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IN FOCUS

ELECTRONIC DISCOVERY

New rules also affect e-discovery of nonparties

Cases suggest potential expense and relevance will be primary factors.

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In 1999, the Advisory Committee on the Civil Rules, in response to a growing concern and request by attorneys nationwide, began studying the discovery of electronically stored information—e-discovery—and considering amendments to the Federal Rules of Civil Procedure. The result was a series of amendments to the Federal Rules of Civil Procedure that went into effect on Dec, 1, 2006.

Parties in litigation will often try to use subpoenas to obtain electronically stored records and documents relevant to the litigation that are in the possession of a nonparty. Rule 45 of the Federal Rules of Civil Procedure governs subpoenas to nonparties. While much has been written recently about the new rules and e-discovery's effects on party-to-party discovery, the effects of the new rules on nonparty discovery has received little attention. This article discusses the factors that courts consider in determining whether to enforce a subpoena, when a nonparty has objected to production.

The new rules apply essentially the same changes to Rule 45 subpoenas for electronic discovery to nonparties as to Rule 34 requests to parties. For example, Rule 45 provides that "electronically stored information" may be subpoenaed for production, inspection, sampling or testing. Rule 45 permits the subpoenaing party to specify the production format, but, if not, the nonparty must produce "the information in a form in which the person ordinarily maintains it, or in an electronically searchable form." Protection of nonparties relating to inaccessible documents and privilege forfeiture for inadvertent production is nearly identical to the protection for parties. The new rules on electronic discovery appear not to have changed the procedure and burdens relating to the cost of discovery that existed in the old Rule 45.

Nonparties enjoy more protection from onerous discovery.

The main difference between electronic discovery from nonparties—as compared to electronic discovery from parties—is that nonparties enjoy more protection from burdensome and costly discovery than do parties. For example, though a nonparty in some instances must pay all or part of the discovery costs, Rule 45 requires that a "party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena."

Rule 45(c)(2)(B) provides that when a party issuing a subpoena moves to compel production of documents, the court "shall protect any person who is not a party...from significant expense resulting from the inspection and copying, testing or sampling commanded." Fed. R. Civ. P. 45(c)(2)(B); *Linder v. Calero-Portocarrero*, 251 F.3d 178, 182 (D.C. Cir. 2001) (noting that Rule 45 requires the court to consider what expenses were significant and nonsignificant and require the requesting party to bear the significant costs). However, courts have also noted that under Rule 45 the requesting party does not bear the entire burden; in fact "a non-party can be required to bear some or all of its expenses where the equities of a particular case demand it." *In re Exxon Valdez*, 142 F.R.D. 380, 383 (D.D.C. 1992). Finally, the nonparty is entitled to reimbursement only for his or her reasonable costs. *Broussard v. Lemons*, 186 F.R.D. 396, 398 (W.D. La. 1999).

The potential expense to a nonparty of complying with a subpoena is perhaps the most important factor courts consider in determining whether a subpoena should be enforced. This factor is important because compliance with a demand for electronically stored information is more expensive than traditional discovery, in part, because the unique feature of electronic discovery is the seemingly infinite reservoir from which information may be obtained. *Bank of America v. SR International Business Insurance Co.*, 2006 N.C.B.C. 15 (Mecklenburg Co., N.C., Super. Ct. 2006). Clearly it is much easier for a business to store many years of electronic data than to store several thousand boxes of documents.

But a party's ability to discover data and information does not end with an opponent's archives. Unlike paper documents, which, once destroyed, are gone, it is often possible to

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recover deleted electronic data. See *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 313 n.19 (S.D.N.Y. 2003) (explaining that "many files are recoverable long after they have been deleted even if neither the computer user nor the computer itself is aware of their existence"). Thus documents previously thought to be deleted may be found and produced during the discovery process. This ability to retrieve deleted data or many years of e-mail or electronic information comes at a significant cost and has been a significant factor in various courts' analyses when faced with motions to compel or motions to quash subpoenas. See, e.g., *In re Honeywell Int'l Inc. Sec. Litigation*, 230 F.R.D. 293 (S.D.N.Y. 2003); *Linder v. Adolfo Calero-Portocarrero*, 251 F.3d at 179-90; *Bank of America*.

'Bank of America' example

Bank of America is a recent opinion citing the costs to a nonparty associated with a subpoena as a basis for denying a motion to compel. That case involved a lawsuit by Bank of America against some of its insurers over claims made by plaintiffs under excess liability insurance policies that were denied by the defendants. As part of their discovery, the defendants served a subpoena on Marsh Inc., which had acted as the plaintiffs' insurance broker with respect to insurance policies at issue in the litigation. The defendants and Marsh met and conferred over the scope of the subpoena, but were unable to reach an agreement regarding the defendants' request that Marsh produce certain e-mails contained only on backup tapes.

The defendants moved to compel and, prior to oral argument, narrowed the scope of their motion to e-mails originating from eight individuals over a two-year period contained on approximately 350 to 400 backup tapes. Marsh complained that the plaintiff's request would subject it to unreasonable, oppressive and undue burden and expense. In support of its opposition, Marsh submitted a declaration from the manager of an outside data recovery and electronic discovery company estimating that it would cost Marsh approximately $1,395,960 to $1,400,920 to comply with the defendants' subpoena. The defendants did not offer any evidence contradicting this declaration.

The court first looked to Rule 45 of North Carolina Rules of Civil Procedure, which is for all relevant purposes identical to the Federal Rules of Civil Procedure, and noted that it requires the party responsible for issuance of a subpoena to "take reasonable steps to avoid imposing an undue burden or expense on a person subject to the subpoena." The court then denied the defendants' motion to compel, finding that their subpoena amounted to a "significant burden to place on a non-party." The court explained: "Marsh is faced with not only these expenses but also the burden of having in-house counsel oversee the process and outside counsel conduct responsiveness and privilege review of the documents produced." 2006 N.C.B.C. at 21.

The court did not, however, conduct its analysis in a vacuum. In reaching its conclusion, the court emphasized the fact that during the relevant period Marsh had a document-retention policy in place that "required that a printed copy of every computer-generated document, including those forwarded to a client, and every substitute e-mail discussion (including those relating to instructions from and discussions with the client regarding the insurance coverage or program) be maintained as part of the insurance placement filed." Id. Thus, the court reasoned, "it is likely that defendants already have in their possession the information that has been requested." Id. The court then concluded that "where, as here, the third-party subpoena imposes a burden on the third party to retrieve and recover electronically stored information which is inaccessible by its nature, there must be a high degree of marginal utility, and, even then, allocating costs to the party seeking the information would be reasonable." Id. at 24.

Other factors to consider

Aside from the potential costs to a nonparty of compliance, in determining whether to enforce a subpoena, courts consider several other factors. In *U.S. ex rel Tyson v. Amerigroup Ill. Inc.*, No. 02 C 6074, 2005 U.S. Dist. Lexis 24929 (N.D. Ill. Oct. 21, 2005), the relator claimed that the defendants charged excessive or unreasonable costs to federal and state health care programs. The nonparty was a state department of public aid. The defendants sought the discovery of e-mails from current and former employees of the nonparty. The defendants claimed that the e-mails were critical to proving that the nonparty had knowledge of the claimed illegality which it insisted would be a defense to the claimed fraud. The court found that the nonparty met its burden of proving that the production of one year's worth of e-mails was unduly burdensome.

The nonparty complained, in part, about the expense of complying with the subpoena, and the defendant offered to pay the costs associated with retrieving the e-mail. The court noted: "Expense is but a part of the burden....[T]he process of retrieving the emails also entails the extensive use of equipment and internal manpower. It will take six weeks to restore and review the data of just one of the three individual's email accounts. The entire project, then, will entail eighteen weeks of effort. To be sure, one can imagine the use of three dedicated servers to perform each of the six weeks of restoration work concurrently, but the end result is still eighteen weeks of man-power and eighteen weeks of use of the necessary equipment. That burden, which is undeniably substantial, exists independently of the monetary costs entailed." 2005 U.S. Dist. Lexis 24929, at *13.

Aside from these monetary and manpower costs, the court highlighted the nonparty status of the entity moving to quash the subpoena. The court held that the concern for the unwanted burden "thrust upon non-parties" is a factor entitled to special weight in evaluating the balance of competing needs. Id. at *14. This factor was entitled to even more weight in this case, the court noted, because the nonparty had no interest in the outcome of litigation. The last element in the court's analysis was the fact that the requested e-mails were not critical to the action. Holding that the above factors all weighed against enforcing the subpoena, the court granted the nonparty's motion to quash.

Over the next few years more courts will be called upon to decide disputes involving subpoenas to nonparties. While the law in this area is still in its infancy, some principles can be gleaned from the above cases. First, it appears that the most important factor courts consider in determining whether a nonparty should comply with a subpoena is the potential expense associated with compliance. Second, courts consider the relevance of information sought and whether it can be obtained from another source. Sometimes, if the requested information is critical to the case, courts will enforce the subpoena, but will require the party issuing the subpoena to pay for either all or some of the costs associated with compliance. See, e.g., *Linder*, 251 F.3d at 179-90. Finally, courts will consider whether the nonparty has an interest in the outcome of the litigation.