4. An opinion from the U.S. District Court for the District of New Jersey quashing subpoenas seeking broad categories of documents and testimony, including copies of the Petitioner's laptop and cellphone, but permitting the Plaintiff leave to re-serve a more narrowly tailored subpoena.

In *Korotki v. Cooper Levenson, April Niedelman & Wagenheim, P.A.*, 2022 WL 2191519 (D.N.J. June 17, 2022), U.S. Magistrate Judge Matthew J. Skahill addressed a motion by Plaintiff's ex-husband (Petitioner) to quash Plaintiff's third-party subpoena *duces tecum* requesting documents and ESI, granting Petitioner's motion to quash and denying Plaintiff's cross-motion to compel compliance while permitting Plaintiff leave to re-serve a "more narrowly tailored third-party subpoena."

In this proceeding for legal malpractice, Plaintiff alleged that Defendant induced her to sign documents related to her marriage with Petitioner that were adverse to her interests, enabling Petitioner to divert all of their marital assets to Petitioner's sole and exclusive use and benefit and enabling Petitioner to obtain a divorce from Plaintiff without her knowledge or consent as well as prevent her from receiving alimony or other support. *Id*. at *1. Plaintiff issued and served two subpoenas under Fed. R. Civ. P. 45 upon Petitioner, one subpoena *duces tecum* containing 88 demands for Petitioner to produce documents and ESI (including demands to produce Petitioner's laptop and cellphone for imaging), and one subpoena *ad testificandum* demanding that Petitioner appear for a deposition with the 88 items sought in the subpoena *duces tecum*. Petitioner moved to quash both subpoenas.

Magistrate Judge Skahill first laid out the rules governing the issuance, service, and enforcement of third-party subpoenas under Rule 45, which permits parties to serve subpoenas seeking documents. *Id*. at *2. However, upon a timely motion by the person served, courts have the authority to quash or modify subpoenas that require disclosure of privileged or other protected matter, subject a person to undue burden, or that fall outside the scope of permissible discovery (which is the same under Rule 45 as under Rule 26(b)). He further explained that under Rule 45(d), parties issuing and serving a subpoena must take reasonable steps to "avoid imposing undue burden or expense on a person subject to the subpoena," and courts may enforce this duty through sanctions. *Id*. at *3 (quoting Fed. R. Civ. P. 45(d)(1)).

Magistrate Judge Skahill explained that discovery from a third party to a litigation requires a "stronger showing of relevance than for simple party discovery." *Korotki*, 2022 WL 2191519, at *3 (internal quotations omitted). Further, courts analyze proportionality under Rule 26(b)(1) differently for third parties, particularly when the material sought is available from a party. He explained that resolving the dispute lies "within the Court's sound discretion" and involves striking a "delicate balance" between the relevant factors. *Id*. at *4.

Magistrate Judge Skahill then turned to examining Petitioner's argument that Plaintiff's subpoenas imposed an undue burden and fell outside the scope of permissible discovery because the materials sought could have been requested from Defendant or were already in her possession, custody, or control. Magistrate Judge Skahill found the subpoenas "generally calculated to yield [relevant] information," and while some demands related to matters of liability, a majority were relevant to Plaintiff's potential damages. However, noting the requirement under Rule 45 that courts quash overbroad subpoenas even if relevant, Magistrate Judge Skahill stated he could "readily conclude that the Subpoenas are overbroad as drafted." *Id*. at *5. He stated that the "demands are vast, in many instances are temporally unrestrained, and would wield an undue burden on the Petitioner to the extent they would require the Petitioner to reproduce materials already provided to the Plaintiff or materials that can be more readily obtained from the Defendants."

Magistrate Judge Skahill stated that the demands "to wholesale produce [Petitioner's] lap top computer … and cell phone" illustrated the requests' overbreadth. Magistrate Judge Skahill stated that courts generally "guard against undue intrusiveness and [are] cautious in requiring the inspection of electronic devices, in order to protect privacy interests." He stated that "[i]n defining the extent of discovery to afford a party, a court should consider the relationship between the plaintiff's claims and the electronic devices." "Mere suspicion or speculation that a party may be withholding discoverable information is insufficient to support an intrusive examination of the opposing party's electronic devices or information systems." *Id*. (internal quotations omitted). Caution is particularly important where "the connection between the party's claims and the [electronic device] is vague and unproven." *Id*. at *6.

Magistrate Judge Skahill stated that although the subpoenas could uncover relevant material, they also "threaten[ed] to sweep in substantial irrelevant information," and with respect to proportionality, they were "not commensurate to the needs of the case and appear[ed] overbroad." Magistrate Judge Skahill stated that he would "not permit such extraordinary and uniquely invasive access" considering that the information was available from other sources and no evidence showed that Petitioner had improperly withheld information that should already have been turned over.

Magistrate Judge Skahill described the requests for the laptop and cellphone as "patently overbroad" and criticized the demands as "seek[ing] materials duplicative of those already produced and exchanged in the state matrimonial matter." *Id*. at *7. He agreed with Petitioner that a large number of demands in the subpoena were "identical or virtually identical" to certain requests for production from the matrimonial matter, although he noted as a caveat that the subpoenas and requests for production were issued three years apart. He also found that Plaintiff "took no steps to avoid imposing an undue burden or expense as required under Rule 45(d)(1)" and had not made a

"precise showing" of what materials she alleged Petitioner did not initially produce in response to the requests for production.

Magistrate Judge Skahill concluded that demands concerning Petitioner's dealings with Defendant likely were in Plaintiff's possession, custody, or control or could have been sought from Defendant, though he acknowledged that certain materials might be unattainable due to attorney-client privilege and work product. He also determined that a Rule 34 request might yield discovery from the underlying matrimonial case. Accordingly, he found that Plaintiff could either submit a discovery request to Defendant or find the documents on her own accord.

Magistrate Judge Skahill then quashed the subpoenas due to Plaintiff's failure to demonstrate any efforts to obtain the discovery on her own. He based this holding on the subpoena's lack of proportionality and Rule 45(d)(1)'s requirement for parties to "take reasonable steps to avoid imposing undue burden and expense." *Id*. (quoting Fed. R. Civ. P. 45(d)(1)).

After quashing the subpoenas in their entirety, Magistrate Judge Skahill stated that he would "permit Plaintiff to serve a more narrowly drawn version consistent with" this opinion. *Id*. at *8. He decided not to modify the subpoena himself, noting that it is within the court's discretion to require the Plaintiff to modify the subpoena.