Non-party Discovery: Reducing the Risk of Cost-shifting

This Checklist outlines steps a requesting party can take to minimize the costs associated with e-discovery from a non-party, and describes the cost-shifting tests under federal law and the laws of California and New York.

EVAN GLASSMAN
PARTNER
STEPTOE & JOHNSON LLP

Evan has a diverse practice that includes representing plaintiffs and defendants in commercial litigation, professional liability matters, white collar criminal matters and intellectual property disputes. His work frequently involves multi-jurisdictional and cross-border disputes, and efforts to obtain and enforce judgments and arbitral awards around the world.

JEFFREY A. NOVACK
ASSOCIATE
STEPTOE & JOHNSON LLP

Jeffrey focuses his practice on white collar criminal defense and complex civil litigation. He has represented both individuals and entities in a diverse array of matters, including insider trading, accounting fraud, campaign finance, insurance coverage, professional liability and contract disputes.

IDENTIFY SOURCES OF RELEVANT INFORMATION

At the start of a case, counsel should:

- Consider:
  - where relevant information is housed; and
  - who has the authority to obtain it.
- Determine whether the opposing party has access to the relevant information sought because the information is within its possession, custody or control (*FRCP 34(a)*) (for more information, search Document Requests: Initial Considerations on our website).
- Consider the extent of e-discovery needed from non-parties.

ADDRESS COST-SHIFTING ISSUES EARLY IN THE CASE

- If the case involves a significant volume of electronically stored information (ESI) from a non-party, determine whether to litigate in a jurisdiction that is more advantageous to the discovery needs in the case (see below *Consider the Cost-shifting Tests of the Courts*). For example, if the scope of cost-shifting is unfavorable under state law, counsel may want to:
  - file the case in federal court;
  - file the case in another state court with jurisdiction; or
  - remove the case to federal court.
- Avoid placing undue weight on the factors a court considers for cost-shifting. Instead, assess:
  - the importance of cost-shifting within the broader context of the case (that is, whether cost-shifting should be a driving factor in determining where the case proceeds); and
  - the equities involved in the case (even if a jurisdiction has adopted a specific test for cost-shifting, courts tend to approach discovery in an equitable manner).

- Carefully craft discovery requests to:
  - avoid imposing an undue burden on the non-party;
  - encourage cooperation between the requesting party and non-party;
  - elicit a more targeted production by the non-party, thereby reducing the amount of time it takes to review the production;
  - reduce the non-party's costs for review and consequently the costs that may be shifted; and
  - demonstrate to the court that the requests are not intended to burden or harass the non-party, thereby undermining the non-party's arguments in favor of cost-shifting.
- Investigate the non-party's financial resources and interest in the outcome of the case because both may be considered as part of the cost-shifting analysis. If multiple non-parties have access to the information sought, consider requesting information from the non-party in the best financial position or with the greatest interest in the outcome of the case.

COMMUNICATE WITH THE NON-PARTY THROUGHOUT DISCOVERY

- Begin communicating with the non-party about the desired discovery as early in the case as possible.
- Maintain an ongoing discussion with the non-party about the scope of discovery, including:
  - the non-party's expected method for data collection and review (for example, the technologies the non-party intends to use);
  - search terms or other methods of culling relevant data (courts have held that the requesting party must suggest search terms even if the non-party has been uncooperative) (see, for example, *Apple, Inc. v. Samsung Elecs. Co., No. 12-0630, 2013 WL 1942163, at *3 (N.D. Cal. May 9, 2013)*; *DeGeer v. Gillis, 755 F. Supp. 2d 909, 929 (N.D. Ill. 2010)*);
  - data custodians; and
  - the burden to the non-party.
- Inquire up front about the volume of potentially relevant ESI to determine:
  - the total volume of data collected;
  - the volume of data collected per custodian; and
  - the number of hits generated by search terms (counsel may be able to limit costs by proposing alternate search terms that yield a more reasonable number of hits).
- Consider entering into an agreement with the non-party about the handling of expenses if the non-party expresses an intention to seek costs. An agreement on discovery expenses, particularly early in a case, can prevent the time, expense and distraction of litigating cost-shifting disputes.

PARTICIPATE IN MANAGEMENT OF THE NON-PARTY'S PRODUCTION

- Consider offering to manage the production and storage of the non-party's ESI. Although this approach is unconventional and untested in litigation, it may enable the requesting party to have control over the costs of production that are most likely to be subjected to cost-shifting, and may demonstrate to the court the requesting party's:
  - willingness to be reasonable; and
  - desire not to burden the non-party.
- Determine whether to manage the production and storage of the non-party's ESI either:
  - in-house at the requesting party's law firm; or
  - through a vendor chosen by the requesting party.
- To help make opposing parties less wary of the requesting party hosting the non-party's ESI, agree that:
  - the non-party has remote access to upload the data at issue;
  - only technical personnel from counsel for the requesting party can access the database until it is designated for production;
  - technical personnel with access to the database are screened from counsel for the requesting party;
  - no attorney for the requesting party has access to the database until production is authorized;
  - attorneys for the requesting party only have access to the data that is designated for production by the non-party; and
  - at the end of the litigation, the data will be disposed of in a manner on which the parties have agreed.
- Protect the requesting party from any potential liability based on its hosting of the non-party's data by drafting contractual provisions similar to those used by third-party e-discovery vendors.
- Make clear that counsel's receipt of the non-party's data does not create an attorney-client relationship between counsel and the non-party.

CONSIDER THE COST-SHIFTING TESTS OF THE COURTS

To determine which jurisdiction may be most advantageous to the discovery needs in the case, counsel should consider the cost-shifting tests of the relevant courts. Guidance for cost-shifting in the federal courts and under the laws of California and New York is set out below.

FEDERAL COURTS

A federal court may apply one of several tests to determine whether cost-shifting is appropriate. For example:

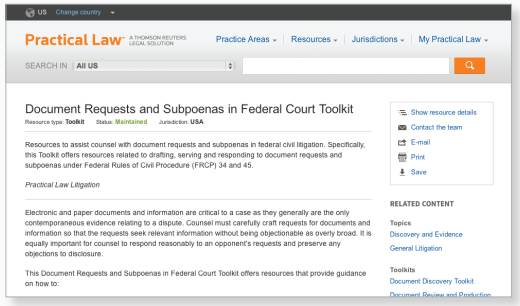
- Some courts follow the approach advocated by the Sedona Conference's 2008 Commentary on Non-Party Production & Rule 45 Subpoenas and consider:
  - the scope of the request;
  - the invasiveness of the request;
  - the need to separate privileged material;
  - the non-party's interest in the litigation;
  - whether the requesting party ultimately prevails;
  - the relative resources of the requesting party and non-party;
  - the reasonableness of the costs sought; and
  - the public importance of the litigation.

  (See, for example, *DeGeer, 755 F. Supp. 2d at 928-29*.)

DOCUMENT REQUESTS AND SUBPOENAS IN FEDERAL COURT TOOLKIT

The Document Requests and Subpoenas in Federal Court Toolkit available on practicallaw.com offers a collection of resources to assist counsel with drafting, serving and responding to document requests and subpoenas under FRCP 34 and 45. It features a range of continuously maintained resources, including:

- Document Requests: Initial Considerations
- Document Requests: Drafting and Serving the Request
- Document Requests: Request for the Production of Documents (RFP)
- Document Requests: What to Expect in Response to an RFP
- Document Requests: Common Problems with an RFP Response
- Subpoenas: Using Subpoenas to Obtain Evidence (Federal)
- Federal Subpoena Checklist



- Other courts have weighed the following factors set out in *Rowe Entertainment Inc. v. The William Morris Agency, Inc.* (*205 F.R.D. 421, 429 (S.D.N.Y. 2002)*):
  - the specificity of the discovery requests;
  - the likelihood of discovering critical information;
  - the availability of the information from other sources;
  - the purposes for which the non-party maintains the requested data;
  - the relative benefit to the requesting party;
  - the total cost associated with production;
  - the relative ability of the requesting party and non-party to control costs and their incentive to do so; and
  - the resources available to the requesting party and non-party.

  (See, for example, *In re Subpoena to Creeden & Assocs., Inc., No. 12-5573, 2012 WL 4580841, at *2 (N.D. Ill. Sept. 28, 2012)*.)
- Courts also have found that the presence of the following factors may balance against cost-shifting:
  - the non-party's interest in the outcome of the case;
  - the non-party's ability to more readily bear the costs; and
  - whether the litigation is of public importance.

  (See, for example, *Dow Chem. Co. v. Reinhard, No. M8-85, 2008 WL 1968302, at *1-2 (S.D.N.Y. Apr. 29, 2008)*.)
- Courts also may evaluate whether the dialogue between the requesting party and non-party was cooperative and collaborative (see, for example, *Apple, 2013 WL 1942163, at *3; DeGeer, 755 F. Supp. 2d at 929*).

CALIFORNIA COURTS

California courts have looked to federal case law to aid in the resolution of e-discovery disputes (see, for example, *Vasquez v. Cal. Sch. of Culinary Arts, Inc., 230 Cal. App. 4th 35, 42-44 (2014)*). Additionally, California's Electronic Discovery Act establishes procedures for a party to obtain discovery of ESI that is in the possession of other parties and non-parties. The Act:

- Requires the requesting party to take reasonable steps to avoid imposing undue burden or expense on the non-party.
- Enables the court to protect non-parties from undue burden or expense resulting from compliance.
- Places the burden on the non-party opposing a subpoena to show that the requested information can be obtained only from a source that is not reasonably accessible because of burden or expense.
- Permits a court to allocate the expenses of discovery if good cause exists for the production of ESI from a source that is not reasonably accessible.
- Requires the non-party to translate any data compilations within the scope of the subpoena into a reasonably usable form at its own reasonable expense.
- Permits a court to limit the scope of e-discovery, even from a source that is reasonably accessible, if:
  - it is possible to obtain the information from another source that is more convenient, less burdensome or less expensive;
  - the discovery sought is unreasonably cumulative or duplicative;
  - the party seeking discovery has had other opportunities to obtain the information sought; or
  - the likely burden or expense of the proposed discovery outweighs the likely benefit.

(*Cal. Civ. Proc. Code § 1985.8(i)*.)

NEW YORK COURTS

Guidance for e-discovery cost-shifting in New York can be found in the following:

- **New York's Civil Practice Law and Rules (CPLR).** Under CPLR 3111 and 3122(d), the requesting party must defray a non-party's reasonable expenses for document production. Courts have discretion to determine the reasonableness of production expenses under the CPLR. For example:
  - the Appellate Division, First Department has held that courts should allocate ESI production costs to the

requesting party (*Tener v. Cremer, 89 A.D.3d 75, 82 (1st Dep't 2011*) (directing the lower court to consider on remand the cost of disruption to normal business operations));

- a supreme court in Nassau County allowed for recovery of attorneys' fees (*Finkelman v. Klaus, No. 5257/05, 2007 WL 4303538, at *6 (Sup. Ct. Nassau Co. Nov. 28, 2007)*); and
- a supreme court in Kings County awarded only the minimum wage for time spent researching and identifying the documents to be produced (*Klein v. Persaud, No. 8007/09, 2009 WL 4894366, at *3 (Sup. Ct. Kings Co. Dec. 21, 2009)*).

- **Case law.** The Appellate Division, First Department applied the following seven-factor test laid out in *Zubulake v. UBS Warburg LLC* (*217 F.R.D. 309, 322 (S.D.N.Y. 2003)* (modifying the *Rowe* factors)) to determine whether cost-shifting was appropriate:
  - the extent to which the requests are specifically tailored to discover relevant information;
  - the availability of the requested information from other sources;
  - the total cost of production, compared to the amount at issue in the case;
  - the total cost of production, compared to the resources available to the requesting party and non-party;
  - the relative ability of the requesting party and non-party to control costs and their incentive to do so;
  - the importance of the issues at stake in the case; and
  - the relative benefit to the requesting party of obtaining the information.

  (*US Bank Nat'l Ass'n v. GreenPoint Mortg. Funding, Inc., 94 A.D.3d 58, 63-64 (1st Dep't 2012)*.)
- **Court rules.** The Rules of the Commercial Division of the New York Supreme Court, for example, include guidelines for e-discovery from non-parties. Under these guidelines, a requesting party should:
  - confer with the non-party about the scope, timing and form of production;
  - seek to reduce the cost and burden of discovery by, among other things, entering into a claw-back agreement and using advanced analytic software; and
  - defray the non-party's reasonable production expenses, which may include fees charged by outside counsel and e-discovery consultants, the cost of disruption to the non-party's normal business operations (if the cost is measurable) and the costs incurred in identifying, collecting, reviewing and producing ESI.

  (*Commercial Division Rule 11-c and Appendix A (22 NYCRR § 202.70(g))*.)

This Checklist is based in part on "Third-Party Discovery in the Electronic Era" by Evan Glassman and Jeffrey A. Novack (New York Law Journal, April 28, 2014).