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DISCOVERY

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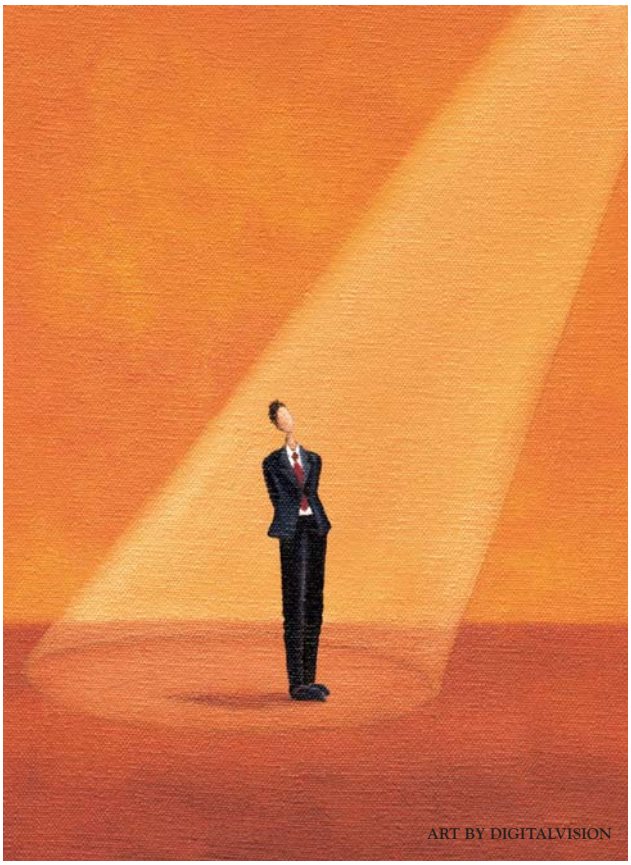
What Ever Is a Non-Party to Do?

Guidance for responding to civil subpoenas in a post-'Zubulake' world.

BY GRANT J. ESPOSITO

SEEMINGLY LOST amidst the recent clamor regarding electronic discovery is a discussion of the obligations of non-parties that are likely to possess relevant electronic documents. Do they also have to issue preservation notices, produce all potentially relevant electronic data, and absorb the attendant costs? Moreover, how will non-parties be treated if and when the proposed amendments to the Federal Rules of Civil Procedure take effect?

The uncertainty surrounding the world of electronic discovery, coupled with the risks of failing—even inadvertently—to satisfy one's legal obligations create a conundrum for non-parties. By parsing recent case law and the proposed amendments to the Federal Rules, however, non-parties can equip themselves with some helpful tools in negotiating the often complicated and expensive process of responding to civil subpoenas in the post-*Zubulake* world.



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Is There a Duty to Preserve?

The duty to preserve evidence adheres to those who have been or expect to be sued.[1] Federal courts have held that this duty triggers an obligation on the actual or anticipated litigant to take reasonable steps to prevent the loss or destruction of any potentially relevant electronic evidence.[2] Such steps include instituting litigation holds and suspending routine document retention policies.[3]

But the existence of litigation between others does not automatically require a non-party to turn off the automatic-purge function of its e-mail system, disturb the normal rotation of its backup tapes, or even distribute litigation-hold memoranda.[4] The courts generally recognize that it is not the obligation of third parties to subsidize litigation in which they have a limited stake in the outcome. As the First Circuit explained: "Although discovery is by definition invasive, parties to a law suit must accept its travails as a natural concomitant of modern civil litigation. Non-parties have a different set of expectations."[5]

A recurring practice under the Private Securities Litigation Reform Act illustrates how non-parties are largely exempt from the onus of preservation. The PSLRA stays discovery, including third-party discovery, during the pendency of a motion to dismiss.[6] Out of a concern that non-parties will dispose of relevant electronic documents according to their routine document-retention policies pending the resolution of such a motion, plaintiffs have requested, and courts have often granted, leave to issue non-party preservation subpoenas.[7] It stands to reason that if non-parties already had an affirmative obligation to preserve, there would be no need for litigants to seek those judicial decrees.

Moreover, research has not revealed any reported decisions that have imposed on non-parties the obligation to issue a preservation notice. The focus has been on compliance, i.e., providing the requesting party with the information sought, and not on preservation. *Chase Manhattan Bank v. T&N PLC*, 156 F.R.D. 82, 85 (S.D.N.Y. 1994) (noting that there is no requirement under the Federal Rules that a non-party undertake a "particular means demanded by the subpoena issuer in order to comply [with the subpoena]").

Further, the case law does not appear to require non-parties to continue preserving documents after they have taken reasonable measures to produce responsive information. In short, those outside the caption are spared the preservation burdens the combatants bear.

What Must Be Produced?

Given the voluminous nature of electronic records and the attendant costs of extraction, the time and expense associated with production of electronic information are particularly burdensome. The Federal Rules of Civil Procedure expressly provide protections for non-parties.

Rule 45 requires that the party seeking discovery from a non-party take reasonable steps to avoid imposing undue burden or expense. And federal courts have consistently held that one's status as a non-party is a factor entitled to special weight in assessing undue burden.[8]

Exercising their discretion, federal courts have protected non-parties by quashing or modifying subpoenas, shifting some or all of the costs of

Grant Esposito *is a partner in the New York office of Morrison & Foerster. His practice focuses on complex commercial litigation issues, including accountants' liability, antitrust, product liability, securities, and electronic discovery and records management. Mr. Esposito has particular experience in representing clients in the pharmaceuticals and professional services industries in the United States, Canada and Europe.*

production to the party issuing the subpoena, or imposing sanctions on the issuing party or its attorneys for failing to meet their affirmative obligation to limit the burden on the non-party.[9] For example, one federal court refused to uphold a subpoena that would have required a non-party to engage in the arduous task of combing through its e-mail files, where there was no showing that the parties' electronic production was insufficient.[10]

Another court had occasion to evaluate the propriety of a request for data stored on backup media. In *Amerigroup Illinois, Inc.*, the defendant issued a subpoena requesting the non-party to search and restore e-mail accounts contained on backup tapes for three employees spanning a five-year period. The non-party indicated that its backup system only contained one year's worth of e-mail, but argued that, nevertheless, the subpoena was unduly burdensome.[11]

Citing the *Zubulake* line of cases, the *Amerigroup* court recognized that information stored on backup tapes is near the bottom of the hierarchy of accessibility and characterized restoration of e-mails through use of backup tapes as a "unique burden."[12] Emphasizing that burden and the significance of the movant's "non-party status itself," the court quashed the subpoena.[13]

Interestingly, the court dismissed as non-determinative the defendant's offer to pay the costs incurred in retrieving the e-mail. The court appeared moved by the fact that it would take six weeks to restore and review the e-mail data from just one of the three individuals identified.[14]

Therefore, unlike the federal courts' treatment of litigants under the *Zubulake* line of cases, the *Amerigroup Illinois, Inc.* decision, and those following it, demonstrate the federal courts' reluctance to impose heavy electronic-discovery burdens on non-parties, even where the requesting party offers to bear the costs of production.[15] Such decisions provide significant leverage to non-parties in negotiating the scope of requests for electronic information.

What of Proposed Rule Changes?

The proposed amendments to the Federal Rules, which aim to provide guidance to litigants regarding electronic discovery, recognize that non-parties will also be asked to part with electronically stored information.[16] The proposed amendments ensure that the new protections provided to litigants are equally available to non-parties under Rule 45.

For instance, although the issuing party may designate the form of production for electronic data, the proposed rule allows the non-party to object to the form sought by the issuing party. The result is that, regardless of the ultimate determination, in no case will the non-party be burdened with the obligation of having to produce electronic information in more than one form.

More significantly, non-parties are not required to produce documents from sources that are identified as "not reasonably accessible." While the proposed Rule 45 permits a court to order discovery from "inaccessible" sources upon a showing of "good cause," the court must engage in the balancing required by Rule 26(b)(2)(C), as amended, with due regard for protecting a non-party from significant burden or expense. In this sense, the lessons of *Amerigroup Illinois, Inc.* are unchanged. The proposed amendments do not reflect an intention to enlarge the burdens imposed on non-parties with respect to electronically stored information.

How Should Non-Party Respond?

The relaxation of the discovery rules as they pertain to non-parties do not, however, excuse a failure to respond to requests for information.

Ignoring a subpoena is punishable as a contempt of court. Moreover, many jurisdictions recognize a civil claim based on negligent or intentional spoliation of evidence by a non-party (either as an independent tort, under traditional negligence theories or under other traditional torts). In those cases, an affirmative obligation to preserve arises out of an agreement, a statutory obligation or a special relationship.

Such cases are usually limited to those where an insurer or an employer takes possession of physical evidence that caused an accident and does not maintain it to permit the injured to pursue potentially culpable parties.[17] But no one wants to face such a charge.

Each subpoena presents unique challenges, but some general guidelines are worthy of consideration.

Send copies of the subpoena both to those knowledgeable about the underlying dispute (who will likely know what documents are truly relevant, if any) and those who know where electronic information resides (who can explain the burdens of production before they are asked to retrieve documents). Then discuss the time and effort required to locate and extract the requested information. Get specific. General claims of burden will persuade neither the issuer of the subpoena nor the court.

Next, after determining the scope of a reasonable response, avoid the temptation to act unilaterally. The hallmark of virtually every current development regarding electronic discovery, as evidenced by the proposed amendments to the Federal Rules, is disclosure and dialogue. Given the protections described above, non-parties can negotiate from a position of strength when seeking to narrow an overbroad subpoena, especially when it comes to electronic discovery.

Finally, to encourage the requesting party to be reasonable in seeking electronic information from a non-party, consider also the decision in *Natural Gas Commodity Litig.*[18] In that case, when the non-parties objected to the burden imposed by a subpoena seeking large quantities of electronic data maintained in an outdated format, the court required plaintiffs to negotiate a reasonable sampling and search protocol to limit the burden on the non-parties.

A gentle reminder of the authorities cited above should help make clear that litigants seeking electronic information from non-parties act unreasonably at their peril.

1. See, e.g., *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998).
2. See *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003).
3. See id.
4. See, e.g., *Capricorn Power Co., Inc. v. Siemens Westinghouse Power Corp.*, 220 F.R.D. 429, 436 (W.D. Pa. 2004); *Broussard v. Lemons*, 186 F.R.D. 396, 398 (W.D. La. 1999).
5. *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 717 (1st Cir. 1998); see also *Fletcher v. Dorchester Mut. Ins. Co.*, 773 N.E.2d 420, 424-25 (Mass. 2002) ("Persons who are not themselves parties to litigation do not have a duty to preserve evidence for use by others").
6. 15 U.S.C. §78u-4(b)(3)(B). See, e.g., *Faulkner v. Verizon Communications, Inc.*, 156 F. Supp. 2d 384, 404 (S.D.N.Y. 2001).
7. Compare *In re Grand Casinos Inc., Sec. Litig.*, 988 F.Supp. 1270, 1272-73 (D. Minn. 1997) (granting request for leave to issue third party subpoena), with *Asset Value Fund Ltd. P'ship v. Find/SVP, Inc.*, No. Civ. 3977(LAK), 1997 WL 588885, at *1 (S.D.N.Y. Sept. 19, 1997) (refusing to issue preservation subpoena to non-party, because the court lacked jurisdiction over non-party, who had not been served with process).
8. See Fed. R. Civ. P. 45(c)(1); *North Carolina Right to Life, Inc. v. Leake*, 231 F.R.D. 49, 53 (D.D.C. 2005); *In re Automotive Refinishing Paint*, 229 F.R.D. 482, 495 (E.D. Pa. 2005).
9. See, e.g., *Heidelberg Americas, Inc. v. Tokyo Kikai Seisakusho, Ltd.*, 333 F.3d 38, 41-42 (1st Cir. 2003); *In re Law Firms of McCourts and McGrigor Donald*, No. M 19-96(JSM), 2001 WL 345233, at *1-*2 (S.D.N.Y. April 9, 2001); *Mannington Mills, Inc. v. Armstrong World Indus., Inc.*, 206 F.R.D. 525, 532 (D. Del. 2002).
10. See *Braxton v. Farmer's Ins. Group*, 209 F.R.D. 651, 653 (N.D. Ala. E. Div. 2002).
11. See *United States v. Amerigroup Illinois, Inc.*, No. 02 C 6074, 2005 WL 3111972, at *2 (N.D. Ill. Oct. 21, 2005).
12. See id. at *2-*4.
13. See id. at *4-*5.
14. See id. at *4.
15. *Amerigroup Illinois, Inc.* was favorably cited recently both in New York (*Treppel v. Biovail Corp.*, No. 03 CIV. 3002 PKL/JCF, 2006 WL 278170 (S.D.N.Y. Feb. 6, 2006), *Quinby v. WestLB AG*, No. 04 Civ. 7406 (WHP) (HBP), 2006 WL 59521, at *1 (S.D.N.Y. Jan. 11, 2006) (quashing a third party subpoena that sought production of e-mail as overbroad, noting that subpoena would yield a "vast amount of irrelevant material")), and in Indiana (*Morrow v. AirRide Tech., Inc.*, No. IP-05-113, 2006 WL 559288 (S.D. Ind. March 6, 2006)).
16. See Excerpt from the Report of the Civil Rules Advisory Committee, July 25, 2005 at 89-107 available at http://www.uscourts.gov/rules/Reports/ST09-2005.pdf #page=177. The Proposed Amendments were adopted by the Federal Judicial Conference on Sept. 20, 2005. The Rules Enabling Act, 28 U.S.C. §2074, provides that no later than May 1, the Supreme Court is to transmit the Proposed Amendments to Congress. Unless Congress intervenes, the Proposed Amendments will become effective on Dec. 1, 2006.
17. See, e.g., *Fletcher*, 773 N.E.2d at 424 n.9 (collecting cases); *Boyd v. Travelers Ins. Co.*, 166 Ill.2d 188 (Ill. 1995) (The Illinois Supreme Court rejected spoliation of evidence as an independent cause of action, but held that, under existing negligence law, the insurance company assumed a duty to preserve propane heater that injured plaintiff when it took possession of the heater); *MetLife Auto & Home v. Joe Basil Chevrolet, Inc.*, 775 N.Y.S.2d 754 (N.Y. 2004) (finding that in the absence of a court order the third party insurer had no duty to preserve car involved in accident).
18. No. 03 Civ. 6186 VM AJP, 2005 WL 3036505 (S.D.N.Y. Nov. 14, 2005).