The Federal Bar Association
Northern Virginia Chapter

Presents:

A BENCH-BAR DIALOGUE:

New Rules … and old Rules
That the Magistrate Judges Think You Should Know!

Including: **Rules 45 and 37, as recently amended;**
Rule 8, pleading affirmative defenses; and
Rules 15 and 21, joining parties.

United States Magistrate Judges
of the
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Moderator:
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May 19, 2014

In law school, we were immersed in legal thought and analysis on many levels, the most important of which being "positive law"—that is, laws that have been promulgated, passed, adopted, or otherwise "posited" by an official or entity vested by the government with authority to prescribe the rules and regulations within a defined jurisdiction. These may be such laws as legislative enactments, judicial orders (common law), executive decrees, and administrative regulations. As litigators, our work now is largely, if not exclusively, focused on the directives of positive law. That narrow focus may limit our thinking—indeed, may impair our judgment. Litigation takes place within the real world, not apart from it. In my view, we need to be mindful of the "laws of the real world" as well.

The first of the "laws of the real world" we should keep in mind are **Newton's Three Laws of Physics**. Simply stated, they are as follows:

1. Unless acted upon, body in motion tends to stay in motion, and body at rest tends to stay at rest.
2. Force equals mass times acceleration (F = ma).
3. For every action there is an opposite and equal reaction.

When applied to positive law, these translate roughly as follows: Positive law will change or inspire actions otherwise originated by other forces (*e.g.*, the economic forces of a marketplace). Positive law may accelerate mass to create force—*e.g.*, large corporations (*mass*) who are allowed unlimited campaign spending (*acceleration*) gain political power (*force*). And the action of positive law (*e.g.*, the passive-loss rule in taxation), will lead to reactions in the investment community (*e.g.*, investments in unnecessary, money-losing hotels to create passive-loses to shield active-gains from taxation). The later repeal of the passive-loss rule also imparted acceleration (if not an *accelerant*) to the "savings and loan crisis" of the 1980s.

The second of the "laws of the real world" that may enrich our thinking are the **Boy Scout Laws of Knot-tying**. Simply put, a knot should be easy to tie, easy to untie, and right for

the job. For example, is the new "plausibility" pleading standard easy to apply? Is it easy to untie—in the sense of knowing where it does not apply? And is it the right "knot" for the job of preventing expensive discovery?

The last of the "laws of the real world" I want to bring to your attention today is the most important: **The Law of Unintended Consequences**. Indeed, I consider it to be the most powerful force in the universe—at least the portion of the universe governed by humans. The idea that beneficial unintended consequences may flow from actions finds it roots in economic thought—most notably Adam Smith's metaphorical "invisible hand" of the marketplace. Guided by an "invisible hand," a manufacturer's self-interested conduct (cutting costs and lowering prices to gain market share) has the collateral and unintended consequence (at least a consequence to which the manufacturer is indifferent) of benefiting consumers (obtaining goods at lower prices and gaining a higher standard of living). But economics also has admonished that some unintended consequences may be harmful—even perversely so.

In 1692, the English Parliament was considering legislation to reduce the maximum permissible interest rate for borrowing from 6 percent to 4 percent. John Locke argued against the measure, pointing out that instead of benefiting borrowers, the reduced interest rate would cause lenders to find ways to disobey and circumvent the law to the borrowers' detriment, or if the new law were scrupulously obeyed, it would cause a restriction on credit thus robbing "widows and orphans" of their estates. For a contemporary example, recall the "easy credit terms" and relaxed mortgage lending regulations intended to spur the "American Dream of Homeownership" that fueled the "housing boom" in the early 2000s—which was then followed by financial collapse in 2008, widespread mortgage foreclosures, and a near global depression.

See if you can find the "laws of the real world" at work in the following Rules.

I. RULE 45

A. A LITTLE HISTORY

Since the enactment of the Civil Rules in 1937, Rule 45 has governed the issuance and service of trial and discovery subpoenas. But Rule 45 has seen a lot of changes since then, and practice under the current Rule—particularly as revised in December 2013—would hardly be recognized by a practitioner under older versions of the Rule.

For example, it was not until 1970 that the scope of a discovery subpoena *duces tecum* to compel production of documents from a non-party was expressly made co-extensive with the scope of party-to-party discovery. *See* ADV. COM. NOTES, 48 F.R.D. 487, 543 (1970) ("The changes make it clear that the scope of discovery through a subpoena is the same as that applicable to Rule 34 and the other discovery rules."). Indeed, as discussed further below, document-discovery really came of age in 1970.

Yet, both before and after 1970, a non-party could be compelled by subpoena *duces tecum* to produce documents during discovery only when the non-party's deposition was being taken pursuant to a subpoena *ad testificandum*. *E.g.*, *McLean v. Prudential S.S. Co.*, 36 F.R.D. 421, 425-26 (E.D. Va. 1965) (quashing discovery subpoena for only documents); *Jones v. Continental Cas. Co.*, 512 F. Supp. 1205, 1206-07 (E.D. Va. 1981) (same). Even then, however, that limitation was sometimes ignored, and otherwise circumvented by a "document deposition" (or "custodian deposition"), which lasted only a few minutes, and often involved little more than the document custodian testifying that the documents produced were true and correct copies of the documents requested by the subpoena, and providing foundation testimony for the evidentiary use of those documents as "business records." *See* ADV. COM. NOTES, 134 F.R.D. 525, 670 (1991) (describing custodian deposition practice). By the late 1980s, through

agreement (or acquiescence), document custodian affidavits or declarations also began replacing "document depositions." Finally, in the 1991 revision of Rule 45(a), currently found at Rule 45(a)(1)(A)(iii), a subpoena to compel production of non-party documents formally became unlinked from the taking of a deposition. *See* ADV. COM. NOTES, 134 F.R.D. at 670. That was another significant step in streamlining the process.

As these two examples show, the numerous revisions to Rule 45 have been intended to simplify subpoena practice and make it both broader and more efficient. Those still seem to be the guiding principles behind the most recent amendments in 2013. The 2013 changes explained below focus on further streamlining and simplification of issuance, service, and enforcement of Rule 45 subpoenas.

B. ISSUANCE OF A SUBPOENA

Before the 1991 revisions, Rule 45 subpoenas for both trial and discovery were issued by the Clerk, bore the name and seal of the issuing District Court, and generally were enforceable only within the territorial boundaries of the issuing District Court. The 1991 revisions revolutionized the process by providing for attorney-issued subpoenas.

Under the amended rule, an attorney (as an "officer of the court") was qualified to issue a subpoena if he or she was admitted to the bar of the "issuing" District Court—which, in 1991, could be ***either*** the district where the action was pending ***or*** the "ancillary" district where the subpoena would be issued, served, and enforced. ADV. COM. NOTES, 134 F.R.D. 525, 668-70 (1991); *see* Rule 45(a)(3)(A) & (B) (superseded 2013). Even counsel admitted *pro hac vice*—whether in the district where the action was pending or in the ancillary district—could issue a subpoena. *Id*. at 669. Current Rule 45(a)(3) still provides that an attorney "authorized to

practice in the issuing court" may issue subpoenas; however, as is discussed next, the definition of "issuing court" has been changed.

C. THE "ISSUING COURT"

Under the 1991 amendments, the "issuing court" defined the place of issuance, the place of service, place of compliance, and the place of enforcement. Not anymore. All four have been changed.

Prior to 1991, the issuing court had to have territorial authority to serve and enforce the subpoena. Even after the 1991 loosened up the rules for issuance and service, a discovery subpoena still had to "issue from the court in which the deposition or production would be compelled," which also would be the court that could quash or enforce the subpoena under Rules 45 and 37. ADV. COM. NOTES, 134 F.R.D. at 670. Essentially, issuance was nationwide, but service, compliance, and enforcement was localized. Thus, the "issuing" court, even if the court where the action was pending, necessarily was local to the subpoena recipient.

Under new Rule 45, "A subpoena must issue from the court where the action is pending." FED.R.CIV.P. 45(a)(2). Essentially, then, the idea of the local or territorial authority to issue a subpoena has been eliminated altogether. And, as is shown below, "nationwide service" of subpoenas is now the order of the day.

Although attorneys still may issue subpoenas, they may do so only if "authorized to practice in the issuing court." FED.R.CIV.P. 45(a)(3). The change to Rule 45(a)(3) was thought to be "consistent with current practice," but perhaps is not. The new Rule 45(a)(3) should still permit counsel of record in the litigation (whether members of the bar of that court or *pro hac vice* counsel) to issue subpoenas, but might have unintentionally eliminated the authority of

counsel in ancillary districts to issue and serve subpoenas where compliance and enforcement will be sought.

D. SERVICE OF SUBPOENAS

Under Rule 45 prior to 1991, subpoenas generally were served within the territorial boundaries of the issuing court. Trial subpoenas were issued by the trial court and had territorial effect only within the District, or within the state in which the District was located, ***plus*** within 100 miles from the courthouse (even if outside the District or state). The so-called "100-mile bulge" provision lead to some interesting contests about how to measure that distance—either "as the crow flies" or by road distances, which can vary significantly. *See SCM Corp. v. Xerox Corp*., 76 F.R.D. 214 (D. Conn. 1977) (distance between New York site of service and Connecticut trial court was 88 miles as the crow flies, but 113 miles by car). Discovery subpoenas were strictly territorial, however, and confined to the district or state of the issuing court, which lead to frequent problems in this District, which is adjacent to several others, including the District of Maryland, the District of Columbia District, and the Western District of Virginia. These limitations on service were narrowly construed and strictly enforced. *See, e.g*., *In re Guthrie*, 733 F.2d 634 (4th Cir. 1984). You either got it right, or the subpoena would be quashed.

The 1991 revisions were aimed at changing that, but did not quite get all the way to nationwide service. To be sure, based on the expanded notions of issuance of subpoenas by attorneys either in the court where the action was pending or in the ancillary court where the subpoena would be complied with or enforced, it was believed that the 1991 revisions "effectively authorize[d] service of a subpoena anywhere in the United States by an attorney

representing any party" to the action. ADV. COM. NOTES, 134 F.R.D. at 669. But that was not "nationwide" service—it was more like nationwide issuance than nationwide service.

In fact, former Rule 45(b)(2) limited effective service to "any place … within the district of the issuing court; outside that district but within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection; within the state of the issuing court [if that is permitted by state court practice]; or that the court authorizes on motion and for good cause, if a federal statute so provides." Essentially, then, the limitations on service found in the pre-1991 rule were retained even as the rule was otherwise revolutionized by attorney-issuance. *Id*. at 671. That did not make for easy application.

The new rule is simple: "A subpoena may be served at any place within the United States." FED.R.CIV.P. 45(b)(2). Thus, a subpoena issued by an attorney in the name of the trial court, as the "issuing court," may be served anywhere. But, as is discussed below, the limitations on the ***place of compliance*** and ***place of enforcement*** may still keep subpoena practice largely local to the subpoena-recipient.

Finally, service is not complete unless the proper attendance and mileage fees are tendered with the subpoena. FED.R.CIV.P. 45(b)(1). No fees, no valid subpoena. 9A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3d, § 2454 at 401-03 & nn.13-15 (2008). Personal service also is required. *Id*. at 397-401. Thus, despite the liberalization of place of service rules, some service technicalities still must be observed.

E. PLACE OF COMPLIANCE

With the elimination of the territorial limits on place of issuance and place of service, the only territorial limitation found in new Rule 45 is the "place of compliance." Although the revisers identify Rule 45(c) as "new," it is merely a recycling of "the various provisions [of the

existing rule] on where compliance can be required and simplifies them." FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES, Rule 45, Adv. Com. Notes, 2013 Amendment, at 226 (Westlaw 2014). And while the "place of service is not critical to place of compliance" (*id.*), the "place of compliance" rules have the look-and-feel of the old place of service rules. In any event, this is the real roadmap within the rule.

Subdivision (c) makes a categorical distinction between subpoenas for testimony and those for "other discovery." FED.R.CIV.P. 45(c)(1) & (2). Each sub-subdivision (1) and (2) makes further distinctions. Let's start with the "place of compliance" for testimony.

1. Appearance for Trial, Hearing, or Deposition

Generally, the "place of compliance" for giving testimony in any setting is "within 100 miles of the where the person resides, is employed, or regularly transacts business in person." FED.R.CIV.P. 45(c)(1)(A). Are those 100 miles as-the-crow-flies? (Probably.) May the person be compelled to come from outside the District in which the testimony will be taken, so long as that is within 100 miles? (Probably.) May the person be compelled to come from outside the state where the testimony will be taken, like under the old 100-mile bulge provision for a trial subpoena? (Probably.) And a "person" presumably may be an individual (natural person) or an entity (like a corporate person)—so where does an non-party international corporation have to comply with a subpoena to give Rule 30(b)(6) testimony? Where does a corporation "reside"—in its state of incorporation, at its headquarters, or anywhere it has a remote office? If the witness is a traveling sales representative, where does he or she "regularly transact business in person"? Neither the Rule nor the Advisory Committee Notes give any express answers to those obvious questions.

Sub-subdivision (B) adds more content (and, in my view, some confusion), but does solve one vexing problem under the old provisions—the so-called "Vioxx Problem." There are two place-of-compliance-scenarios addressed in Sub-subdivision (B).

First, if the "person" subpoenaed for testimony "is a party or a party's officer" that person may be compelled to appear anywhere "within the state where the person resides, is employed, or regularly transacts business in person," without regard to the 100-mile limit stated in (c)(1)(A) …

Hey, wait a minute! I thought parties and party-officers could be deposed on mere notice? That is correct! Under the Rules, parties may initiate discovery depositions upon notice to the other party. FED.R.CIV.P. 30(a)(1) & (b). Generally, corporate officers and directors are party-witnesses, and may be deposed as individuals on notice, rather than by subpoena or only through the Rule 30(b)(6) process. See 8A WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3d § 2103 at 477-82 (2010); see also E. I. du Pont de Nemours & Co. v. Kolon Indus., Inc., 268 F.R.D. 45, 48 (E.D. Va. 2010). The revisers confirmed this, too. FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES, Rule 45, Adv. Com. Notes, 2013 Amendment, at 227 (Westlaw 2014) (depositions of parties and party officers "need not involve use of a subpoena"). Okay … better now?

So what is the purpose of Rule 45(c)(1)(B)(i)? It solves the "Vioxx Problem." FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES, Rule 45, Adv. Com. Notes, 2013 Amendment, at 226 (Westlaw 2014). What, you ask, is the "Vioxx Problem"?

Under former Rule 45(b)(2)(A) & (B) and (c)(3)(A)(ii), some courts held that trial subpoenas can only command the appearance of a witness—any witness, even an officer of a corporate opponent—within the state where the trial will be held, or outside the forum state but

within 100 miles of courthouse. *E.g.*, *Johnson v. Big Lots Stores, Inc.*, 251 F.R.D. 213 (E.D. La. 2008); *accord Mazloum v. District of Columbia Metro. Police Dep't*, 248 F.R.D. 725 (D.D.C. 2008); *Johnson v. Land O'Lakes, Inc.*, 181 F.R.D. 388, 397 (N.D. Iowa 1998); *Lyman v. St. Jude Medical S.C., Inc.*, 2008 WL 2224352, *13 (E.D. Wis. May 27, 2008). Some district courts—indeed, ***a majority of district courts considering the issue***—disagreed, reasoning that the rule "vests [a district court] with the authority" to subpoena out-of-state corporate officers to appear at trial regardless of the territorial limits of the district or state, or the 100-mile bulge. *E.g., In re Vioxx Prods. Liability Litig*., 438 F. Supp. 2d 664, 667-68 (E.D. La. 2006). Assuming that the *Vioxx* case posed a problem—rather than that it provided a much-needed solution to the problem of obtaining live testimony in complex cases—the revisers set out to "solve" the problem.

The kernel within the *Vioxx* line of cases that blossomed into a "problem" was an assumption that there was inherent "authority" to expand the reach of Rule 45. Is there such "authority" inherent in the District Court to exercise powers not set forth in a rule? It may depend on who you ask. *Compare Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 123, 126 (1989) (Rules are given their "plain meaning," and if "unambiguous, judicial inquiry is complete;" even where an expanded meaning of a Rule appears desirable, the Court's "task is to apply the text, not to improve upon it"), *with*, *Chambers v. NASCO, Inc*., 501 U.S. 32 (1991) (notwithstanding limitations in Rule 11, federal courts have "inherent power" to impose sanctions "beyond the reach of" Rule 11). So, inherent power is interstitial, but not to improve.

At least within the Fourth Circuit, there was an answer to the "Vioxx Problem": "Whatever inherent powers the district courts may once have had, they now have no power to issue a deposition subpoena unless expressly or impliedly so authorized by the Rules." *In re Guthrie*, 733 F.2d 634, 637 (4th Cir. 1984). Thus, the "Vioxx Problem" should not have been a

problem in the Fourth Circuit or the Eastern District of Virginia. Why was it such a problem in the Eastern District of Louisiana (whose own judges could not even agree)?

In any event, the "Vioxx Problem" is now solved, and corporate officers and parties only can be subpoenaed for trial "within the state" in which they reside, work, or transact business. FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES, Rule 45, Adv. Com. Notes, 2013 Amendment, at 226 (Westlaw 2014) ("For parties and party officers, Rule 45(c)(1)(B)(i) provides that compliance may be required anywhere in the state where the person resides, is employed, or regularly conducts business in person."). But by solving the "Vioxx Problem" in this way, have the revisers created another troublesome ambiguity? That is, by using the "within the state" language in (c)(1)(B), did the revisers also implicitly limit the 100-miles to "within the state" in the provisions of (c)(1)(A)? Can corporate officers who reside in Potomac, *Maryland* be compelled to appear in Alexandria, *Virginia* for depositions ***and*** trials? More imponderables …

The second place-of-compliance-scenario addressed in (c)(1)(B)(ii) is directed to trial subpoenas in general. Essentially, trial subpoenas may have state-wide effect for all witnesses, subject to a "substantial expense" exception. That is, if a trial witness must travel more than 100 miles at "substantial expense," the party serving the trial subpoena may be ordered to pay those costs. FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES, Rule 45, Adv. Com. Notes, 2013 Amendment, at 226 (Westlaw 2014). *What? I thought all witnesses were reimbursed mileage and a per diem under Rule 45(b)(1)? What else must the party pay?* Who knows …

2. Subpoenas for "Other Discovery"

There is one easy, clear edict in Rule 45(c)(2): a subpoena for "inspection of premises" must command compliance "at the place of inspection." FED.R.CIV.P. 45(c)(2)(B). *Really … we needed a rule amendment to clarify and simplify that?*

Where to comply with a discovery subpoena for documents, electronic records, or other tangible things, however, is far from clear. That production may be compelled "within 100 miles of where the person resides, is employed, or regularly transacts business in person." FED.R.CIV.P. 45(c)(2)(A). That appears to make sense only if you assume that "the person" is an individual being asked to produce personal records located in his home or office. Other than the individual/personal records example, why is the place of compliance tied to the location of "the person" instead of the location of the documents? What if you serve the registered agent of IBM in Richmond, Virginia—does IBM then have to comply with the subpoena within 100 miles of Richmond by producing documents it otherwise stores in New York? Maybe yes … maybe no.

First, prior to the 1991 revisions, corporate non-parties often objected successfully when a subpoena for their documents was served on an officer or agent who was not at the corporate headquarters where the documents were kept, and which sought to compel production at a remote site. *E.g.*, *Ariel v. Jones*, 693 F.2d 1058 (11th Cir. 1982) (affirming order quashing subpoena *duces tecum* directed to Colorado corporation but served on registered agent in Florida). The 1991 revisions added language to what was then Rule 45(a)(2), to the effect that "the person subject to the subpoena to compel a non-party is required to produce materials in that person's ***control whether or not the materials are located within the territory within which the subpoena can be served***." ADV. COM. NOTES, 134 F.R.D. at 670 (emphasis added). In the current version of Rule 45, a subpoena may command production of "designated documents, electronically stored information, or tangible things in that person's possession, custody, or control." FED.R.CIV.P. 45(a)(1)(A)(iii). Thus, as under the 1991 version of Rule 45, the location of the documents is not determinative, but the location of "the person" who has "control" of them is.

Second, who has "control" of corporate documents? Usually, that is a corporate officer or director. *United States v. IBM*, 71 F.R.D. 88, 91 (S.D.N.Y. 1976) ("A subpoena *duces tecum* seeking corporate documents directed to an individual who is an officer or director of a corporation acts to create an obligation upon the corporation—through those who manage and direct the corporation—to product the documents sought."). So, under Rule 45, "the person" who "controls" corporate documents ordinarily is an officer or director—right? Maybe not. It appears that service on a "registered agent" also might suffice in Virginia. *See In re Motorsports Merchandise Antitrust Litig.*, 186 F.R.D. 344, 348-49 (W.D. Va. 1999) (service of Rule 45 subpoena *duces tecum* on non-party corporation is sufficient if served on, *inter alia*, any officer, director, or "registered agent"). Therefore, any "person" who may be served with a subpoena directed to a corporation—including a "registered agent"—may be deemed to have "control" of corporate documents for Rule 45 purposes.

E. NOTICE OF SERVICE

In 1991, when the right to subpoena documents was unlinked from the deposition requirement, parties were required to give notice of any document subpoenas. Prior to 1991, of course, a notice of deposition had accompanied a subpoena for testimony and documents. But now that pure document subpoenas had been authorized, the notice requirement was instituted "to afford other parties an opportunity to object to the production or inspection, or to serve a demand for additional documents or things." ADV. COM. NOTES, 134 F.R.D. at 671. Problem solved … or so it seemed.

Yet, two more problems arose under this scheme. One was solved (again), the other not.

First, the revisers were advised that parties "frequently fail to give the required notice to the other parties." FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES, Rule 45, Adv. Com. Notes,

2013 Amendment, at 226 (Westlaw 2014). Thus, Rule 45(a) was amended to require service "on each party" of notice "***before*** [the subpoena for documents] is served." FED.R.CIV.P. 45(a)(4) (emphasis added). Problem solved … again … we hope.

Second, Rule 45 (still) does not require that the party who serves the subpoena and obtains the non-party's production to provide to other parties either notice of receipt or access to the documents produced. Inexplicably, the revised rule does not solve this problem, but the revisers offer this advice:

> Parties desiring access to information produced in response to the subpoena will need to follow up with the party serving it or the person served to obtain such access. The rule does not limit the court's authority to order notice of receipt of produced materials or access to them. The party serving the subpoena should in any event make reasonable provision for prompt access.

FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES, Rule 45, Adv. Com. Notes, 2013 Amendment, at 226 (Westlaw 2014). Problem ***not*** solved … still. Why not?

I offer this advice instead: Put provisions for notice of receipt and access in your discovery plan, or ask that the Magistrate Judge include such a provision in the *Rule 16(b) Scheduling Order*.

F. OBJECTIONS

Under Rule 45, the subpoena-recipient always has had (and still has) standing to assert "all the rights conferred by Rules 26-37 or any other authority" to object to the subpoena. ADV. COM. NOTES, 134 F.R.D. at 671. That would include relevance, undue burden, privilege, and the like. In addition, certain "new" rights were added in 1991 (as Rule 45(c)), which now are found in Rule 45(d), including protection from "undue burden and expense," the allowance of "a reasonable time to comply," to shield "privileged or other protected matter," and to alleviate "undue burden." FED.R.CIV.P. 45(d)(1)-(3). In certain circumstances, the court "must" quash or modify the offending subpoena, in others the court "may" quash or modify the subpoena.

FED.R.CIV.P. 45(d)(3)(A) ("must") & (B) ("may"). If warranted, the court may impose certain terms and conditions in lieu of quashing or modifying the subpoena. FED.R.CIV.P. 45(d)(3)(C). So, all told, the subpoena-recipient who receives an outrageously burdensome and invasive request for documents should feel pretty secure, right? Wrong!

In 1991, the time for responding to a subpoena was extended from 10 days to 14 days, in part "to allow a bit more time for [any] objections to be made." ADV. COM. NOTES, 134 F.R.D. at 672. But now only a "reasonable time" for compliance is required (FED.R.CIV.P. 45(d)(3)(A)(1)), which may be shorter than 14 days. Thus, despite the allowance of 30 days for a party to object to Rule 34 document requests (FED.R.CIV.P. 34(b)(2)(A)), the subpoena-recipient must serve his "written objection" to document requests "before the earlier of the time specified for compliance or 14 days after the subpoena is served." FED.R.CIV.P. 45(d)(2)(B). Furthermore, just as under Rule 34, the subpoena-recipient has the obligation of stating his objections with specificity and bears the burden "to show that discovery should not be allowed." *Castle v. Jallah*, 142 F.R.D. 618, 620 (E.D. Va. 1992). How is that fair, when a subpoena-recipient may be served with as subpoena of scope "coextensive" with the scope of Rule 34?

And to make matters worse, the failure to timely serve objections constitutes of waiver of all objections, including "objections based on claims of privilege." *In re Buchanan Ingersoll, P.C.*, 202 Fed. Appx. 454, 2006 U.S. App. LEXIS 26231 (Fed. Cir. 2006) (applying Fourth Circuit law); *accord Motorsports*, 186 F.R.D. at 349 (same). However, in "unusual circumstances and for good cause … the failure to act timely will not bar consideration of objections." *Motorsports*, 186 F.R.D. at 349-50. Those circumstances include a facially overbroad subpoena, undue expense, or the informal assertion of objections. *Id*. So, the bottom-line is clear: Objections—use 'em or lose 'em.

Can a party object to a document-subpoena that has been served on its accountant or lawyer, or its part supplier, etc.? The general rule is that only the subpoena-recipient can object, and that a party lacks standing to object to a subpoena unless and only to the extent the party "claims some personal right or privilege to the documents sought." *Green v. Sauder Mouldings, Inc.*, 223 F.R.D. 304, 306 (E.D. Va. 2004). So, this may be an instance in which the party serving the subpoena has a greater say when arguing the relevance of documents that are not subject to privilege.

G. ASSERTION OF PRIVILEGES

In 1991, the revisers incorporated the Rule 26(b)(5) privilege log procedures as Rule 45(d)(2) (ADV. COM. NOTES, 134 F.R.D. at 674-75), which is now Rule 45(e)(2). The subpoena-recipient must assert a "privilege objection" within the time allowed for other objections or be "at risk of waiving the privilege or protection." *Id*. at 675. As noted above, the subpoena-recipient must assert privilege objections within a very short period of time—the shorter of the time for compliance or 14 days. FED.R.CIV.P. 45(d)(2)(B). Must the recipient and his lawyers have completed your privilege review by then and serve a privilege log with the objections? The answer may depend on the volume of documents to be reviewed and produced.

The revisers state that a subpoena-recipient "who fails to provide adequate information about the privilege or protection claim to the party seeking the information is subject to an order to show cause why the person should not be held in contempt … ." ADV. COM. NOTES, 134 F.R.D. at 675. If you are making a small production and there are not many privileged documents, you may need to comply with both obligations—objections and privilege log—within the time for stating objections. However, "[a] person served with a subpoena that is too broad may be faced with a burdensome task to provide full information regarding all that

person's claims to privilege or work product protection. Such a person is entitled to protection that may be secured through an objection made pursuant to [Rule 45(d)(2)(B)]." *Id*. A good faith effort to comply through both production and at least a generalized privilege objection may save you from a finding of waiver (or citation for contempt, or both). *See Motorsports*, 186 F.R.D. at 349 ("unusual circumstances" that prevent waiver of objections include, *inter alia*, "a subpoena that is overbroad on its face" and "a subpoena that would impose significant expense on a non-party acting in good faith"). And, of course, the subpoena-recipient may obtain an extension of time to comply by agreement or on its own motion for a protective order.

H. WHAT IS "RELEVANT" AND WHO DECIDES

When a Rule 45 subpoena is served for compliance in a district other than where the action is pending—an "ancillary district" in Rule 45 parlance—who decides whether the documents and testimony are even relevant to the lawsuit or are a mere "fishing expedition"? That is an important question to the non-party who may claim burden or who may fear being joined to the lawsuit.

Prior to 1970, a party had to show "good cause" to obtain document discovery even from an adversary. *Schlagenhauf v. Holder*, 379 U.S. 104, 118 (1964). The 1970 amendments eliminated the "good cause" requirement for production of documents under Rule 34. ADV. COM. NOTES, 48 F.R.D. 487, 526 (1970). One of the reasons for the change was that the "good cause" standard was too general and "tended to encourage confusion and controversy." Those amendments also emphasized that "the scope of discovery through a subpoena is the same as that applicable to Rule 34 and the other discovery rules." *Id*. at 543. The breadth of that scope is now well settled. *Castle*, 142 F.R.D. at 620 (scope of production under Rule 45 is "coextensive" with that under Rule 34). Instead of "good cause," all that needed to be shown under Rule 34

(and hence Rule 45) as revised in 1970 was "relevance" as then-broadly defined by Rule 26(b), as relevant to the "subject matter" of the litigation.

But the concept of showing "good cause" in order to obtain discovery was revived in part in 2000, when the definition of "relevance under Rule 26(b)(1) was narrowed. Under the rules as revised in 2000, discovery is generally permitted only of "matter, not privileged, that is relevant to the claim or defense of any party." FED.R.CIV.P. 26(b)(1). Nonetheless, there is a pathway to broader discovery: "For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action." *Id*. This two-part standard of "relevance" is meant to limit "party-controlled" discovery to the pleadings, but the district court "retains authority to order discovery of any matter relevant to the subject matter involved in the action for good cause." ADV. COM. NOTES, 192 F.R.D. 340, 389 (2000). The rule drafters admit that there is no bright line between what is relevant to a claim or defense and what is relevant to the subject matter involved in the action. *Id.* That will require court control. And although the "good cause" standard is meant to be "flexible" (*id.*), it also is meant to involve a judicial officer to manage discovery more closely: "The amendment is designed to involve the court more actively in regulating the breadth of sweeping or contentious discovery." *Id.* "Party-controlled" discovery, broadly expanded in 1970, has been reigned-in.

Discovery fights between the parties over "relevance" persist even under the narrowed definition of relevance, and often present difficult issues for the trial court. Yet, how is an ancillary court, which knows little about the case, expected to involve itself "more actively in regulating the breadth of sweeping or contentious discovery" sought from a non-party who will be complying in the ancillary district? How does (or how should) the ancillary court analyze relevance?

When faced with a relevance issue under Rule 45, the ancillary court is cautioned to apply a balancing test: "the factors required to be balanced by the [ancillary] court in determining the propriety of a subpoena are the relevance of the discovery sought, the requesting party's need, and the potential hardship to the party subject to the subpoena." *Heat and Control, Inc. v. Hester Indus., Inc.*, 785 F.2d 1017, 1024 (Fed. Cir. 1986) (applying Fourth Circuit law to Rule 45 discovery dispute). It is well settled that "[r]elevance under Rule 26(b)(1) has been construed more broadly for discovery than for trial." *Id.* And when the district court has jurisdiction over ancillary discovery matters, it "should be cautious in determining what is relevant evidence to the main action … because of [its] unfamiliarity with the main action. Where there is doubt over relevance, the rule indicates that the [ancillary] court should be permissive." *Id.*; *accord Metal Foil Prod. Co. v. Reynolds Metals Co.*, 55 F.R.D. 491, 493-94 (E.D. Va. 1972) (overruling non-party corporate officer's relevancy and privilege objections in ancillary discovery matter and permitting depositions to be taken). However, if "it is clear 'that the evidence sought can have no possible bearing on the issues,'" then the subpoena may be quashed. *Bush Development Corp. v. Harbour Place Assoc.*, 632 F. Supp. 1359, 1364 (E.D. Va. 1986). That is a difficult determination in the factual vacuum often presented to the ancillary court.

Indeed, in *Metal Foil Products*, the district judge acknowledged that he had "no familiarity" with the disputed issues (*id.* at 492), and compelled the non-party depositions "[w]ithout deciding whether the information which plaintiffs seek is either relevant or protected" (*id.* at 493). Plainly, the district court hearing an ancillary discovery proceeding should not make a narrow ruling on relevance that, in effect, has the preclusive effect of a motion *in limine* ruling, but neither should the ancillary court allow an unrestricted "fishing expedition" into information

possessed by the non-party. In light of the ancillary court's lack of familiarity with the facts of the case, therefore, the scope of discovery from a non-party may be ***more extensive*** than that between the parties as monitored by the trial court.

I. ENFORCEMENT PART 1: PLACE OF COMPLIANCE

Even though a Rule 45 subpoena is now issued in the name of the district court in which the action is pending, enforcement of, or relief from a subpoena is adjudicated in the district where compliance is required. *See* FED.R.CIV.P. 45(d); FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES, Rule 45, Adv. Com. Notes, 2013 Amendment, at 227 (Westlaw 2014) ("subpoena-related motions and applications are made to the court where compliance is required"). If the place of compliance is the district in which the action is pending, then the party moving to compel or the non-party seeking a protective order simply files the appropriate motion.

If the place of compliance is another district, then the movant opens a miscellaneous action in the ancillary court. An ancillary discovery proceeding filed in the Eastern District of Virginia, Alexandria Division, will be assigned to a District Judge and Magistrate Judge, and the ordinary motion practices apply. Under the rules of court, "nondispositive" matters may be referred to a Magistrate Judge "to hear and determine" and to enter a "written order setting forth the disposition of the matter." FED.R.CIV.P. 72(a). It long has been the practice in this division to refer discovery matters to the Magistrate Judges. *See* E.D.VA.CIV.R. 72. Typically, then, a Rule 45 motion is referred to the Magistrate Judge and heard (and decided) on a Friday.

J. ENFORCEMENT PART 2: RULE 72 REVIEW

If the party or non-party formally objects to the Magistrate Judge's ruling, the district judge may consider those objections and "shall modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law." FED.R.CIV.P. 72(a); *Jesselson v.*

Outlet Assoc., etc., L.P., 784 F.Supp. 1223, 1228 (E.D. Va. 1991). All matters concerning discovery are committed to the district court's discretion. *E.g.*, *Erdmann v. Preferred Research, Inc.*, 852 F.2d 788, 792 (4th Cir. 1988). Therefore, the Rule 72 standard of review of the Magistrate Judge's discovery rulings generally looks and feels like an abuse of discretion standard.

A Rule 45 discovery ruling may be overturned as an abuse of discretion if it is (1) '"clearly unreasonable, arbitrary or fanciful'"; (2) "based on an erroneous conclusion of law"; (3) "clearly erroneous"; or (4) "the record contains no evidence on which the [magistrate judge] rationally could have based [his] decision." *Heat and Control*, 785 F.2d at 1022 (applying Fourth Circuit law and reversing discovery ruling) (citations omitted). The standard is deferential, and will not necessarily result in a do-over hearing.

K. ENFORCEMENT PART 3: APPELLATE REVIEW

Appeals from Rule 45 discovery motion rulings are relatively rare, and so the grounds and procedures for seeking immediate appellate review may seem (indeed, may *be*) arcane. *See* 9A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3d, § 2466 (2008). Some discovery disputes involving non-parties, however, are very contentious, such as those involving privileges or trade secret information. In those cases, you may need to know the basic rules for seeking immediate appellate review. (***NB:*** The word *seeking* was used, not "*obtaining*." Not all seekers are successful in obtaining immediate appellate review.) Whether you can seek immediate appellate review depends on where you are and who you are.

Depending on where you are, a party may be able to obtain immediate appellate review when a subpoena is quashed. If a subpoena to a non-party has been quashed by the court in which the action is pending, a party has no right to an immediate appeal; instead, that order, like

all other orders entered in the case, may be addressed on appeal from the final order. *See* 9A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3d, § 2466 at 536-37 & n.3 (2008); *accord Nicholas v. Wyndham Int'l, Inc.*, 373 F.3d 537, 541 (4th Cir. 2004) (in "the ordinary course … the party aggrieved by a discovery order may challenge that order along with any other orders entered in the case" only after final judgment). By contrast, "an order denying discovery from a nonparty in an ancillary proceeding where the underlying lawsuit is pending in another circuit is immediately appealable as a collateral order." *Nicholas*, 373 F.3d at 541-42. So where a party must seek compliance controls whether an immediate appeal may be filed from an order quashing a subpoena.

If you are a non-party, and compliance with the subpoena is ordered by the court in which the action is pending over your objection, you must disobey the order and suffer a contempt citation in order to seek immediate appellate review of the contempt citation. *See* 9A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3d, § 2466 at 537-38 & n.4 (2008) (collecting cases). Even if you are a non-party and compliance with the subpoena is ordered by an ancillary court over your objection, you still must disobey the order and suffer a contempt citation in order to seek immediate appellate review of the contempt citation. *MDK, Inc. v. Mike's Train House, Inc.*, 27 F.3d 116, 120-22 (4th Cir. 1994). So, the subpoena-recipient would be in for tough sledding to obtain immediate appellate review, no matter the place of compliance.

The reason for the "contempt route" to immediate appellate review has been explained as follows:

> We recognize, of course, that the contempt route is a difficult path to appellate review, and one that may carry with it a significant penalty for failure. In discovery disputes, however, this difficulty is deliberate. As Judge Friendly has noted, the contempt limitation ensures that the aggrieved party will first take a

> careful "second look" at the issue in question to determine whether it truly warrants inviting a contempt citation.

Id. at 121-22. So, the subpoena-recipient is deliberately placed on the horns of a dilemma when he considers seeking immediate appellate review.

Finally, parties and non-parties sometimes seek immediate appellate review of a Rule 45 ruling through a writ of mandamus. *See, e.g., In re Buchanan Ingersoll*, 2006 U.S. App. LEXIS 26231 at *3. This also is a difficult route—indeed, nearly impossible. Generally, mandamus will issue only when the discovery order constitutes a clear abuse of discretion or usurpation of judicial power, no other avenue of obtaining relief is available, and the right to issuance of the writ is "clear and indisputable." *Id*. So, do not count on this route, either.

L. ENFORCEMENT PART 4: TRANSFER

In 1970, the law of unintended consequences caught up with Rule 45 in yet another way. In a seemingly off-hand remark, the revisers noted that if the non-party upon whom the subpoena has been served seeks a protective order that discovery not be had, and the ancillary court feels unprepared to make a definitive ruling, then the ancillary court "may, and frequently will, ***remit*** the deponent or party to the court where the action is pending." ADV. COM. NOTES, 48 F.R.D. 487, 505 (1970) (emphasis added). What did "remit" mean?

There was a split authority on the meaning of "remit." Under one line of cases, an ancillary court employed the authority to "remit" as authority to transfer a difficult discovery matter to the district court where the action is pending. *E.g., SEC v. Paradyne Corp.*, 601 F.Supp. 560 (D. Md. 1985); *Bank of Texas v. Computer Statistics, Inc.*, 60 F.R.D. 43 (S.D. Tex. 1973); *see also In re Digital Equipment Corp.*, 949 F.2d 228, 231 (8th Cir. 1991) (recognizing authority). Under the other line of cases, the matter is not transferred, but the non-party is "remitted" to the court where the action is pending in this sense: the ancillary district court

declined to rule "because the [trial-forum] district court is in a superior position to decide [the pending] discovery dispute," and the non-party then must seek a protective order from the forum district court. *E.g.*, *Central States, etc. v. Quickie Transport Co.*, 174 F.R.D. 50, 51-52 (E.D. Pa. 1997); *Kearney v. Janderoa*, 172 F.R.D. 381, 383 (N.D. Ill. 1997) (remitting because the trial court "is in the best position to determine the appropriateness" of compelling discovery or granting protective order); *see also In re Sealed Case*, 141 F.3d 337, 342-43 (D.C. Cir. 1998) (*dicta*) (issuing *mandamus* to vacate transfer order, but suggesting alternative procedure). Needless to say, with no clear guidance, "remitting" was a rarity.

Without referring to the power to "remit," the 2013 revisions codified the authority of ancillary courts to "transfer" a subpoena-related motion to the court where the action is pending. FED.R.CIV.P. 45(f). The authority to transfer is limited to instances where the subpoena-recipient has consented or there are "exceptional circumstances." *Id.* Despite the burden on the non-party of being forced to litigate its objections in a remote forum, such a transfer may be warranted to avoid disruption of the trial court's management of the case or when the trial court has already ruled on the same or a related issue. FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES, Rule 45, Adv. Com. Notes, 2013 Amendment, at 227 (Westlaw 2014). The transfer procedure cures some problems, but invites a host of difficult issues.

First, the revisers suggest that "Judges in the compliance districts may find it helpful to consult with the judge in the issuing court presiding over the underlying case while addressing subpoena-related motions." *Id.* If so, should that consultation take place in written communications that are filed so the parties can remain informed? To be sure, private consultation between judges is expressly permitted by the commentary to Canon 3A(4) of the CODE OF CONDUCT FOR UNITED STATES JUDGES ("A judge may consult with other judges or with

court personnel whose function is to aid the judge in carrying out adjudicative responsibilities."). Would a written request for guidance be more "fair" than an unrecorded phone call between judges? Should the judges consult before any transfer and jointly issue an order for transfer so that the transferee-judge in the trial court acknowledges and accepts the duty to decide the issue, instead of having that duty foisted upon her by the transferor-judge the ancillary court?

Second, the revisers acknowledge the logistical burdens that may arise if a subpoena motion is transferred. FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES, Rule 45, Adv. Com. Notes, 2013 Amendment, at 227 (Westlaw 2014). Those burdens may be alleviated, they suggest, by allowing the subpoena-recipient's lawyer to appear and file papers in the trial court without the usual formalities, FED.R.CIV.P. 45(f), or by encouraging telephonic proceedings, FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES, Rule 45, Adv. Com. Notes, 2013 Amendment, at 227 (Westlaw 2014). Alleviated, perhaps, but not cured. If the issue was difficult enough to warrant transfer, will a telephonic hearing be sufficient? And for a difficult motion, retaining local counsel may be necessary to steer the non-party through the trial court's processes.

Third, if compliance will be enforced by contempt order, will the trial court even have jurisdiction over the non-resident, non-party subpoena-recipient to find him in contempt—in other words, is jurisdiction in the trial court implicit in revised Rule 45? Can a rule revision create jurisdiction where there was none? No. *See* FED.R.CIV.P. 82 (rules "do not extend … the jurisdiction of the district courts"). Will the case have to be retransferred to the place of compliance for entry of the enforcement order, and any contempt proceeding? (Revised Rule 37(b) does not help much, as it states that disobedience of a subpoena-related order "may be treated as contempt of either the court where the discovery is taken or the court where the action is pending." FED.R.CIV.P. 37(b). Does that mean one or the other, or both?) If the non-party

decides to disobey the order, suffer a contempt finding, and then appeal, where does he appeal to—the circuit embracing the transferor (ancillary) court, which is local to him, or the circuit embracing the transferee (trial) court, which is not? The revisers identified most of these problems, but did not solve any of them.

Fourth, what about the party's rights to appeal? The revisers state that "If [after transfer, the trial court] rules that discovery is not justified, that should end the matter." FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES, Rule 45, Adv. Com. Notes, 2013 Amendment, at 227 (Westlaw 2014). *Really?* As noted above, a party has the right to seek an immediate appeal from an order quashing the subpoena entered by an ancillary court, but not one entered by the trial court. Will the party have lost that right upon the matter being transferred to the trial court? If so, parties may object to transfer to avoid that (unintended) consequence.

* * *

Despite frequent and extensive revisions, Rule 45 is not perfect, and may never be. But knowing how the Rule has evolved will permit you to use the current version of the Rule more effectively.

II. RULE 8

A. THE RULE 8(a) PLEADING REVOLUTION … AND COUNTER-REVOLUTION

Rule 8 governs the "General Rules of Pleading." While Rule 45 has been substantively revised nearly a dozen times, and in numerous, detailed ways, Rule 8 has remained virtually unchanged since 1937: To plead a claim for relief, the pleading must contain "a short plain statement of the claim showing that the pleader is entitled to relief." FED.R.CIV.P. 8(a)(2). Yet, we have recently undergone a pleading revolution—the "*Twiqbal*" revolution. How did that happen without a rule revision or amendment? It was fomented and carried out by judicial fiat.

To understand the *Twiqbal* revolution, you must first understand that the enactment of Rule 8 in 1937 was itself a revolution, to which *Twiqbal* may be a *counter*-revolution. The rallying cry of the 1937 revolution was "a short plain statement," which few words were sufficient to turn away any argument that a complaint "failed to set forth specific facts to support its general allegations" and should therefore be dismissed:

> The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. The illustrative forms appended to the Rules plainly demonstrate this. Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. Following the simple guide of Rule 8 (f) that "all pleadings shall be so construed as to do substantial justice," we have no doubt that petitioners' complaint adequately set forth a claim and gave the respondents fair notice of its basis. The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.

Conley v. Gibson, 355 U.S. 41, 47-48 (1957) (footnotes omitted). That emphatic and unanimous endorsement of "notice pleading" in *Conley* remained a bedrock principle of federal practice for another *50 years!* And then "notice pleading" was ousted in the *Twiqbal* revolution.

The "eulogy" for "notice pleading" given by the dissenters in *Twombly* fully explains the revolution that Rule 8 wrought in 1937. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570-97 (2007) (Stevens, J., dissenting). The debate between the majority and dissenters in *Twombly* shows that the new "plausibility" standard is, in fact, a *counter*-revolution.

The majority cites the same "short plain statement" requirement, but reinterprets that phrase as follows:

> While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the "***grounds***" of his "entitle[ment] to relief" requires more than labels and conclusions, and a

> formulaic recitation of the elements of a cause of action will not do. ***Factual*** allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).

Twombly, 550 U.S. at 555-56 (emphasis added). The pivotal words in the majority's view are "grounds" and "factual"—two words that did not then, and still do not, appear in Rule 8(a)(2).

In 1937, 2007, and today, Rule 8(a)(2) of the Federal Rules requires only that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Rule 8(a)(1), by contrast, requires that a pleader state "the ***grounds*** for jurisdiction," but Rule 8(a)(2) does not use the term "grounds" to describe the pleader's obligation when stating a claim. Was that word properly imported into Rule 8(a)(2) to redefine the rule?

Similarly, Rule 8(a)(2) was based on former Equity Rule 12, which required "a short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence." *Twombly*, 550 U.S. at 574 (Stevens, J., dissenting) (quoting Equity Rule 12). The wording in Rule 8(a) was deliberately changed to eliminate "facts" and "evidence" because that distinction "proved far easier to say than to apply." *Id*. The "relaxed pleading standards" did not require pleading of "facts" or "evidence;" rather, according to the "principal drafter" of the rules, only "a general statement distinguishing the case from all others, so that the manner and form of trial and remedy expected are clear, and so that a permanent judgment will result." *Id*. at 575 (citations omitted). Specific facts need not have been pleaded.

As the drafting history of Rule 8 shows, I submit, the Rule was revised in 2007 by the Supreme Court, which inserted the words "grounds" and "factual." But there's more.

The Supreme Court also added the "plausibility" requirement: "The need at the pleading stage for allegations ***plausibly*** suggesting (not merely consistent with) [a claim] reflects the threshold requirement of Rule 8(a)(2) that the 'plain statement' possess enough heft to 'sho[w]

that the pleader is entitled to relief.'" *Twombly*, 550 U.S. at 557 (emphasis added). Where did ***that*** come from? It comes from antitrust law standard-of-proof, which requires that an "agreement" among competitors be proven, rather than mere "parallel conduct" of the competitors who may be acting "independently." *Id.* at 554. Merely proving facts showing parallel conduct, but failing to disprove independent action, is insufficient under antitrust law because parallel conduct may result from "rational and competitive business strategy unilaterally prompted by common perceptions of the market." *Id*. So the antitrust plaintiff must prove facts "tending to rule out the possibility that the defendants were acting independently," and thereby show that an agreement among the competitors is more probable than not.

That antitrust standard-of-proof was then transformed into a pleading standard specifically for a Sherman Act § 1 claim:

> In applying these general standards to a § 1 claim, we hold that stating such a claim requires a complaint with enough ***factual matter*** (taken as true) to suggest that an agreement was made. Asking for ***plausible grounds*** to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.

Id. at 556 (emphasis added). There are those new words again: "plausible," "grounds," and "factual."

The justification for reinterpreting the pleading standard in antitrust cases was simple: "[P]roceeding to antitrust discovery can be expensive. As we indicated over 20 years ago … a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Id*. at 558 (citations omitted). The problem was not too little pleading, but too much discovery in antitrust cases. If so, was reinterpreting Rule 8 "the right knot" for solving that problem?

Moreover, given the specific context, the specifically limiting language, and the problem being solved (expensive antitrust discovery), one would have thought that *Twombly* was just stating a new antitrust pleading standard. Indeed, the *Twombly* court was not deciding a pleading question of general applicability. Rather, the question presented on *certiorari* was a narrow one:

> The question in this putative class action is whether a § 1 complaint can survive a motion to dismiss when it alleges that major telecommunications providers engaged in certain parallel conduct unfavorable to competition, absent some factual context suggesting agreement, as distinct from identical, independent action.

Id. at 548-49. Whatever narrow issue the *Twombly* court thought it as deciding, the *Iqbal* court made the new plausibility pleading standard a rule of general applicability:

> Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." As the Court held in *Twombly*, the pleading standard Rule 8 announces does not require "detailed factual allegations," but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement." * * * To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'"

Ashcroft v. Iqbal, 556 U.S. 662, 667-68 (2009) (citations omitted). The *Twiqbal* counter-revolution was thus complete.

They say, "History is written by the victors." So is the common law.

B. THE RULE 8(c) INSURGENCY

If the Supreme Court's rulings in *Twombly* and *Iqbal* constitute something of a counter-revolution under Rule 8(a), then what we are seeing under Rule 8(c) may be an insurgency in the

lower courts. Does the reasoning of *Twiqbal* require that the defendant plead affirmative defenses with factual detail and plausibility?

Rule 8(b)(1) states some general rules for pleading in response to a complaint, including that the defendant "must … ***state in short and plain terms its defenses*** to each claim asserted against it." FED.R.CIV.P. 8(b)(1)(A) (emphasis added). The Rule goes on to state that the defendant "must ***affirmatively state*** any … affirmative defense, including" a long list of typical affirmative defenses like "accord and satisfaction" and "laches." FED.R.CIV.P. 8(c) (emphasis added). When construed together, do these provisions also require more than "unadorned" assertions, "labels and conclusions," and "formulaic recitation[s]" of affirmative defenses? That has become an important question given that defendants often simply list affirmative defenses or plead them in conclusory fashion.

In the Eastern District of Virginia, as in many other districts, that issue produced a split of opinions. *Compare Francisco v. Verizon South, Inc.*, No. 3:9cv737, 2010 U.S. Dist. LEXIS 77083, 2010 WL 2990159 (E.D. Va. July 29, 2010) (Lauck, M.J.) (*Twombly* and *Iqbal* apply), *with Lopez v. Asmar's Mediterranean Food, Inc.*, 1:10cv1218, 2011 U.S. Dist. LEXIS 2265, 2011 WL 98573 (E.D. Va. Jan. 10, 2011) (Cacheris, D.J.) (*Twombly* and *Iqbal* do not apply), *and Grant v. Bank of America*, No. 2:13cv342, 2014 U.S. Dist. LEXIS 24645 (E.D. Va. Feb. 25, 2014) (Morgan, D.J.) (*Twombly* and *Iqbal* do not apply); *see also Pennell v. Vacation Reservation Cntr.*, No. 4:11cv53, 2011 U.S. Dist. LEXIS 150763, *6-10 & n.2 (E.D. Va. Sept. 20, 2011) (Stillman, M.J.) (*sua sponte* raising issue, noting split, but not reaching issue). In addition, there may be some unreported decisions and orders from other judges in the District.

The net result of this should be caution. First, the judge you draw may not have rendered a published decision and you may need to be prepared for the *Twiqbal* test (which apparently is

the majority view). Second, a judge who has previously declined to apply *Twiqbal* might have a change of heart in your case and now adopt *Twiqbal*—or at least decide that certain affirmative defenses you have asserted should be pleaded with particularity. Third, at the very least, your pleading may face some common-sense scrutiny.

For example, Judge Morgan may have eschewed the *Twiqbal* standard, but he nonetheless scrutinized the affirmative defenses for "contextual comprehensib[ility]": "Instead [of applying the *Twiqbal* standard], this Court looks to whether the challenged defenses are contextually comprehensible. Applying that test here, it is clear that Defendants' affirmative defenses are, on their face, contextually plausible and provide Plaintiff with fair notice of the nature of the defense." *Grant*, 2014 U.S. Dist. LEXIS 24645 at *11-12; *accord Odyssey Imaging, LLC v. Cardiology Assoc. of Johnston, LLC*, 752 F. Supp. 2d 721 (W.D. Va. 2010) ("the court should not construe and administer the Rules in a manner that forces the plaintiff to incur undue expense to discover the secrets of a contextually incomprehensible affirmative defense. That may be a fair and proper middle-road."). I agree that "contextual comprehensibility" may be a good middle-road.

The affirmative defenses pleaded in *Grant* were not one-word conclusory assertions, like "laches," but short statements of recognized defenses, like "Plaintiff's alleged injuries and damages, which are not admitted but expressly denied, were proximately caused and contributed by Plaintiff's own acts and are therefore barred or reduced in amounts to be determined by the trier-of-fact." *Id*. at 5 (quoting Tenth Affirmative Defense). Similarly, none of the defenses in *Grant* were "contextually" out of place—such as listing "injury by fellow servant" as a boilerplate affirmative defense in a suit on a note.

In *Odyssey*, however, the defendant did not fare as well. Even though the judge did not adopt *Twiqbal*, numerous boilerplate-pleaded affirmative defenses were stricken because "[t]here are no facts alleged in any of the pleadings that makes this defense contextually comprehensible." *Odyssey*, 752 F. Supp. 2d at 727. Whether or not *Twiqbal* applies, some level of judicial scrutiny may be applied.

III. JOINING NEW PARTIES … UNDER RULE *15* … AS A MATTER OF RIGHT?

Rule 21 clearly states that "On motion or on its own, the court may at any time, on just terms, add or drop a party." FED.R.CIV.P. 21. That rule has not been substantively changed since 1937. Accordingly, only the court may add a party, which may be done by a *sua sponte* court order, or by a party-initiated motion—which, of course, is a request for entry of an order. *See* FED.R.CIV.P. 7 (b)(1) (defining motion). Moreover, a party may be added only "on just terms"—meaning a new party cannot be simply shoe-horned into a case, but its needs must be accommodated. Therefore, no party may unilaterally join new parties without a motion, without an order, and without "just terms"—right? Wrong.

Instead, the plaintiff can use Rule 15(a) to amend of right and add new defendants in its absolute, unbridled discretion. *See Galustian v. Peter*, 591 F.3d 724, 729-30 (4th Cir. 2010) (holding that plaintiff enjoys an absolute right under Rule 15(a) to amend its complaint once to add a co-defendant, with or without leave of the court). So Rule 21 is not the only portal through which to bring in new parties.

A word of caution, however: In order to ensure efficient case management, Rule 16(b) requires the Court to issue a scheduling order, *see* FED.R.CIV.P. 16(b)(1) & (2), which, among other deadlines, "***must limit the time to ... amend the pleadings*** …," FED.R.CIV.P. 16(b)(3)(A) (emphasis added). Pursuant to the parties' joint discovery plan, a deadline for joining new

parties also may be stated, and adopted by the *Rule 16(b) Scheduling Order*. Once set, this schedule may be modified only for good cause and with the Court's consent. *See* FED.R.CIV.P. 16(b)(4). "Therefore, after the deadlines provided by a scheduling order have passed, the good cause standard must be satisfied to justify leave to amend the pleadings." *Nourison Rug Corp. v. Parvizian*, 535 F.3d 295, 298 (4th Cir. 2008). Thus, the scheduling order may trump the pleader's right under Rule 15(a) to act unilaterally to join new parties by amendment.

IV. PROPOSED NEW RULES

Although delivered with much fanfare in 1937, the Federal Rules of Civil Procedure were not carried down the mountain on stone tablets. As we have seen, they have been repeatedly amended and revised, reinterpreted, and even ignored. This new set is based upon the 2010 Duke Conference. Although the comment period has ended, here are some new proposed rules for our discussion (which "laws of the real world" might these proposed rules violate?):

- Allow requests for documents to be served 21 days after service of the complaint.
- Require the responding party who has stated an objection to state also "whether any responsive materials are being withheld on the basis of that objection."
- Allow scheduling order to direct party "to request a conference with the court" before filing a discovery motion.
- Rule 1 would require the parties to "cooperate."
- The definition of "relevance" would no longer allow discovery that is merely "related to the subject matter" of the action.
- The cost of production, including ESI processing, would factor into discovery parameters.
- Rule 37(e) would specify more sanctions.

Some other revisions were proposed but not adopted:

- Reduce the number of depositions from 10 to 5.
- Reduce the length of each deposition from 7 to 6 hours.
- Reduce the number of interrogatories from 25 to 15.
- Limit the number of requests for admission to 25.