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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)

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INTRODUCTION:

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From the employee’s perspective, this prospect is almost always unwelcome, and it raises

Approximately half of the states have similar rules.

- 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

held that this approach “confirm[ed]” that the witness was sought as an expert and that there

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

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 an

[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.

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*,