules providing for an automatic stay of discovery after the filing of a motion for a protective order (see *Petersen v. DaimlerChrysler Corp., No. 06-cv-0108, 2007 WL 2391151, at *5 (D. Utah Aug. 17, 2007)* (citing *DUCiv R 26-2*); see also *Horsewood v. Kids "R" Us, No. 97-cv-2441, 1998 WL 892667, at *1 (D. Kan. Dec. 10, 1998)* (citing *D. Kan. Rule 26.2*)).

In the absence of a controlling local rule, the moving party should consider also asking the court to enter a temporary stay of the contested discovery pending resolution of its motion for a protective order.

WHERE TO MAKE THE MOTION

The subpoena's recipient must move for a protective order in the court where the lawsuit is pending, or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken (*FRCP 26(c)(1)*; see also *Lefkoe v. Joseph A. Bank Clothiers, Inc., 577 F.3d 240, 246 (4th Cir. 2009)*).

PROCEDURE FOR MAKING THE MOTION

As with a motion to quash or modify a subpoena, the procedure for making a motion for a protective order may differ depending on whether the motion is made in the court where the action is pending or the court for the district where the deposition will be taken. For more on this issue, see *Procedure for Making the Motion*.

TIME TO MAKE THE MOTION

A motion for a protective order is deemed timely if made before the subpoena's return date (see *In re Coordinated Pretrial Proceedings in Petroleum Prods Antitrust Litig., 669 F.2d 620, 622 n. 2 (10th Cir. 1982)*). However, it is normally best to make the motion even earlier than that. As explained above, simply filing a motion for a protective order will not always suspend the movant's duty to provide the sought-after discovery (see *Immediate Effect of Motion for a Protective Order*). Accordingly, the recipient may need to request a temporary stay of discovery pending resolution of its motion. It may take a couple of days for the court to rule on this request (and there is no guarantee that it will be granted).

REQUIRED DOCUMENTS

The documents required to be served and filed in connection with a motion for a protective order are generally the same as those required for a motion to quash or modify a subpoena. For more on this issue, see *Required Documents*.

METHOD OF SERVICE

A motion for a protective order is served in the same way as a motion to quash or modify a subpoena. As with a motion to quash or modify, the method of service may differ depending on whether the motion is made in the court where the underlying action is pending or the court for the district where the deposition will be taken. For more on this issue, see *Procedure for Making the Motion*.

ATTORNEY ADMISSIONS ISSUES

As with a motion to quash or modify, the moving party's attorney should ensure that he is admitted to practice in the court where the motion is made, and obtain a CM/ECF login and password if necessary. For more on this issue, see *Procedure for Making the Motion*.

CLAIMING PRIVILEGE OR PROTECTION

Asserting and litigating attorney-client privilege and work product claims raises numerous procedural and substantive legal issues. This section of the Note outlines how to properly assert privilege and work product claims when responding to a subpoena. It also explains which jurisdiction's law controls privilege and work product determinations in federal court. For a more detailed analysis of these issues, see *Practice Notes, Asserting the Attorney-Client Privilege and Work Product Protection (http://us.practicallaw.com/8-515-4489)* and *Litigating the Attorney-Client Privilege and Work Product Doctrine (http://us.practicallaw.com/8-515-4328)*.

PROCEDURE FOR ASSERTING THE PRIVILEGE OR PROTECTION

To the extent that a recipient withholds otherwise responsive materials on the basis that the materials sought are protected by the attorney-client privilege, work product doctrine or some other recognized protection, the recipient must both:

- Expressly make the privilege or protection claim.
- Describe the nature of the withheld materials in a manner that enables the parties to assess the assertion without revealing the privileged or protected information.

(*FRCP 45(e)(2)(A)*.)

Generally, the recipient does this by serving a privilege log on the issuing party's attorney. The recipient risks waiving its privilege claims and being held in contempt if it fails to provide the required detail in a privilege log (*1991 Advisory Committee Notes to former FRCP 45(d)(2)*).

Ideally, the recipient will serve its privilege log along with either its production of non-privileged documents, written objections, motion to quash or motion for a protective order. However, courts may allow the recipient to serve the log within a reasonable time after serving its objections or motion (see *Tuite, 98 F.3d at 1416-17*; see also *Time to Assert Privilege Objections*).

For more information on how to assert the attorney-client privilege and work product protection, see *Practice Note, Asserting the Attorney-Client Privilege and Work Product Protection (http://us.practicallaw.com/8-515-4489)*. For more information on how to prepare a privilege log, see *Standard Document, Privilege Log (http://us.practicallaw.com/7-381-2093)*.

WHAT IF THE RECIPIENT INADVERTENTLY PRODUCED PRIVILEGED OR PROTECTED INFORMATION?

Unless otherwise provided by an agreement or protective order, a litigant who inadvertently produces privileged or work product-protected material in response to a subpoena may notify the parties of this fact, triggering the receiving party's duty to:

- Promptly return, sequester or destroy the documents and any copies it has.
- Not use or disclose the information until the claim is resolved.
- Take reasonable steps to retrieve the information if the party disclosed it before being notified.

(*FRCP 45(e)(2)(B)*.)

The party that received the purportedly privileged or protected information may promptly present the information to the court under seal for a determination of the claim (*FRCP 45(e)(2)(B)*). The person who produced copies of the privileged information must preserve the information at least until the claim is resolved (*FRCP 45(e)(2)(B)*).

PRIVILEGE AND WORK PRODUCT DETERMINATIONS: CHOICE OF LAW

If there is a dispute about whether materials are protected from disclosure by the attorney-client privilege, the court generally will resolve the dispute under either federal or state substantive law, depending on whether the underlying cause of action arises from alleged violations of federal or state law (*FRE 501*; see also *Practice Note, Litigating the Attorney-Client Privilege and Work Product Doctrine: Choice of Law for Attorney-Client Privilege (http://us.practicallaw.com/8-515-4328)*).

Work product determinations, on the other hand, are decided under federal law regardless of the nature of the parties' substantive claims (see *Practice Note, Litigating the Attorney-Client Privilege and Work Product Doctrine: Choice of Law for Work Product Doctrine (http://us.practicallaw.com/8-515-4328)*).

The analysis gets more complicated when documents are held by non-US entities. In certain situations, the court may apply a foreign country's law in deciding whether to compel production of the subpoenaed documents (see *Practice Note, Litigating the Attorney-Client Privilege and Work Product Doctrine: Applying Foreign Law to Privilege Issues (http://us.practicallaw.com/8-515-4328)*).

Certain waiver issues in federal litigation are governed by FRE 502 regardless of whether the substantive claims in the case rest on state or federal law. For more on this issue, see *Attorney-Client Privilege: Waiving the Privilege: Unintentional (Inadvertent) Express Waiver (http://us.practicallaw.com/0-503-1204)*.

ALTERNATIVE WAYS TO RESPOND TO A SUBPOENA

While this Note primarily addresses the conventional ways to respond to a subpoena, the recipient does have other options. As explained below, the recipient can alternatively seek to obtain the desired result by responding informally to the subpoena.

INFORMALLY CONTACT THE ISSUING PARTY

An efficient and cost-effective way of clarifying or narrowing the scope of a subpoena, and possibly defraying some of the costs associated with document production, is for the recipient (or the recipient's attorney) to contact the attorney that issued the subpoena. This direct dialogue may lead to additional time to respond to the subpoena, as well as a better understanding of what is being sought and perhaps even an agreement about the scope of the documents that will be produced in response to the subpoena. In some jurisdictions, this type of discussion between the receiving and issuing parties is mandatory before filing any motion to quash or modify (see, for example, *C.D. Cal. L.R. 45-1*).

INFORMALLY CONTACT THE ADVERSE PARTY

Before responding to a subpoena, the recipient may want to first contact a party to the underlying lawsuit that is adverse to the issuing party. The adverse party may independently move to quash or modify the subpoena if it has a personal right or privilege that is affected by information responsive to the subpoena (see *Brown v. Braddick, 595 F.2d 961, 967 (5th Cir. 1979)*, *Jacobs v. Conn. Community Tech. Colleges, 258 F.R.D. 192, 194-95 (D. Conn. 2009)* and *Sterling Merch., Inc. v. Nestle, S.A., 470 F. Supp. 2d 77, 81 (D.P.R. 2006)*). If the recipient's

interests and the adverse party's interests are identical, the recipient may, for example, save time and money by simply signing on to a motion to quash drafted by the adverse party.

CONSEQUENCES FOR FAILING TO COMPLY WITH A SUBPOENA

A recipient who fails to comply with an otherwise valid subpoena or subpoena-related order without adequate excuse can be held in contempt and subjected to fines or even imprisonment (*FRCP 45(g)*). However, some courts will first order the recipient to comply with the subpoena before holding the recipient in contempt (see *Subpoenas: Using Subpoenas to Obtain Evidence: Relief Available: Contempt Sanctions (http://us.practicallaw.com/0-503-1893)*).

FRCP 45(g) does not state what constitutes an "adequate excuse" for non-compliance. That question is typically determined by the facts of a particular case. However, there are certain situations in which the court likely will find adequate excuse for non-compliance. For example, a recipient's absolute inability to comply with a subpoena constitutes adequate excuse for disobedience so long as the recipient has not taken deliberate steps to make compliance impossible (see *Kowalczyk v. United States, 936 F. Supp. 1127, 1149-50 (E.D.N.Y. 1996)*).

Given the fact-intensive inquiry and discretion by the court to determine what amounts to adequate excuse, the prudent course is to comply with the subpoena, serve written objections, or move to quash or seek a protective order, rather than disregard the subpoena and hope that the court will find an adequate excuse for non-compliance.

APPEALS

Generally, federal appeals courts may hear appeals only following final judgments from lower courts. Discovery orders, such as orders quashing (or compelling compliance with) subpoenas, are typically deemed interlocutory and are therefore reviewable only in connection with an appeal from a final judgment (see *In re Subpoena Served on the Cal. Pub. Utils. Comm'n, 813 F.2d 1473, 1476 (9th Cir. 1987)*). However, these orders may sometimes be immediately appealable. As explained below, whether an immediate appeal lies from an order quashing (or compelling compliance with) a subpoena generally depends on the relief ordered by the court and the particular court that issues the order.

ORDER DENYING DISCOVERY ENTERED IN UNDERLYING ACTION

An order that denies discovery sought from a non-party through a federal subpoena generally is considered interlocutory. Therefore, the order is not immediately appealable if entered by the court where the underlying action is pending (see *Caswell v. Manhattan Fire & Marine Ins. Co., 399 F.2d 417, 422 (5th Cir. 1968)*).

ORDER DENYING DISCOVERY ENTERED IN ANCILLARY ACTION

An order denying discovery commanded by a subpoena served on a non-party in an ancillary proceeding is immediately appealable if the ancillary proceeding is pending in a district court located in a different circuit from where the underlying lawsuit is pending (see *Nicholas v. Wyndham Int'l, Inc., 373 F.3d 537, 541-42 (4th Cir. 2004)* and *Cusumano v. Microsoft Corp., 162 F.3d 708, 712 (1st Cir. 1998)*).

In contrast, courts are split over whether an immediate appeal may lie from an order denying discovery from a non-party where the ancillary proceeding and the underlying lawsuit are in separate district courts within the same circuit. For example:

- Several circuits hold that an appeal in this situation must wait until entry of a final judgment in the underlying action (see *Periodical Publishers Service Bureau, Inc. v. Keys, 981 F.2d 215, 217-18 (5th Cir. 1993)*, *Hooker v. Cont'l Life Ins. Co., 965 F.2d 903, 905 (10th Cir. 1992)*, *Barrick Group, Inc. v. Mosse, 849 F.2d 70, 73 (2d Cir. 1988)* and *In re Subpoena Served on the Cal. Pub. Utils. Comm'n, 813 F.2d at 1476-80)*).
- Other circuits take a more liberal approach and allow the aggrieved party to immediately appeal (see *Heat & Control, Inc. v. Hester Indus., Inc., 785 F.2d 1017, 1021-22 (Fed. Cir. 1986)* and *Ariel v. Jones, 693 F.2d 1058, 1059 (11th Cir. 1982)*).

If the aggrieved party is forced to file two separate appeals after entry of final judgment in the underlying action (that is, an appeal from the ancillary proceeding and an appeal from a final judgment in the underlying action), it must file two separate notices of appeal in the district courts (and pay the required filing fees for both) and then move in the appellate court to consolidate the two appeals under Rule 3(b) of the Federal Rules of Appellate Procedure (see *Hooker, 965 F.2d at 905*).

ORDER GRANTING DISCOVERY

Non-parties may not take an immediate appeal from court-ordered discovery based on a subpoena regardless of whether the order is made in the underlying action or in an ancillary proceeding. To obtain immediate appellate review, the subpoenaed party must defy the court order, be found in contempt and appeal the contempt citation (see *In re Flat Glass Antitrust Litig., 288 F.3d 83, 89-90 (3d Cir. 2002)* (underlying action), *MDK, Inc. v. Mike's Train House, Inc., 27 F.3d 116, 119-122 (4th Cir. 1994)* (ancillary proceeding), *Hooker, 965 F.2d at 904 n.1* (ancillary proceeding) and *In re Subpoena Served on the Cal. Pub. Utils. Comm'n, 813 F.2d at 1476* (non-party must appeal contempt citation); but see *Caswell, 399 F.2d at 422)*).

STANDARD OF REVIEW

As a general matter, appeals of orders made during discovery are reviewed under an abuse of discretion standard (see *Wantanabe Realty Corp. v. City of New York, 159 Fed. App'x 235, 240 (2d Cir. 2005)*). However, appeals of orders regarding the attorney-client privilege are typically reviewed under a de novo standard (see, for example, *United States v. Graf, 610 F.3d 1148, 1157 (9th Cir. 2010)*).

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