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THE SEDONA CONFERENCE® COMMENTARY ON NON-PARTY PRODUCTION & RULE 45 SUBPOENAS

A Project of The Sedona Conference® Working Group on Electronic Document Retention & Production (WG1)

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I. SCOPE

The December 2006 amendments to the Federal Rules of Civil Procedure relating to electronically stored information ("ESI") affected not only discovery practices between parties, but also the acquisition of information from non-parties. This paper describes the changes to Federal Rule of Civil Procedure 45 (third party subpoenas), briefly explains the similarities and differences between amended Rule 45 and amended Rules 26, 34 and 37, and explores what lessons the case law teaches us as to whether there are differences in the way courts address the duties of parties and non-parties related to producing ESI. In addition to discussing what the new rules and cases require, we explore the actual experiences of attorneys and parties and outline best practices.[1]

II. RULE 45 AS REVISED

Clearly, practice prior to the 2006 amendments involved requests for and production of ESI from non-parties in connection with Rule 45 subpoenas, just as did discovery between parties. The change brought about by the amendment to Rule 45 was to recognize this practice explicitly.

A. Relationship of Rule 45 to Rules 26 & 34

Many of the changes to Rules 26 and 34 were incorporated into Rule 45 with the addition of wording to clarify the applicability to subpoenas.

- Rule 26(b)(2)(B) concerning "not reasonably accessible data," is the same as Rule 45(d) (l)(D). The comments to both rules include the same procedure for designating and adjudicating "not reasonably accessible" claims.
- Rule 26(b)(5)(B), on inadvertent disclosure of material, is the same as Rule 45(d)(2)(B). They both set forth a "claw back" provision.
- Rule 45(d)(l)(C) corresponds to Rule 34(b)(2)(E)(iii)'s "one bite" rule.
- In addition, Rule 45(d)(l)(B) is the same as Rule 34(b)(2)(E)(ii) with respect to the format of production, including "reasonably usable" language.

B. Issues

1. Undue Burden or Cost

Rule 45(c)(l) requires that the party issuing a subpoena take reasonable steps not to impose undue burden or expense. This provision reflects the prior decisions of Federal courts that status as a non-party is a factor entitled to special consideration inassessing undue burden.[2] Many courts balance the benefit to the party with the burden on the non-party.[3]

Only a few reported cases address the acquisition of ESI from non-parties. The courts that have considered the topic, both before and after the December 2006 revisions, focus on the non-party's burden. Courts recognize that the costs and burdens of preservation and production that the law imposes on litigants should not be the same for non-parties. Third parties should not be required

1 A summary of the results of a survey are attached as Appendix A to this document. The survey questions themselves are attached as Appendix B. The Editors and The Sedona Conference® would like to recognize the invaluable assistance provided by Molly Johnson, a Senior Research Associate with The Federal Judicial Center, in the design of the survey.

2 *See North Carolina Right to Life, Inc. v. Leake,* 231 F.R.D. 49, 52 (D.D.C. 2005); *In re Automotive Refinishing Paint Antitrust Litig.*, 229 F.R.D. 482, 495 (E.D. Pa. 2005); *Gty Chemical Co. v. Romaco AG*, 243 F.R.D. 310 (N.D. Ind. 2007).

3 *Fears v. Wilhelmina Model Agency, Inc.*, 2004 WL 719185 (S.D.N.Y. April 1, 2004).

to subsidize litigation in which they have no stake in the outcome.[4] If a third party makes a timely objection to a subpoena, an order to compel production is required.

In relation to ESI, courts have refused to uphold a subpoena that required a non-party to engage in the difficult task of going through ESI where there was no showing that the production of ESI from the parties was insufficient.[5] Courts have also quashed subpoenas requesting data on backup tapes, characterizing restoration of e-mails through backup tapes as an undue burden (despite the requesting party's offer to bear the costs of production).[6] Another court required a party to negotiate a reasonable sampling and search protocol to limit the burden on non-parties who objected to the burdens imposed by a subpoena that requested large quantities of electronic legacy data.[7]

However, at least one court has held that a third party's argument to resist an ESI subpoena on the grounds that the ESI sought was available as hard copy documents was not sufficient to quash or otherwise grant a protective order.[8]

Rule 45 contains a potential internal inconsistency that no court has yet addressed. Well before the 2006 amendments, Rule 45(c)(2)(B)(ii) was amended to protect a non-party under an order to compel from "significant expense" related to the production. There is a significant body of case law applying that requirement in the pre-2006 amendment context. Rule 45(d)(l)(D) now has been amended to allow a non-party to object to discovery that is "not reasonably accessible because of undue burden or cost." The interplay between those two provisions has not yet been examined. Must a non-party first object and show that the material sought by a subpoena is not reasonably accessible due to undue burden or cost, and then when opposing a motion to compel based on the same subpoena, plead "significant expense?" Are these standards the same? Will courts automatically protect a non-party from "significant expense" if, during the process, the non-party has shown "undue burden or cost?"

2. Preservation

Third parties may have obligations to preserve evidence relevant to others' litigation imposed by contract or other special relationship once they have notice of the existence of the dispute.[9] Some courts place a burden on the party to have the non-party preserve the evidence.[10] And at least one court has ruled that the issuance of a subpoena to a third party imposes a legal obligation on the third party to preserve information relevant to the subpoena including ESI, at least through the period of time it takes to comply with the subpoena and resolve any issues before the court.[11]

Case law does not require a non-party to continue to preserve materials after they have taken reasonable measures to produce responsive information. In some circumstances, however, the receipt of a subpoena may serve to notify a non-party that it may become a party in the litigation or in a future litigation. In that case the non-party should take affirmative steps to preserve documents responsive to the subpoena and the potential broader scope of the proceeding.[12] However, service of and compliance with a nonparty subpoena is not, in and of itself, sufficient to serve as a notice of future litigation.[13]

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4 *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 717 (1st Cir. 1998) ("Although discovery is by definition invasive, parties to a law suit must accept its travails as a natural concomitant of modern civil litigation. Non-parties have a different set of expectations."). S*ee also Fletcher v. Dorchester Mut. Ins. Co.*, 773 N.E.2d 420, 424-25 (Mass. 2002) ("Persons who are not themselves parties to litigation do not have a duty to preserve evidence for use by others.").

5 *Braxton v. Farmer's Ins. Group*, 209 F.R.D. 651, 653 (N.D. Ala. 2002).

6 *United States v. Amerigroup Illinois, Inc.,* No. 02 C 6074, 2005 WL 3111972, at *2 (N.D. 111. Oct. 21, 2005).

7 *Natural Gas Commodity Litig.*, 235 F.R.D. 199, 220 (S.D.N.Y. Nov. 14, 2005).

8 *Auto Club Family Ins. Co. v. Ahner,* 2007 U.S. Dist. Lexis 63809, *10 -11 (E.D. La., Aug. 29, 2007).

9 "Negligent Spoliation of Evidence" 101 ALR 5th 80.

10 *Metlife Auto & Home v. Joe Basil Chevrolet, Inc.*, 775 N.Y.S.2d 754 (2004). While it is beyond the scope of this paper to consider tort liability on third parties that destroy evidence relevant to others' disputes, the interested reader may turn to *Gribben v. Wal-Mart Stores, Inc.*, 824 N.E.2d 349, 353-354 (Ind. 2005) for an analysis of state law on the tort of third party spoliation and a list, accurate as of that date, of states that do and do not recognize such a tort. Typically the issue before the courts is compliance with the subpoena - has the information sought been provided? - not the question of whether the party properly preserved evidence. *Chase Manhattan Bank v. T&N PLC*, 156 F.R.D. 82, 85 (S.D.N.Y. 1994) (noting no requirement under the Federal Rules for a non-party to undertake a particular means demanded by the subpoena issuer in order to comply with the subpoena.)

11 *In re Napster, Inc. Copyright Litig.*, 2006 WL 3050864, at *6 (N.D. Cal. Oct. 25, 2006) (organization under a legal obligation to preserve documents based on a third party subpoena).

12 For example, if an organization is subpoenaed for deposition or production of documents as a third party, the subject matter of the litigation, and the information the organization discloses, can serve as notice that future litigation involving the organization is likely, leading the organization to preserve documents more broadly and altering the nature of documents later prepared by the organization in anticipation of litigation.

13 *In re Napster*, 2006 WL 3050864 at *6.

3. Cost-Shifting

Again, few reported cases discuss shifting the costs of responding to a subpoena from a non-party to the party serving the subpoena. Rule 45(c) protects non-parties from significant expense, and shifting the cost to the requesting party is one way to ensure this protection.[14] In addition, Rule 45(d)(l)(D) incorporates the provisions of a new rule, 26(b)(2)(B), which permits non-parties to resist producing ESI that is "not reasonably accessible because of undue burden or cost," which carries with it the authority of the court to place conditions on an order requiring the production of such material for "good cause," including shifting some or all of the costs. Whether a non-party will be able to shift the cost of attorney review is an open question, but some courts have allowed such shifting.[15]

Questions of undue burden invariably lead to questions of cost shifting. In *Tessera*[16], the Northern District of California sets forth eight factors in determining whether to shift cost to the requesting party: (1) the scope of the request; (2) the invasiveness of the request; (3) the need to separate privileged material; (4) the non-party's financial interest in the litigation; (5) whether the party seeking production of documents ultimately prevails; (6) the relative resources of the party and the non-party; (7) the reasonableness of the costs sought; and, (8) the public importance of the litigation.[17]

Because courts tend to be more lenient with non-parties than with parties, it is difficult to predict how a particular court will approach any particular dispute. Furthermore, courts have not resolved such questions as whether the party and non-party must meet and attempt to resolve disputes prior to proceeding to court for a motion to compel or motion to quash.[18] Nothing in Rule 45 requires such a conference.[19] Nor does anything in Rule 45 require the parties to confer with each other or with the nonparty prior to serving a subpoena. Furthermore, courts have not addressed the question of whether cost shifting would be allowed for the costs imposed on the non-party during the preservation process.

4. Possession, Custody or Control

As is the case with requests for production issued to parties,[20] a non-party recipient of a subpoena must produce responsive information in its "possession, custody or control". This can be complex factual issue which is not easily determined.

Non-party recipients of subpoenas must be mindful of the unique ownership and privacy issues posed by ESI. ESI may be subject to privacy policies (*e.g.*, in the context of non-party e-mail providers such as AOL, search engines such as Google which maintain records of users' electronic searches, or retailers such as Amazon which maintain records of purchases), contractual obligations or ownership issues (e.g., offsite data storage sites and preservation businesses, non-party purchasers or providers of consolidated or streaming data such as Doubleclick which tracks online site visits or Bloomberg which provides streaming stock information), and international data protection law.[21] Who owns the data and what rights do they have to protect it?

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14 As noted in *Linder v. Calero-Portocarrero*, 183 F.R.D. 314, 322-23 (D.D.C. 1998), "When non-parties are forced to pay the costs of discovery, the requesting party has no incentive to deter from engaging in fishing expeditions for marginally relevant material. Requesters forced to internalize the cost of discovery will be more inclined to make narrowly-tailored requests reflecting a reasonable balance between the likely relevance of evidence that will be discovered and the costs of compliance."

15 *See e.g., In re Application of the Law Firms of McCourts and McGrigor Donald*, No. M 19-96, 2001 WL 345233, at *3 (S.D.N.Y. April 9, 2001) and *In re Auto. Re finishing Paint*, 229 F.R.D. at 496 (E.D. Pa. 2005).

16 *Tessera, Inc. v. Micron Technology, Inc.*, 2006 WL 733498 (N.D. Cal. March 22, 2006).

17 *Tessera* at *10. The court relied upon William W. Schwarzer, A. Wallace Tashima, James M. Wagstaff E., *Federal Civil Procedure before Trial* 11:2308-2309 (the Rutter Group-2004) for these factors. *See also, Bank of Am. Corp. v. SR Int'l Bus. Ins. Co., Ltd.*, 05-CVS-5564 (Superior Ct. Mecklenburg Co. NC Nov. 1, 2006).

18 Although, in *Tessera* the court notes that non-party Hynix did participate in extensive efforts to meet and confer, the court's recognition of this fact seems to imply that efforts to resolve this through meetings with parties are not a requirement but may be something to consider in cost shifting. *Id.* at *31 -32.

19 Though many District Court local rules require that parties meet and confer prior to bringing any discovery motions before the court. *See e.g.,* S.D. Fla. R. 7.1.A.3.

20 Whether information maintained by a non-party is within a party's "possession, custody, or control" such that service of a subpoena under Rule 45 is not necessary is beyond the scope of this paper. The subject is addressed [elsewhere and] in *In re NTL, Inc. Sec. Litig.*, Nos. 02 Civ. 3013 (LAK)(AJP), 7377 (LAK)(AJP), 2007 WL 241344 (S.D.N.Y. Jan. 30, 2007).

21 In addition, Internet Service Providers ("ISPs" such as Yahoo and AOL) and Application Service Providers ("ASPs" which provide computer-based services such as medical billing or credit card processing) may act as third-party hosts of data, which may be subject to unique laws and regulations.

III. BEST PRACTICES

A. Meet and Confer

1. Parties should disclose, in the Rule 26(a) mandatory initial disclosures, information from non-parties that they believe they may need to support a claim or defense, along with the identity of the non-parties.

2. Parties should address, in the Rule 26(f) conference, the need for information from non-parties, how to acquire that information with the least burden on the non-party, cost-sharing between parties, stipulations on admissibility of information from non-parties, notification of non-parties to hold information, scope of the hold, and how to notify the non-parties as to when they may resume routine document destruction.

3. Parties should have the results of the Rule 26(f) conference concerning third party information incorporated into the Rule 16 scheduling and discovery management order.

4. When appropriate prior to issuing a subpoena to a non-party, the parties should meet again to address unresolved issues.

5. While the Federal Rules do not require that the parties "meet and confer" with the non-party recipients of a subpoena, local rules or judges' personal rules may contain broad requirements encompassing all parties – even non-party recipients of subpoenas. Even in the absence of such a requirement, prior to issuing a subpoena to a non-party, the issuing party should, when feasible, contact the non-party to discuss burden, form of production, cost, retention of important information, scope, and duration of a litigation hold. This is particularly important if the party and the non-party have a preexisting business relationship. Upon receipt of a subpoena, a non-party subpoena recipient should initiate discussions as soon as possible in light of the 14 day limitation for asserting objections pursuant to Rule 45(c)(2)(B).

6. Before seeking either to quash or to enforce a subpoena, the parties and non-party should have a substantive discussion to try to resolve the dispute.

7. Whenever possible, parties and non-parties should consider stipulating to extend the 14 days in Rule 45(c)(2)(B) for the non-party to serve an objection to facilitate and allow meaningful dialogue.

8. When the subpoena seeks information within the "possession, custody or control" of a non-party, but which is owned by or subject to the privacy concerns of other non-parties, the subpoena recipient should discuss these concerns with the relevant stakeholders `and attempt to reach an agreement addressing those issues. The parties and non-party should consider whether they can address these concerns through steps such as redacting personally identifiable information from the ESI, setting up protective orders, or notifying any additional non-parties with an interest in the ESI. If necessary, the parties should stipulate to a reasonable extension of the non-party's time to serve an objection in order to allow it time to provide notice to additional non-parties with an interest in the ESI.

B. Accessibility, Sampling & Privilege

1. Active or reasonably accessible data should be produced and reviewed prior to seeking data that may be unduly burdensome to produce.

2. The party and non-party subpoena recipients should consider initial testing or sampling approaches, as per Fed. R. Civ. P. 34(a), in order to inform decisions concerning the volume and nature of responsive documents, the form of production, and cost.

3. A frequent challenge in the course of non-party productions arises in connection with the assertion of privilege by a party as to documents held or produced by the non-party. This challenge may be exacerbated by the volume of ESI as opposed to traditional paper documents. Rule 45(d)(2)(B) addresses this issue by allowing a party to notify the recipient of the ESI "of the claim [of privilege] and the basis for it" and sets forth a process for the handling of such information. Nonetheless, if the parties anticipate serving non-party subpoenas that may call for the production of privileged ESI, the parties should address, as part of the Rule 26(f) conference, a reasonable timetable for a party to assert a Rule 45(d)(2)(B) objection. In the absence of such an agreement, the reasonableness of the timing of any such objection will likely simply be another matter for dispute.

C. Form of Production

1. Parties and non-party subpoena recipients have disparate goals concerning the form of production: non-party subpoena recipients wish to produce responsive ESI in the least burdensome and costly method while parties will seek to obtain the ESI in the most useable format for review and presentation. Recognizing that Rule 45 incorporates the Rule 34 "one bite"[22] provision all parties should work together to reach an agreement on the production format. Where the parties seek a production format that is preferable for their discovery and trial purposes, but which involves significant additional costs for the non-party, the parties should consider paying the difference in costs.

D. Cost Shifting[23]

1. Parties should bear in mind the following factors and be prepared to address them in connection with cost-shifting discussions: (a) the scope of the request; (b) the invasiveness of the request; (c) the need to separate privileged material; (d) the non-party's interest in the litigation; (e) whether the party seeking production of documents ultimately prevails; (f) the relative resources of the party and the nonparty; (g) the reasonableness of the costs sought; and, (h) the public importance of the litigation.

2. Non-parties should work closely with parties to minimize cost and burden.

3. Courts should continue to protect non-parties from undue burden and expense.

E. Litigation Hold

1. Absent a contractual or other special obligation, the non-party's duty to preserve typically begins upon receipt of a subpoena.

2. Once a subpoena has been received, the non-party should consider immediately issuing a preservation notice/legal hold. Non-parties must preserve material within the scope of a subpoena or based upon a contractual or other special relationship with one or more of the parties.[24] If a decision is made to agree to the scope of the subpoena (unilaterally or by agreement of the parties), then the scope of preservation and production is known and a decision can then be made as to whether a preservation notice is needed and the specific scope of such a notice. However, if a decision is made to challenge the scope of the subpoena, then a legal preservation notice that is broader in scope may be a more prudent course of action in case the court disagrees with the challenge.

3. The duration of a non-party's duty to preserve is not coextensive with a party's duty to preserve. In the ordinary course, a non-party subpoena recipient's duties should

22 This is the notion that one need only produce information in one form.
23 These best practices focus upon federal law, realizing that some states by rule or statute automatically shift the cost to the party. *See, e.g.,* N.Y.C.P.L.R. Section 3122d and Tex. R. Civ. Proc. 205.3f.
24 The scope differs significantly from the preservation requirements for parties.

terminate once the non-party has produced, in conformity with their discovery obligations, either:

(i) all information responsive to the subpoena;

(ii) all information responsive to the subpoena except information excluded pursuant to timely objections by the producing party's pursuant to Rule 45(c)(2)(B); or

(iii) information responsive to the subpoena and satisfying any agreement with the party issuing the subpoena (i.e., after the issuance of the subpoena, the recipient and the issuer may negotiate and agree to a narrower scope of production that will satisfy the party).

4. During initial substantive discussion between the party issuing the subpoena and the non-party, it is in both sides' interest to initiate a discussion and reach a mutual agreement concerning the termination of the non-party's duty to preserve. Best practices would suggest that the sides agree:

(i) that when the non-party believes it has completed its production, it notify the party issuing the subpoena in writing;

(ii) following receipt of that notice, the non-party will continue its hold for an agreed - upon period of time while the parties review the production and authentication to ensure its sufficiency (the "Review Period");

(iii) in the absence of a further request or objection by either party, the duty to preserve will terminate at the end of the Review Period;

(iv) should the two sides' dispute the sufficiency of the production or the end of the duty to preserve, the party will have the obligation to seek court intervention within a reasonable time (e.g., 14 days) after the conclusion of the Review Period; and

(v) the non-party's duty to preserve will extend through the time to seek intervention and pending any court decision. In the absence of a timely application for court intervention, the non-party's duty to preserve will terminate.

F. Admissibility

1. Parties should work with non-parties to ensure that material received is authenticated and stipulate to admissibility when possible so the non-party is not unduly burdened with continued obligations to retain data or to testify for foundational matters.

2. Parties should, as much as possible, stipulate to the non-assertion or waiver of objections such as "hearsay."

Appendix A

WGI Survey Results Summary

In connection with this WG1 whitepaper, the Special Project Team created a survey regarding Rule 45 non-party subpoena practice which was sent out to the members of WG1.[25] While the neither the sample size nor the response rate was sufficient to draw any scientific conclusions, some interesting insights can be gained from the responses.[26]

A. Undue Costs

1. Over 73% of the respondents witnessed situations in which non-parties experienced undue costs or burdens responding to Rule 45 subpoenas because of the need to preserve, collect, review and produce ESI. A significant number of the respondents answered that such undue burdens and costs occurred "frequently" or "very frequently".

2. A number of respondents have generally found that courts are not sympathetic to undue cost arguments, especially when claimed by large corporations.

3. Less than one third of the respondents who answered this question have seen non-parties succeed in quashing or limiting a Rule 45 subpoena based on the argument that production of ESI is *per se* unduly burdensome or costly.

4. The respondents reported that the most successful arguments relating to undue burden and cost have concerned the subject matter and/or attempt to narrow the time frame or number of custodians. If the third party can argue that the parties have access to the ESI themselves or can acquire it from a less costly source than the third party, this is often successful in arguing to quash or limit a subpoena.

B. Production Format

1. Although Rule 45 was amended to clarify the right to ask for a specific production format, it is not yet clear that those serving subpoenas are taking advantage of this change. Approximately 67.8% of the respondents reported that requesting parties "occasionally (20-40%)" or "seldom (less than 20%)" specified the production format in their subpoenas.

2. When a form of production is specified in a Rule 45 subpoena, 50% of the respondents indicated that form was "native electronic format," 36.7% said the form requested was "TIFF/PDF (with searchable text)," and another 20% said the format requested was paper.[27]

3. If a subpoena requests production in TIFF or PDF, nearly 85% of the answering respondents said the request included a request for any metadata.

4. When a Rule 45 subpoena requests a specific form of production, 35.7% of the respondents reported that the non-party agrees to the requested form of production. Over half of the respondents (53.6%) reported that in their experience the non-party initially objects to the requested form of production, but that despite an initial dispute, the requesting party and the responding non-party generally reach an agreement. None of the respondents believed courts were needed to resolve this dispute.

25 The actual survey questionnaire is attached as Appendix B.
26 Respondents were given the option of skipping select questions, so the percentages cited are of answering survey-takers.
27 Respondents were told they could choose more than one type of production.

5. A majority of respondents (64.3% of those who responded) had not argued or heard arguments resisting ESI production pursuant to a Rule 45 subpoena on the grounds that the source is not reasonably accessible because of undue burden or cost. Several respondents said this issue has generally been resolved short of motion practice.

C. Cost-Shifting/Cost-Sharing

1. More than half (57.7%) of the respondents have been involved in a Rule 45 subpoena where the issue of cost-shifting or cost-sharing was raised in connection with the production of ESI. No one reported having litigated the issue, but rather indicated that the parties generally negotiated the issue and in many cases the party serving the subpoena actually offers to pay production costs.

2. Nearly 80% of the answering respondents believe that the threshold for cost-shifting or cost-sharing is lower when a non-party asserts undue burden or cost arguments related to the production of ESI.

D. Conclusion of Non-Party Obligations

1. Over 70% of the answering respondents reported that in their experience non-parties have difficulty determining when a matter is resolved such that their obligations under a Rule 45 subpoena are at an end.

E. Practice Pointers

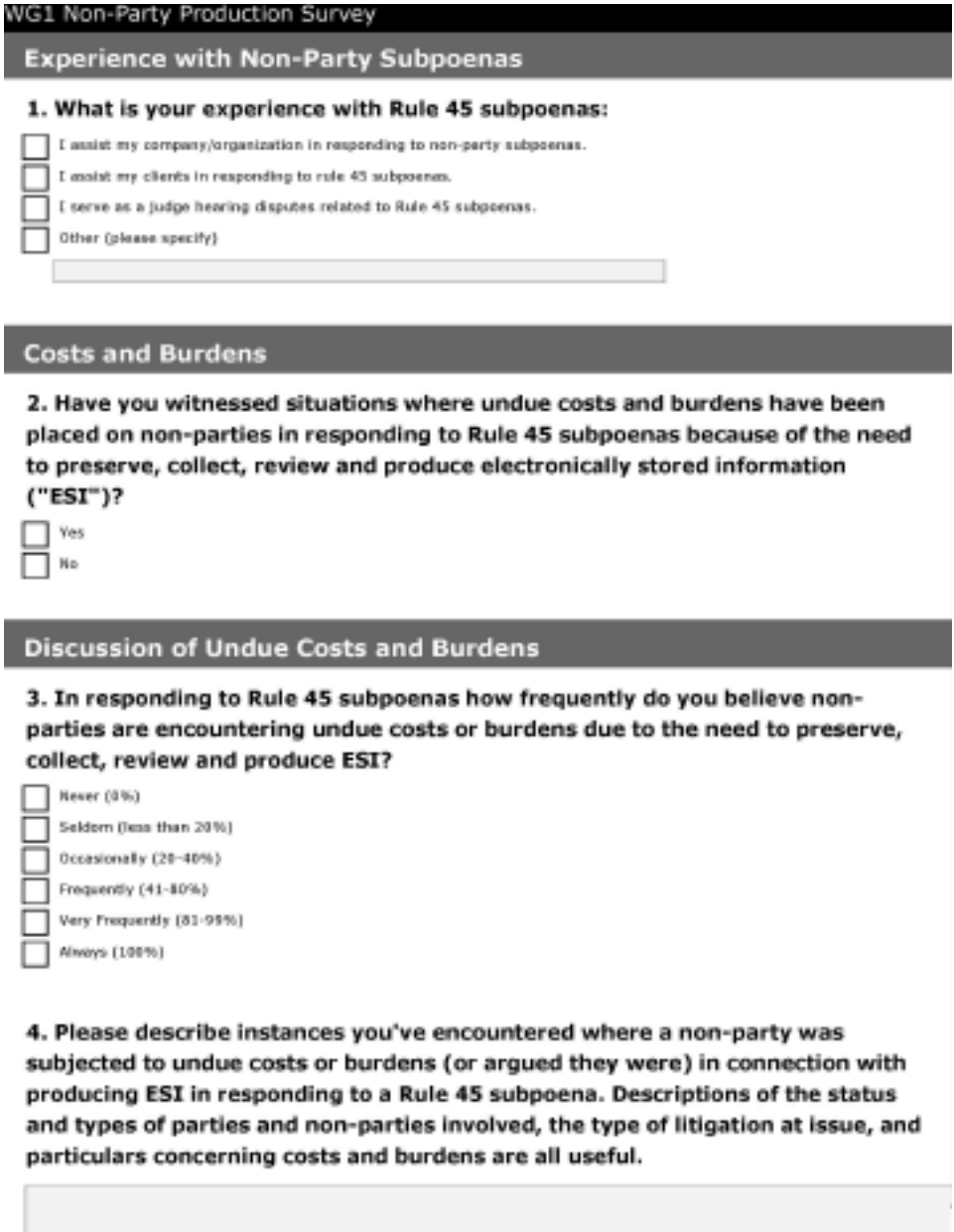
1. Respondents suggested that responding non-parties: adopt an open, cooperative, transparent approach; be proactive, not reactive; involve legal counsel and e-discovery professionals in the procurement of IT applications; educate internal counsel and risk management professionals regarding issues; be specific, as broad-based arguments couched in vague notions of burden or cost are not well received; and talk early.

2. Respondents suggested that in making Rule 45 requests, counsel should take extra precautions to tailor requests narrowly; meet the subpoena recipient as soon as possible to negotiate production issues; discuss cost-shifting if necessary.

3. A number of respondents reported anecdotal situations in which select samples of data sources (e.g., time periods, custodians, backup tapes) were used to see if any responsive documents were found before proceeding to a full-blown review.

Appendix B

WG1 Non-Party Production Survey



WG1 Non-Party Production Survey

Experience with Non-Party Subpoenas

1. What is your experience with Rule 45 subpoenas:

- [ ] I assist my company/organization in responding to non-party subpoenas.
- [ ] I assist my clients in responding to rule 45 subpoenas.
- [ ] I serve as a judge hearing disputes related to Rule 45 subpoenas.
- [ ] Other (please specify)

Costs and Burdens

2. Have you witnessed situations where undue costs and burdens have been placed on non-parties in responding to Rule 45 subpoenas because of the need to preserve, collect, review and produce electronically stored information ("ESI")?

- [ ] Yes
- [ ] No

Discussion of Undue Costs and Burdens

3. In responding to Rule 45 subpoenas how frequently do you believe non-parties are encountering undue costs or burdens due to the need to preserve, collect, review and produce ESI?

- [ ] Never (0%)
- [ ] Seldom (less than 20%)
- [ ] Occasionally (20-40%)
- [ ] Frequently (41-80%)
- [ ] Very Frequently (81-99%)
- [ ] Always (100%)

4. Please describe instances you've encountered where a non-party was subjected to undue costs or burdens (or argued they were) in connection with producing ESI in responding to a Rule 45 subpoena. Descriptions of the status and types of parties and non-parties involved, the type of litigation at issue, and particulars concerning costs and burdens are all useful.

WG1 Non-Party Production Survey

5. What undue cost/burden arguments relating to production of ESI in connection with a Rule 45 subpoena have you seen raised? Which have been the most/least effective?

6. In the past 3 years have you seen non-parties succeed in quashing or limiting a Rule 45 subpoena based on the argument that production of ESI is per se unduly burdensome or costly?

- [ ] Yes
- [ ] No

Comment

WG1 Non-Party Production Survey

Request for Specific Form of Production

7. In your experience since the FRCP amendments relating to ESI, what percentage of time do requesting parties specify the form of production in Rule 45 subpoenas?

- ☐ Never (0%)
- ☐ Seldom (less than 20%)
- ☐ Occasionally (20-40%)
- ☐ Frequently (41-80%)
- ☐ Very Frequently (81-99%)
- ☐ Always (100%)

8. Has this practice changed since Rule 45 was amended?

- ☐ Yes
- ☐ No

Please explain your answer

9. Generally when a form of production is specified in a Rule 45 subpoena, what form is requested? (You may choose more than one type of production, but then please explain your answer in the "Other" field.)

- ☐ Native Electronic Format
- ☐ Paper
- ☐ TIFF/PDF (no searchable text)
- ☐ TIFF/PDF (with searchable text)
- ☐ Other (describe):

10. If you answered TIFF/PDF to the question above, does the request include a request for any metadata?

- ☐ Yes

WG1 Non-Party Production Survey

☐ No

11. Please provide a general description of the type of metadata that is requested.

Practices Relating to Form of Production

12. In most cases where a Rule 45 subpoena requests a specific form of production . . .

☐ The non-party agrees to the requested form of production.

☐ The non-party objects to the requested form of production, but while there may be an initial dispute the requesting party and non-party generally work it out.

☐ The non-party objects to the requested form of producion and the court must resolve the dispute.

☐ Other (please specify)

13. If there is a dispute about the requested form of production in connection with a Rule 45 subpoena, are other parties to the lawsuit (i.e., parties other than the one that served the non-party subpoena) invited/allowed to participate in attempts to resolve the dispute?

☐ Yes

☐ No

If you answered Yes, how do other parties get invited to participate?

WG1 Non-Party Production Survey

Reasonable Accessibility

14. Have you had experience arguing or hearing arguments resisting production of ESI pursuant to a Rule 45 subpoena on the grounds that the source is not reasonably accessible because of undue cost or burden? (You may provide more than one "Yes" answer.)

- [ ] No, this issue has not yet come up in my experience.
- [ ] Yes, I've argued on behalf of the recipient of a subpoena resisting production.
- [ ] Yes, I've argued on behalf of a requesting party seeking production.
- [ ] Yes, I've heard arguments as a judicial officer over the issue of reasonable accessibility.
- [ ] Other (please specify)

15. In general what evidence have you experienced being used to support the argument that a source of ESI is not reasonably accessible because of undue cost or burden. Be as specific as you can (e.g., was data used to support the argument; were witnesses from the IT department used; was the testimony of an outside vendor or expert used, etc.)

16. Please describe any best practices or practice pointers in this area:

WG1 Non-Party Production Survey

Testing or Sampling

17. Have you been involved in a Rule 45 subpoena where the issue of sampling or testing the non-party's ESI was raised?

- ☐ No
- ☐ Yes

18. Please describe what happened in the case(s) in which you were involved where the issue of sampling or testing the non-party's ESI was raised:

19. Please describe any best practices or practice pointers in this area:

WG1 Non-Party Production Survey

"Meet and Confer"

While amended Rule 26(f) requires that parties meet and confer about issues related to the preservation and production of electronically stored information, amended Rule 45 does not have a similar mandatory requirement. We hope to assess whether this makes a difference in practice.

20. In your experience, how frequently do the requesting party and the non-party subpoena recipient engage in informal discussions to resolve issues related to ESI?

- ☐ Never (0%)
- ☐ Seldom (less than 20%)
- ☐ Occasionally (20-40%)
- ☐ Frequently (41-80%)
- ☐ Very Frequently (81-99%)
- ☐ Always (100%)

21. When the requesting party and the non-party subpoena recipient engage in negotiations related to ESI production, are non-requesting parties invited to participate?

- ☐ No, in my experience non-requesting parties are not invited to participate in these discussions.
- ☐ Yes, in my experience non-requesting parties are invited to participate in these discussions.

22. How does the non-requesting party generally get involved in the discussions?

- ☐ The non-requesting party is generally invited into the discussions by the requesting party.
- ☐ The non-requesting party is generally invited into the discussions by the non-party subpoena recipient.
- ☐ The non-requesting party is generally made a part of the discussions through court intervention.

23. Please describe any best practices or practice pointers in this area:

WG1 Non-Party Production Survey

Cost Shifting or Cost Sharing

24. Have you been involved in a Rule 45 subpoena where the issue of cost shifting or cost sharing was raised in connection with production of ESI?

- [ ] No
- [ ] Yes

25. Please explain your answer to the previous question:

26. What factors did the court use to evaluate the costs and burdens relative to the obligation to produce ESI in deciding whether to order cost shifting or cost sharing?

27. In your experience, is the threshold for cost shifting or cost sharing lower when a non-party asserts undue burden or cost arguments related to the production of ESI?

- [ ] Yes
- [ ] No

28. What do you base your response to the last question on?

WG1 Non-Party Production Survey

Release from Subpoena Obligations

29. In your experience do non-parties have difficulty determining when a matter is over such that their obligations under a Rule 45 subpoena are at an end?

- [ ] Yes
- [ ] No

Comment:

30. What steps have you taken (or seen others take) after responding to a subpoena to determine whether the non-party's obligation to preserve ESI is at an end?

Permission to Contact

31. May we contact you if we wish to discuss your responses further?

- [ ] Yes
- [ ] No

WG1 Non-Party Production Survey

Contact Information

Please provide the information requested below so that we might contact you to discuss your answers.

32. Name:

33. What is your professional affiliation?

- [ ] Company
- [ ] Law Firm
- [ ] Academic Institution
- [ ] Court
- [ ] Other (please specify)

34. E-mail Address:

35. Phone Number:

Thank You!

Thank you for your time and thoughts in filling out this survey.

Sedona Rules - What's said in Sedona stays in Sedona.

While we believe the information requested is largely focused on factual matters and should not be construed to ask for privileged or confidential information, we will not attribute any of the information you provide to you or your organization without your explicit permission.

When you click on "Done" you'll be taken out of the survey, so please go back and fill any items you've skipped before you click "Done."