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TOPIC:

Involuntary Expert Witnesses: Subpoenas of Faculty as "Unretained Experts" under Federal Rule of Civil Procedure 45(d)(3)(B)(ii)

AUTHORS:

Grant Garber and Erin Butcher[1]

INTRODUCTION:

College and university counsel routinely handle subpoenas seeking institutional records and, perhaps less often, depositions and testimony of employees who may be fact witnesses or records custodians.

This NACUANOTE addresses a less common but more problematic variation: Use of subpoenas to compel faculty and other employees to serve as "unretained experts" to provide analysis and opinion testimony.

DISCUSSION:

In a typical example, a party in litigation asks a researcher to serve as a retained expert witness, the researcher declines, but the party issues a deposition subpoena anyway, essentially forcing the researcher to contribute her expertise to the case as an "unretained expert." This usually would require the researcher to be deposed, to discuss her research and critique that of other experts, and to offer opinions on underlying issues facing the litigants.

From the employee's perspective, this prospect is almost always unwelcome, and it raises serious concerns for both the employee and the institution, as in these scenarios:

- A litigant may invite a renowned university scientist to serve as a retained expert, then attempt to force her to give a deposition even after she declines to be retained or testify.

- A researcher who works with local stakeholders as part of his university responsibilities is served with a subpoena when one of those stakeholders finds itself in litigation, then is asked to opine on the stakeholder's practices or decisions (e.g., education professor who runs programs in local school district asked to comment on the district's practices; agriculture professor and extension specialist, whose daily responsibilities include consultation with area farmers, asked to discuss a local farmer's operations, etc.).

- A litigant's retained expert cites articles published by the university's researcher, who then receives a subpoena from the opposing litigant seeking to discredit the researcher's underlying work.

- A professor serves as a retained expert in a lawsuit, as part of her extramural activities, then receives a deposition and/or document subpoena in subsequent similar lawsuits involving different parties (e.g., products liability cases involving the same or similar products).

This NACUANOTE addresses the use of subpoenas directed to unretained experts and summarizes arguments used to resist such requests—often successfully—under Federal Rule of Civil Procedure 45(d)(3)(B)(ii) and similar state provisions.[2]

I. "UNRETAINED EXPERT" DISCOVERY

Federal Rule of Civil Procedure 45(d)(3)(B)(ii) governs subpoenas directed to "unretained experts." Under the rule, a court may quash a subpoena of an unretained expert under the following circumstances:

> (B) *When Permitted*. To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:
> . . .
> (ii) disclosing 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.

Under Rule 45(d)(3)(C), a court may quash, modify, or allow the subpoena depending whether the requesting party shows "substantial need" for the testimony or materials:

> (C) *Specifying Conditions as an Alternative*. In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying the subpoena, order appearance or production under specified conditions if the serving party:
> (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
> (ii) ensures that the subpoenaed person will be reasonably compensated.

Approximately half of the states have similar rules.[3]

II. "NOW WHAT?": ASSESSING A SUBPOENA OF AN UNRETAINED EXPERT AS COLLEGE OR UNIVERSITY COUNSEL

A professor, researcher or other employee has been served with (or anticipates) a deposition subpoena that requires her expertise and/or research documents – and she now seeks your advice. Your assessment may involve the following:

1. Should college or university counsel represent the employee?

First, college or university counsel should determine whether the institution should represent the researcher.

Where the subpoena relates to the employee's research or work at the institution, college or university counsel will likely want to be involved. In such cases, both the employee and the college or university have shared interests at stake, including concerns about harm to research integrity and reputation, and counsel will be able to represent both the employee and the institutional client.

In some cases, however, an employee may receive an unretained-expert subpoena arising from outside consulting or extramural activities. That outside work usually is separate from the employee's institutional responsibilities and, thus, beyond the scope of the school's legal representation. For example, a researcher who frequently serves as a retained expert for a particular company may receive an unwanted subpoena from another firm within that industry, as part of an unrelated lawsuit.[4] In that case, counsel should consider whether it is more appropriate for the company's lawyer to represent the researcher.

When making these decisions, conflict of interest policies, faculty handbook provisions, state ethics laws, and other authorities may apply.

2. What are the individual's and institution's preferences?

Counsel's approach will be guided by the preferences of the would-be expert, her supervisors, and other appropriate administrators. Usually, all stakeholders will prefer to avoid a deposition altogether, both because of the obvious burdens and, in some cases, to avoid conflicts of interest or harm to professional relationships with one (or more) litigation parties. For example, an education professor may be reluctant to testify against a local school district that collaborates with the college or university in research and training programs, just as a business school dean would be eager to avoid an expert deposition in a commercial dispute between two businesses that partner with his school. In fact, academic units may have policies that prohibit their employees from serving as outside expert witnesses in cases that affect the institution's interests.[5] These scenarios may raise thorny conflicts, often best resolved by staying out of the case.[6]

3. Can the institution and individual resist the subpoena?

During your initial conversations about the subpoena, the researcher may ask, "Is there any way to avoid this deposition?" As discussed below, the answer may well be "yes": Courts routinely grant motions to quash subpoenas of faculty, researchers, and similar individuals who are sought as unretained experts, absent a showing of "substantial need" by the requesting party. The key issues that drive those decisions are summarized in the following sections. Because

these outcomes are fact-specific, of course, college and university counsel should work closely with the researcher and other stakeholders to develop the best arguments.[7]

III. KEY ISSUES IN ASSESSING THE LIKELIHOOD OF SUCCESS OF A MOTION TO QUASH

1. What type of testimony does the subpoena compel from the employee?

A court's assessment whether to compel the testimony largely will turn on the type of testimony sought from the employee. Two preliminary questions a university or college counsel should address are (1) whether the employee's testimony would involve a unique opinion as an expert or her personal observations of facts; and (2) whether the employee's testimony would help establish an industry standard.

a. Is the witness asked to provide an expert opinion and analysis or merely factual observations and other lay testimony?

A motion to quash under Rule 45(d)(3)(B)(ii) can succeed only if the witness is being sought as an expert. The rule provides that if the individual is merely asked to testify to observations about "specific occurrences in dispute" as a fact witness, the motion likely will fail.[8] Thus, under the rule, the court's decision often turns on whether the employee is truly sought as an expert. Where the employee is compelled to provide her general impressions, drawing from her expertise within an industry, a court is more likely to quash a subpoena than where the employee is compelled to testify on personal knowledge or personally observed facts. Accordingly, the first issue legal counsel should examine in assessing the likelihood of success of a motion to quash is whether the subpoena seeks opinion testimony based on expert "study" or, instead, mere factual observations based on the witness' own involvement in the underlying facts. The answer often dictates the ultimate outcome of the motion, since, as discussed in the next section, a true expert can be compelled to participate only upon a showing of substantial need.[9]

On one hand, courts have quashed subpoenas where they determined that the expert was sought to give specialized expert analysis of the type that would qualify under Federal Rule of Evidence 702:

- Professor in diagnostic radiology department was asked to testify regarding historical developments in medical imaging systems industry, based on his "years of study and research," not merely factual testimony based on his personal knowledge in the field.[10]

- Professor who prepared declarations in prior patent case was sought as an expert, rather than just merely to establish the "fact" that his opinion differed from other experts in the case.[11]

- RAND Corporation political scientist was sought as an expert regarding whitepaper she co-authored regarding military service of transgender persons, not merely as a lay witness describing underlying facts.[12]

- University researcher who studied cold sore remedies was sought as an expert, not merely for his "factual knowledge that [pharmaceutical product] does not work." Expert "works as a researcher, not as a participant in the industry . . . ."[13]

- School district autism specialist was sought as an expert to discuss industry practices for educating autistic students, even though she would not be asked to draw conclusions about the defendant school's practices.[14]

On the other hand, courts have compelled individuals to testify when their testimony was limited to factual matters, often arising from personal involvement in underlying facts or prior involvement or consultation with a party:

- University's director of disability services was ordered to testify at hearing about her discussions with a prospective student who sought her advice with his disability discrimination case against a public employer, though court seemed to doubt whether fact testimony would be relevant to case.[15]

- Human resources consultant who prepared report documenting daily responsibilities of restaurant employees and summarizing employee interviews was required to testify, where her testimony would be primarily observations based on personal knowledge rather than opinion under Fed. R. Evid. 702.[16]

- Consultant that prepared valuation report for non-party regarding hospital property was ordered to produce and testify about it, in case involving subsequent damage to the property, since the report was a singular source of pre-damage information regarding value, and requesting party would experience "undue hardship" in re-creating it.[17]

- Fire investigator was required to produce his report, which consisted mostly of factual observations, in dispute between insurers regarding casualty claim.[18]

As these cases demonstrate, the court first will examine the type of testimony at issue to determine if it requires specialized analysis or mere reporting of facts. The more the testimony consists of the reporting of facts, the more likely that a court will require the individual to testify.[19]

b. Is the unretained expert's opinion sought to establish a comparative standard by which to judge a party?

Relatedly, the distinction between expert and lay testimony is made clear in one scenario that appears often in the cases: If a party seeks a witness primarily to establish a standard of conduct by which to judge the opposing party, then the witness almost certainly is being sought as an expert. And unless the witness is uniquely able to opine on those matters, courts typically will deny use of a compelled expert and invite the party to retain its own.

For example, a court quashed a subpoena of an expert on K-12 educational services for autistic students, whose testimony about her own school district's programs was sought to "develop[] standards by which to measure the appropriateness of educational supports and services" of the unrelated defendant school district.[20] In seeking the witness's expertise to "establish standards" to judge the school's practices, the requesting party was seeking expert testimony. And because it could not show a substantial need for that testimony, the subpoena was quashed.

Similarly, in a False Claims Act case involving allegedly fraudulent research data, the defendant countered that a researcher at another university was able to replicate the results and sought to depose him, in order to compare research protocols used by the two institutions.[21] The court

held that this approach "confirm[ed]" that the witness was sought as an expert and that there was no substantial need to compel the testimony, since his research was publicly available.[22]

Thus, requests for an unretained expert to opine about comparative standards or industry best practices likely will not survive a motion to quash.

2. Is there a "substantial need" for the unretained expert's testimony?

If the unretained expert is asked to give an expert opinion, then the court next will examine the requesting party's articulated "substantial need" for the compelled testimony. As discussed below, a court is more likely to find substantial need for the testimony if the expert has unique expertise that cannot be obtained elsewhere. In contrast, a court may be less inclined to find substantial need where the underlying research data is already publicly available or where many experts in the subject matter exist.

a. Is the intended witness "unique," or are equivalent alternative experts reasonably available?

Courts also consider whether the would-be expert is uniquely able to speak to core issues in the case, or whether equivalent alternative witnesses or sources of information are reasonably available.

Not surprisingly, litigants often show "substantial need" for testimony from witnesses who possess highly unique expertise, such as where the individual is uniquely positioned to comment given her prior involvement in a matter or her unique inventions in a specialized field.[23] The more unique the topic of the expert's expertise, and the fewer the number of others who can speak on the topic, the more likely the expert will have to testify.

For example, in *Walker v. Blitz USA, Inc.*, the compelling party sought an expert on portable plastic gasoline containers with a flame arrestor for the feasibility of the addition of the flame arrestor. Both parties agreed that only one company in the United States manufactured portable plastic gasoline containers with a flame arrestor and no other company manufactured a substantially similar product. Only that same company had conducted research on these containers to determine the efficacy of the flame arrestor, completed by the expert at issue over a twenty-two year period. Based on these facts, the court determined that the compelling party demonstrated substantial need for the information known to and opinions of the expert relating to design, development, and manufacture of flame arrestors by his employer for his employer's unique product.

Similarly, unique experts have included the authors of pre-existing property and business valuation reports, since "testimony regarding the manner in which the valuations were prepared can be obtained only from the parties who prepared them."[24] But absent that uniqueness, courts usually will find no substantial need and will quash the subpoena, such as where there are multiple experts who could speak to prior art in patent cases,[25] educational practices of K-12 schools,[26] business valuations in a market with several competitors,[27] environmental causes of severe respiratory illnesses,[28] and an assessment of a stock buy-back program.[29]

Courts are especially persuaded that an expert is not unique when the requesting party already has designated and/or retained other experts to speak to the issue, which can be almost a *per se* indication that alternative witnesses are available.[30] Thus, availability of alternative witnesses usually will defeat a subpoena, so long as obtaining the alternative testimony does not involve "unusual or extraordinary expense."[31]

b. Is the underlying data or research of the testimony at issue already available to the litigants?

Courts also are reluctant to compel an unretained expert to testify if the purpose is primarily to discuss her published research or work product, if that material is available for other experts to review and critique. In those scenarios, courts are receptive to arguments that the unretained expert is unduly burdened, especially when other experts in the field could review the unretained expert's published material and provide their own analysis and opinions.

For example, in *Glaxosmithkline v. Merix Pharm. Co.* [32], the court quashed a deposition subpoena of a university researcher in part because his studies were published and, thus, "there is nothing else [the researcher] could add in a deposition . . . ." In *Rosa v. City of Seaside*, the court refused to order depositions of two university researchers whose published work was cited by a party's litigation experts, since "surely [defendant] has its own experts who can attest" to the underlying issues.[33] And in *Intervet v. Merial*, because a university professor's declaration filed in a prior case was available to the litigation parties (and the public), the court did not analyze the matter further, finding there was no need to have the witness testify about it as an expert on what was already publicly available from another case.[34]

When an unretained expert is sought primarily to discuss her own published research materials, a motion to quash is likely to succeed, especially when the requesting party has its own expert to opine on those publications.[35]

3. Does the subpoena impose an undue professional burden on the expert?

Courts also may consider the burden on the witness under the general "undue burden" provisions of Rules 26 and 45, especially in cases where substantial need is marginal. Subpoenas of unwilling experts may impose significant burdens on the researcher and her institution, including a loss of perceived objectivity, premature disclosure of incomplete research, "chilling effects" on future work and significant logistical demands. These harms, which are discussed below, can be deeply concerning to the researcher and may also be persuasive to courts when appropriately framed in a motion to quash.

a. Perceived bias or loss of impartiality of expert and her employer

For most researchers and their institutions, professional success depends on a reputation for objectivity and impartiality. Scientific integrity demands fearless, dispassionate inquiry. For researchers whose work itself depends on collaboration with external stakeholders, professional objectivity ensures credibility within the community and secures relationships necessary for productive work.

Accordingly, courts will scrutinize a subpoena that may compromise an unretained expert's (and/or institution's) reputation for impartiality. For example, in *In re Schaefer*, the federal government subpoenaed a political scientist from the RAND Corporation to compel her testimony as an expert on transgender service in the military.[36] Under the prior Obama administration, the Department of Defense had commissioned the analysis performed by the researcher regarding feasibility of permitting service by openly transgender individuals and the experiences of other militaries that allowed it.[37] The analysis reflected no opinion on the ultimate question. The administration eventually decided to allow service by transgender individuals.

After the 2016 election, the Trump administration sought to reverse this policy, and in resulting litigation, it subpoenaed the RAND researcher for a deposition to discuss the analysis. Both the researcher and her employer objected, arguing that her participation would risk the appearance of "taking sides," thus compromising their core mission of providing independent, non-partisan public policy research for the government.[38]

The court granted the researcher's motion to quash, given the potential jeopardy for both the expert's and her employer's reputations for independence and objectivity. In its analysis, the court considered the practice of the political science with her research, the core principles and mission of her employer, and the controversy of the matter at issue.[39]

Researchers in other fields may encounter similar risks when facing involuntary expert subpoenas. For example, researchers in education, business, medicine, agriculture and other fields who work frequently in their professional communities may lose significant credibility if asked to "take sides" in disputes that arise within those communities.[40] Cases like *Schaefer* offer strong support for counsel defending those interests.

b. Premature disclosure of research and loss of intellectual property

Courts also consider burdens arising from premature disclosure of incomplete research and uncompensated loss of intellectual property. Subpoenas may require disclosure of an unretained expert's work papers, lab notes, raw data, and unpublished research materials, often raising serious concerns for the researcher. Even with appropriate protective orders, the researcher may suffer significant damage to her professional reputation and loss of professional opportunities if incomplete, unvetted, and/or non-peer reviewed work product is disclosed prematurely or piecemeal. Tentative findings or conclusions contained in draft materials may differ from final peer-reviewed work product, which could undermine the researcher's credibility.[41] Premature disclosure may also deprive the researcher of publishing opportunities.

Accordingly, courts will consider such professional harms in deciding motions to quash, especially where the substantial need is low.[42] In most cases involving document subpoenas, courts weigh these considerations in assessing whether the subpoena imposes an undue burden under the general provisions of Rules 26(c) and 45(d)(1) rather than under the unretained expert rule, which is more commonly applied to deposition subpoenas. But because Rule 45(d)(3)(B)(ii) has been interpreted to apply to both an expert's testimony *and* documents ("opinion or information"), this provision also may be available to defend against such requests.[43]

Unretained experts also may be concerned about financial and other losses arising from compelled disclosure of valuable intellectual property. A subpoena may force an expert who typically charges fees to give away opinions or work product at a reduced rate (or for free).[44] A subpoena also may demand exposure of trade secrets or concepts that may be developed into patentable inventions.

These are precisely the dangers that Rule 45(d)(3)(B)(ii) was intended to address. Courts often cite the 1991 Amendment Advisory Notes for Rule 45(d)(3)(B)(ii), which described the rule as giving "appropriate protection for the intellectual property of the non-party witness":

> A growing problem has been the use of subpoenas to compel the giving of evidence and information by unretained experts. Experts are not exempt from the duty to give evidence, even if they cannot be compelled to prepare themselves to give effective

> testimony . . . but compulsion to give evidence may threaten the intellectual property of experts denied the opportunity to bargain for the value of their services. Arguably the compulsion to testify can be regarded as a 'taking' of intellectual property. The rule establishes the right of such persons to withhold their expertise, at least unless the party seeking it makes the kind of showing required for a conditional denial of a motion to quash. [45]

In this context, "intellectual property" seems to mean any kind of valuable information; the Rule does not require a technical intellectual property analysis for trade secrets and copyrights. The Advisory Committee Note further provides that a court should not grant the compelling party this information unless it can satisfy Rule 26(b)(3)[46] and provide reasonable assurance of compensation.[47]

When the expert shows that a subpoena would confiscate her labor or financially valuable information, a court is likely to quash the subpoena. For example, in *Mylan Inc. v. Analysis Group, Inc.*, the court quashed a subpoena, observing that "Mylan's subpoena tries to force [the unretained expert] to produce internal consulting work even though Mylan never paid [the unretained expert] for that work."[48] Accordingly, an expert is likely to persuade a court to consider her motion to quash where she can show that the compelling party is attempting to obtain her intellectual property without compensation.

c. Broader chilling effects on current and future research

Courts also consider broader adverse effects of a subpoena, including potential chilling effects on current and future research. As described above, forcing an unwilling expert to "take sides" in controversial matters she researched impartially could "chill" other researchers from engaging in similar sensitive and controversial research for fear of finding themselves in the center of litigation.[49]

The expert also may argue that disclosure of information related to research subjects will impede her work (and that of others) by dissuading future volunteers from participating. Many researchers have gained relationships of trust with research subjects, believing it to be confidential.[50] Courts have expressed concern for a related "chilling effect" of compelled production of research with the ability to attract volunteers to studies.[51] Accordingly, where compelled testimony would involve controversial matters or human subjects, an expert may argue that her compelled testimony could undermine future research on sensitive and controversial topics by dissuading potential co-authors or research subjects from participation for fear of being forced to testify in litigation.[52]

d. Risk of repeated requests for testimony in related or similar cases

Courts also consider whether the compelled performance may lead to repeat testimony on the same subject in related or similar matters. Prominent researchers in fields that become subject to serial litigation – such as products liability litigation involving pharmaceuticals or consumer goods – may become well-known within the relevant plaintiff and defense bars and find themselves repeatedly drawn into discovery. For example, in *In re Snyder* (pre-dating Rule 45(d)(3)(B)(ii)), the court quashed a subpoena of an author of a vehicle safety report that had been cited in several lawsuits against the vehicle's manufacturer, where the expert had endured "the legal expense and personal disruption required to respond to such subpoenas on at least four occasions."[53] Although the issue was not dispositive, the possibility of repeated depositions also was considered in *In re Schaefer*.[54] Under Rule 45(d)(3)(B)(ii), courts may quash subpoenas that threaten to expose the unwilling expert to repeated discovery intrusions.

e. Logistical challenges and other personal burdens on the expert.

Court also consider logistical challenges and other personal burdens arising from a subpoena, as part of an overall analysis of undue burden. Those burdens may include time and expense necessary to prepare for a deposition or document production, the amount of time that has passed since an expert last studied relevant issues, necessity for travel, and other work that the expert must set aside in order to comply.[55] By the same token, the institution itself may resist a subpoena based on the sheer burden of identifying and preparing responsive records for production.[56] These considerations, which are routinely weighed under Rule 45(d), are rarely dispositive alone. But when coupled with other significant professional ramifications, they can be persuasive in support of a motion to quash.

IV. HELPFUL ISSUES TO DISCUSS WITH THE "UNRETAINED EXPERT"

In assessing the strength of a possible motion to quash, consider discussing the following issues with the researcher and other stakeholders:

- Determine what kind of testimony the subpoena or compelling party seeks. Is the testimony a reporting of facts, or does it require an analysis of data and opinion? Is there any indication – perhaps based on prior communications with the requesting attorney – whether the testimony is sought to establish an industry standard or other benchmark for conduct?

- Determine how specialized and common is the knowledge of the faculty or staff member in the expert's field. For example, could any expert in the field in the country examine the same data, analyze it, and opine on it? Or is the subject matter so esoteric, as in *Walker v. Blitz USA, Inc.,* that few people have an understanding of it, one of whom is your faculty or staff member?

- Determine the impact testifying in the case will have on the expert's reputation and ability to conduct further research and publish. Is the impact merely an issue of time away from other research and low compensation, or is the impact going to mar the reputation of the faculty or staff by requiring the faculty or staff to opine on a controversial topic?

- Determine what if any documents, research, or data the faculty of staff member has provided to the parties in the litigation or published in the public realm that underlies the subject of the compelled testimony. For example, has in-house counsel and the faculty or staff member already produced documents pursuant to a subpoena in this case? Has the faculty or staff member published the research data in a peer-reviewed journal or presented it at a symposium? Would testifying compel the researcher to disclose trade secrets or intellectual property, and thus, constitute an undue hardship?

CONCLUSION:

At first blush, subpoenas of "unretained expert" faculty, researchers, and other employees may seem daunting and difficult to avoid. But college and university counsel should be aware that Rule 45(d)(3)(B)(ii) and similar state provisions impose a heightened burden on the requesting party, and that several arguments are available to successfully resist these subpoenas. This NACUANOTE provides a checklist of analytical arguments to defend against such subpoenas

and a compilation of cases to use in that defense. As these cases show, successful arguments cite both the researcher's intellectual property and research integrity, as well as the burden imposed by being pulled away from research and teaching obligations. Successful arguments also may highlight that other suitable experts may be found. Proactive review and familiarity with these issues may inform both the ultimate response to deposition requests and earlier assessments of document requests that may foretell a subsequent request for an expert deposition.

END NOTES:

[1] Grant Garber is a University Counsel at Auburn University. He previously worked at Ohio University and law firms in Ohio and North Carolina. Erin Butcher is a higher education attorney at Bricker & Eckler LLP in Columbus, Ohio. She previously worked at the Ohio Attorney General's Office.

[2] For a discussion of requests for sensitive research material and data under state public records law, the Freedom of Information Act and as part of academic journal processes, see Ellen Auriti, Nancy Greenan Hamill, Sunil Kulkarni, and Margaret Wu, *Who Can Obtain Access to Research Data? Protecting Research Data Against Compelled Disclosures*, NACUANOTES, Vol. 11, Iss. 7 (Feb. 27, 2013). This NACUANOTE focuses on the use of subpoenas to compel depositions and, less frequently, documents from "unretained experts" under Fed. R. Civ. P. 45(d)(3)(B)(ii).

[3] As of the date of publication, the following states and the District of Columbia have adopted rules or statutes that are substantially similar to Rule 45(d)(3)(B)(ii) (unless otherwise indicated, the relevant provision appears in the state's version of Rule 45): Alabama, Arizona, Colorado, Delaware, the District of Columbia, Iowa (Iowa R. Civ. P. § 1.1701 (4)), Kansas (Kan. Stat. § 60-245), Maine, Minnesota (Minn. R. Civ. P. 45.03), Mississippi, Montana, New Mexico (N.M. R. Civ. P. § 1-045), Nevada, North Dakota, Ohio, Oklahoma (Okla. Stat. Tit. 12, § 2004.1), Rhode Island, South Carolina, Utah, Vermont, Washington, West Virginia, and Wyoming. Other state courts have adopted similar approaches to unretained experts by common law. *See, e.g.*, *Redding Life Care, LLC v. Town of Redding*, 207 A.3d 493 (Conn. 2019); *Meltzer v. Coralluzzo*, 499 So. 2d 69, 70 (Fla. Dist. Ct. App. 1986); *Carney-Hayes v. Northwest Wisconsin Home Care, Inc.*, 699 N.W.2d 524 (Wis. 2005).

[4] *See, e.g.*, *Intervet, Inc. v. Merial Ltd.*, No. 8:07cv194, 2007 WL 1797643, at *1 (D. Neb. June 20, 2007).

[5] A model for such policy could be the federal regulation that generally prohibits executive branch employees from serving as expert witnesses in cases where the government is a party or "has a direct and substantial interest," unless approved by their employing agency. 5 C.F.R. § 2635.805.

[6] Less frequently, there may be differences of opinion within the institution about how to proceed: A researcher may be open to a deposition— perhaps because of relationships within her own specialized discipline or industry— but a dean or provost may have concerns arising from a broader set of interests. A possible solution may involve allowing the researcher to serve as a retained expert, as an approved outside activity.

[7] An early call to the requesting party's attorney also may be helpful. The relevant provisions of Rule 45 are not an everyday issue for most lawyers, and counsel may not be familiar with the heightened showing necessary to obtain such testimony. In many instances, it is also fair to question the value of an unretained expert deposition: Even if the requesting counsel is entitled to the expert's appearance at a deposition, he may not be entitled to require the expert to prepare for it. A disinterested scholar also may be much less willing to take definitive positions on scientific questions—and thus less helpful to the litigant—than a paid expert.

[8] Rule 45(d)(3)(B)(ii) (heightened protections apply only when an unretained expert is asked to provide expert "opinion or information," rather than testimony describing "specific occurrences in dispute").

[9] *See* Rule 45(d)(3)(C)(1).

[10] *DR Sys., Inc. v. Eastman Kodak Co.*, No. 09cv1625, 2009 WL 2982821, at *1, 3 (S.D. Cal. Sept. 14, 2009).

[11] *MedImmune, LLC v. PDL Biopharma, Inc.*, No. 08-5590, 2010 WL 2794390, at *2 (N.D. Cal. July 15, 2010).

[12] *In re Schaefer*, No. 2:19-mc-448, 2019 WL 2336698, at *1, 4–5 (W.D. Pa. June 3, 2019).

[13] *Glaxosmithkline Consumer Healthcare, L.P. v. Merix Pharm. Corp.*, No. 2:05-mc-436, 2007 WL 1051759, at *1, 2–3 (D. Utah Apr. 2, 2007).

[14] *Chavez v. Bd. of Educ. of Tularosa Muni. Sch.*, No. CIV 05-380, 2007 WL 1306734, at *5–6 (D. N.M. Feb. 16, 2007).

[15] *Makeen v. Colorado*, No. 14-cv-3452, 2015 WL 1945299 (D. Colo. Apr. 29, 2015); *see also Los Altos El Granada Investors v. City of Capitola*, No. cv 04-05138, 2011 WL 13260732, at *2 (N.D. Cal. Mar. 11, 2011) (ordering deposition and document production from unretained expert on rent control policies who testified at underlying administrative hearing regarding challenged ordinance).

[16] *Daggett v. Scott*, No. 15-mc-65, 2015 WL 3407314, at *2–3 (D. Colo. May 26, 2015).

[17] *Erdman Co. v. Phoenix Land and Acquisition*, No. 4:12MC00050, 2014 WL 4273622 (E.D. Mo. Aug. 29, 2014); *see Cede & Co. v. Joule Inc.*, No. 696-N, 2005 WL 736689, at *1 (Del. Ch. Feb. 7, 2005) (ordering disclosure of business appraisal).

[18] *Arkwright Mut. Ins. Co. v. Nat'l Union Fire Ins. Co.*, 148 F.R.D. 552 (S.D.W. Va. 1993).

[19] Academic medical centers and other institutions with clinical faculty should note that treating clinicians usually are deemed fact witnesses who are required to testify rather than unretained experts. *See, e.g.*, *Fisher v. Ford Motor Co.*, 178 F.R.D. 195, 199 (N.D. Ohio 1998) (ordering depositions of treating physicians at statutory witness rate); *Young v. United States*, 181 F.R.D. 344, 346 (W.D. Tex. 1997) ("As applied to the medical profession, these discovery rules mean that a treating physician generally must be considered an ordinary fact witness, and should not be considered an expert unless the physician has been *specifically retained* to develop an expert opinion.") (emphasis in original).

[20] *Chavez v. Bd. of Educ. of Tularosa Muni. Sch.*, No. CIV 05-380, 2007 WL 1306734, at *5 (D.N.M. Feb. 16, 2007). By contrast, in *Walker v. Blitz USA*, also discussed above, the compelling party showed that no other expert could establish the standard practice for flame arrestors on portable plastic propane containers, essentially arguing (successfully) that the unretained expert *was* the only example of standard practice. Barring narrow fields of study and limited experts, this factor is difficult for the compelling party to overcome, and legal counsel for the faculty or staff should emphasize this argument.

[21] *U.S. ex rel. Hill v. Univ. of Med. and Dentistry of N.J.*, Civ. No. 03-4837, 2008 WL 4514046 (D.N.J. Sept. 26, 2008).

[22] *Id.* at *3; *see also In re Bextra and Celebrex Marketing Sales Practices and Product Liability Litig.*, 249 F.R.D. 8, 13 (D. Mass. 2008) (rejecting attempt to compel document production, where requesting party sought to "coopt[] the expertise of the NEJM and its outside reviewers in lieu of [or, more likely, in addition to] hiring its own experts to attack Plaintiffs' causation theories") (brackets in original).

[23] *See Walker v. Blitz USA, Inc.*, No. 5:08MC15, 2008 WL 5210660, at *4–5 (N.D. W.Va. Dec. 12, 2008). *But see Edwards v. Techtronic Indus. N. Am., Inc.*, No. 3:13-cv-1362, 2015 WL 3605117, at *3 (D. Or. June 8, 2015) (quashing subpoena where requesting party did not show substantial need for testimony of inventor of unique safety technology).

[24] *Erdman Co. v. Phoenix Land and Acquisition*, No. 4:12MC00050, 2014 WL 4273622, at *3 (E.D. Mo. Aug. 29, 2014); *see Cede & Co. v. Joule Inc.*, No. 696-N, 2005 WL 736689, at *1 (Del. Ch. Feb. 7, 2005). Similarly, in *Deitchman v. E.R. Squibb & Sons, Inc.*, 740 F.2d 556 (7th Cir. 1984), a university researcher possessed a singularly authoritative dataset regarding correlation between a drug and incidence of a specific medical condition. Although the researcher would not be called as a witness, the plaintiff intended to cite his published studies in a products liability suit against the drug-maker. The court allowed defendant to access his data set, in part because "what [defendant] is threatened with is having [expert] as a potent expert witness against it without ever taking the stand or being subject to cross-examination. The situation is unique because there is placed in the hands of a nonwitness the capability of influencing the verdict far beyond that enjoyed normally by the most qualified expert witness who does take the stand." *Id.* at 561.

[25] *Schering Corp. v. Amgen Inc.*, No. Civ.A. 98-97, 1998 WL 552944, at *3 (D. Del. Aug. 4, 1998).

[26] *Chavez v. Bd. of Educ. of Tularosa Muni. Sch.*, No. CIV 05-380, 2007 WL 1306734, at *5–6 (D. N.M. Feb. 16, 2007)

[27] *Apple Inc. v. Qualcomm Inc.*, No. 3:17-cv-108, 2018 WL 3861893, at *6–7 (S.D. Cal. Aug. 14, 2018).

[28] *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 304 F.R.D. 379, 383 (S.D.N.Y. Jan. 15, 2015).

[29] *Thompson v. Glenmede Trust Co.*, No. 92-cv-5233, 1995 WL 752422, at *4 (E.D. Pa. Dec. 19, 1995).

[30] *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.* at 383; *DR Sys., Inc. v. Eastman Kodak Co.*, No. 09cv1625, 2009 WL 2982821, at *4 (S.D. Cal. Sept. 14, 2009).

[31] *Chavez* at *6.

[32] *Glaxosmithkline Consumer Healthcare, L.P. v. Merix Pharm. Corp.*, No. 2:05-mc-436, 2007 WL 1051759 (D. Utah Apr. 2, 2007).

[33] *Rosa v. City of Seaside*, No. 05-03577, 2009 WL 2382760, at *2 (N.D. Cal. July 29, 2009).

[34] *Intervet, Inc. v. Merial Ltd.*, No. 8:07cv194, 2007 WL 1797643, at *2 (D. Neb. June 20, 2007); *see In re: Nat'l Hockey League Players' Concussion Injury Litig.*, MDL No. 14-2551, 2017 WL 1493671, at *8 (D. Minn. Apr. 26, 2017) (declining to order production from university's authoritative medical database in order to undermine a party's expert, when the requesting party remained free to "draw comparisons and attempt to impeach" the expert through other means); *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 304 F.R.D. 379, 383 (S.D.N.Y. Jan. 15, 2015) ("It is not in dispute that the methodologies employed by the Mt. Sinai WTC Health Program, and conclusions reached, have been widely available in numerous publications. Indeed, retained experts for both Plaintiffs and Defendants intend to rely on such publications.").

[35] Although courts may be reluctant to order depositions of unretained experts in these cases, courts may be more willing to order production of underlying research data. *See, e.g.*, *Deitchman v. E.R. Squibb & Sons, Inc.*, 740 F.2d 556, 561 (7th Cir. 1984).

[36] *In re Schaefer*, No. 2:19-mc-448, 2019 WL 2336698, at *1–2 (W.D. Pa. June 3, 2019).

[37] *Id.* at * 2.

[38] *Id.*

[39] *Id.* at *10–11.

[40] *See, e.g., In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 304 F.R.D. 379, 381 (S.D.N.Y. Jan. 15, 2015) (quashing deposition request where witnesses' employer argued that participation "would compromise the institution's desired neutrality" in the litigation).

[41] *See In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, No. 4:12-mc-508, 2012 WL 4856968, at *3 (E.D. Mo. Oct. 12, 2012).

[42] *Dow Chemical Co. v. Allen*, 672 F.2d 1262, 1278 (7th Cir. 1982).

[43] *U.S. ex rel. Willis v. SouthernCare, Inc.*, No. 4:10-cv-00124, 2015 WL 5604367, at *6–8 (S.D. Ga. Sept. 23, 2015) (ordering production where requesting party demonstrated substantial need); *In re Domestic Drywall Antitrust Litig.*, 300 F.R.D. 234, 242 (E.D. Pa. May 15, 2014) (holding that certain elements of industry research reports were entitled to unretained-expert protection); *Friedland v. TIC-The Indus. Co.*, No. 04-cv-01263, 2006 WL 2583113, at *2 (D. Colo. Sept. 5, 2006) (quashing subpoena for accountant's written analysis of litigation costs). However, objections based on Rule 45(d)(3)(B)(ii) may be more effective when opposing deposition subpoenas rather than document subpoenas, perhaps because the personal burdens of sitting for a deposition may be more acute for the expert than a document production, (although a document production can be extremely burdensome and expensive), and also because other provisions of Rules 26 and 45 may offer stronger arguments for documents (*e.g.*, Rule 45(d)(3)(B)(i), regarding trade secrets and confidential information). *See, e.g., In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 304 F.R.D. at 383–84 (quashing deposition subpoena but ordering production from "unparalleled" research data set).

[44] *See, e.g., Statutory Comm. of Unsecured Creditors v. Motorola, Inc.*, 218 F.R.D. 325, 326 (D.D.C. Nov. 24, 2003) ("In a society where knowledge is so valuable, there is something unfair about the courts permitting their processes, such as the issuance of a subpoena, to destroy that market in order to take for free the product of an individual's diligence, research, and expertise.").

[45] Advisory Comm. Note, 1991 (citation omitted). Fed. R. Civ. P. 45(d)(3)(B)(ii) advisory committee's note to 1991 amendment (citations omitted). Historically, courts applied a near-absolute rule against compelling expert testimony. *See, e.g.*, *Chavez v. Bd. of Educ. of Tularosa Muni. Sch.*, No. CIV 05-380, 2007 WL 1306734, at *3 (D.N.M. Feb. 16, 2007) ("The law has, until recently, consistently treated expert's testimony as something he or she could sell or give away, but that could not be compelled."). Courts chipped away at this principle over time, requiring more involuntary expert testimony, see for example *Kaufman v. Edelstein*, 539 F.2d 811, 820 (2d. Cir. 1976), to the point that, by 1987, at least one federal court expressly called for action. In describing the difficult balance between the evidentiary needs of a litigant and the interests of an involuntary expert, the court observed that "[a] solution to the problem is not apparent under the existing rules of evidence and procedure. Members of both the legal and research communities would do well to consider the implications of the present law, and to propose amendments that would increase certainty as to the scope of discovery from 'involuntary expert witnesses.'" *In re Snyder*, 155 F.R.D. 211, 214 (D. Ariz. 1987). Rule 45(d)(3)(B)(ii) was adopted four years later. Since then, scholars have disagreed whether unretained experts have received too little or too much deference in resisting discovery requests. *See* Dr. Frank C. Woodside, III and Michael J. Gray, *Researchers' Privilege: Full Disclosure*, 32 T.M. Cooley L. Rev. 1 (2015); Paul D. Carrington and Traci L. Jones, *Reluctant Experts*, 59 Law & Contemp. Probs. 51 (Summer 1996); *see also* Mark Labaton, Note, *Discovery and Testimony of Unretained Experts: Creating A Clear and Equitable Standard to Govern Compliance with Subpoenas*, 1987 Duke L.J. 140, 140-56 (1987) (describing dilemma for unretained

experts prior to 1991 amendments); Virginia G. Maurer, *Compelling the Expert Witness: Fairness and Utility Under the Federal Rules of Civil Procedure*, 19 Ga. L. Rev. 71 (1984).

[46] Rule 26(b)(3) provides the high bar for parties to gain access to trial preparation materials and work product documents.

[47] *E.g.*, *In re Domestic Drywall Antitrust Litigation*, No. 13-MD-2437, 300 F.R.D. 234, 240 n.3 (E.D. Pa., May 15, 2014) (citing the Advisory Committee Notes for this provision); *Mylan Inc. v. Analysis Grp., Inc.*, No. 18-mc-209, 2018 WL 5043157, at *3 (D. Kan. Oct. 17, 2018) (same). Although Rule 45(d)(3)(C)(ii) requires that an unretained expert must be reasonably compensated, the reported cases suggest that this is rarely an issue: requesting parties invariably offer to provide appropriate compensation.

[48] *Mylan Inc.*, 2018 WL 5043157, at *3; *see also Convolve, Inc. v. Dell, Inc.*, No. C 10-80071, 2011 WL 1766486, at *2 (N.D. Ca. May 9, 2011) (quashing subpoena purporting to require a non-party competitor to perform software demonstration, among other things).

[49] *In re Schaefer*, No. 2:19-mc-448, 2019 WL 2336698, at *10–11 (W.D. Pa. June 3, 2019)*; In Re Fosamax Prods. Liability Litig.*, No. 1:06-MD-1789, 2009 WL 2395899, *3-5 (S.D.N.Y Aug. 4, 2009), (citing *Dow Chemical Co. v. Allen*, 672 F.2d 1262, 1270, 1278 (7th Cir. 1982) (quashing subpoena for research work product, in part given "the chilling effect which invariably accompanies governmentally authorized intrusions into the intellectual life of the university")); *Plough Inc. v. Nt'l Academy of Sciences*, 530 A.2d 1152, 1155-58 (D.C. 1987).

[50] For example, in *Cusumano v. Microsoft Corp.*, as part of the landmark Microsoft antitrust case, the First Circuit upheld the quashing of a subpoena issued to two university faculty, which sought their pre-publication interview notes and transcripts related to a forthcoming book about the "browser wars," in part because the interview subjects had been promised some degree of confidentiality. *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 714 (1st Cir. 1998) ("Academicians engaged in pre-publication research should be accorded protection commensurate to that which the law provides for journalists."); *see also* Robert M. O'Neil, *A Researcher's Privilege: Does Any Hope Remain?*, 59 Law & Contemp. Probs. 3 (Summer 1996), part of a symposium issue from Summer 1996 (arguing for greater protection for researchers through analogy to journalists' protection of sources under the First Amendment, especially for controversial and sensitive topics). But courts generally do not recognize a blanket "researcher's privilege" that shields all underlying research data and materials. *See Kaufman v. Edelstein*, 539 F.2d 811, 820 (2d Cir. 1976); *see also Univ. of Pennsylvania v. EEOC*, 493 U.S. 182, 198 (1990).

[51] *See In Re Fosamax Prods. Liability Litig.*, (citing *Dow Chemical Co.*, 672 F.2d at 1270); *Plough*, 530 A.2d at 1155-58.

[52] Concerns arising from disclosure of sensitive information also may be heard under Rule 45(d)(3)(B)(i), which requires an identical showing of substantial need for access to "a trade secret or other confidential research, development, or commercial information." Other authorities and research guidelines may apply. *See* 42 U.S.C. § 241(d) (prohibiting disclosure of confidential information arising from certain federally funded research in legal proceedings).

[53] *In re Snyder* at 214.

[54] This is one of the factors identified in *Kaufman v. Edelstein*, 539 F.2d at 822 (the "Kaufman factors") for courts considering whether compliance with a subpoena is an undue burden on the subpoenaed party. Other factors include (i) the degree to which the expert is called because of his knowledge of facts rather than to give opinions; (ii) whether the expert is sought to testify to previously formed opinions or new ones; (iii) whether the expert is unique and the availability of comparable alternative witnesses.

[55] *E.g.*, *Nat. Res. Def. Council v. Berhnardt*, No. 1:05-cv-01207 (E.D. Cal., Feb 19, 2019) (noting that a deposition of an unretained expert would not impinge upon his time because it would occur during his

working hours at work and he did not have to prepare for the deposition); *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 304 F.R.D. 379, 383 (S.D.N.Y. Jan. 15, 2015) ("The Non-Retained Experts will be taken away from their primary treatment and research responsibilities for a substantial period of time. Significant time will be required to prepare for depositions and trial."); *Intervet, Inc. v. Merial Ltd.*, No. 8:07cv194, 2007 WL 1797643, at *2 (D. Neb. June 20, 2007) (granting motion to quash where "it would be unnecessarily time-consuming and costly for [the expert] to comply").

[56] *See In re: Nat'l Hockey League Players' Concussion Injury Litig.*, MDL No. 14-2551, 2017 WL 1493671, at *8 (D. Minn. Apr. 26, 2017) (quashing subpoena in part because of "staggering" amount of time and effort required to respond to subpoenas).

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