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Don't Lean on Me: Undue Burden and Cost Issues Complicates Non-Party Electronic Discovery

by *Crista L. Whitman*

The financial burdens, resources and time associated with the production of documents and electronically stored information (ESI) are of widespread concern to attorneys and their clients. These costs are even less palatable when they are being borne by a non-party with little or no stake in the underlying litigation – and the law recognizes this fact. The 2006 amendments to the Federal Rules of Civil Procedure regarding ESI and the related case law carve out important differences between the obligations of parties (Rules 26 and 34) and non-parties (Rule 45).¹

Party status is clearly relevant to questions of fairness and reasonableness in the e-discovery arena, particularly when faced with considerations of undue burden and cost. Rule 45(c) obligates the requesting party to take reasonable steps to avoid placing an undue burden or expense on the non-party. According to the *Sedona Conference Commentary on Non-Party Production & Rule 45 Subpoenas*, courts often employ a balancing test comparing the benefit to the party with the burden on the non-party when analyzing undue burden.

The balancing equation may weigh in favor of the non-party when the requesting party makes duplicative requests for ESI or seeks documents the non-party can show are not reasonably accessible, such as data on back-up tapes. One common example in which the benefit to the party is likely outweighed by the cost to the non-party is when electronic files that were received by or sent from a litigation party are sought from a non-party.²

E-mail production is often expensive due to high storage volumes and technology limitations, which restrict the ability to effectively search and filter data at the point of collection. If the same files are likely in possession of a litigation party and the requesting party fails to show that the ESI production by the party is insufficient, then the balancing test likely tips in favor of the non-party.³ However, non-parties should

TABLE OF CONTENTS

[Don't Lean on Me: Undue Burden and Cost Issues Complicates Non-Party Electronic Discovery](#)

[Document Collection Interviews: Ask the Right Questions](#)

[DSP Blog Post Wins "Pick of the Week" in *LitigationWorld*](#)



Meet DSP

Elizabeth Updike Shares Diverse Professional Insights

Elizabeth Updike has explored the realms of various industries, both outside and inside the field of law, and now brings that diversified professional experience to LeClairRyan.

Elizabeth earned a bachelor's degree in psychology and a minor in industrial and organizational psychology. Following graduation, she began working in the training and development department of a large bank in Roanoke, Virginia. She later transitioned to a human resources position in the commercial and consumer bank divisions, during which time she worked on numerous mergers and acquisitions as well as larger

be aware that the cost protections that Rule 45 puts in place do not automatically protect the responding party from their discovery obligations. Objections based on undue burden and cost must be accompanied by specific evidence.⁴

While it is not always possible for a non-party to entirely avoid discovery obligations based on objections due to undue burden and cost⁵, these considerations may be enough to gain a strategic advantage in negotiations. For example, the requesting party may be ordered to use tools and processes designed to cut discovery costs to avoid an undue burden on a third party. As such, non-parties negotiating a response to a third-party subpoena should strongly advocate for the implementation of search technologies and processes that reasonably limit the scope of discovery and the volume of documents for review.

Typically, these types of decisions occur during the Rule 26(f) meet and confer process. Although the meet and confer requirement does not directly apply to Rule 45, this is the stage in which parties should be taking proactive steps to avoid placing an undue burden on non-parties by carefully ascertaining the scope of discovery that applies to non-parties, and limiting third-party requests, where possible, through litigant discovery.⁶

Cost shifting is another mechanism contemplated under Rule 45(c) for insulating non-parties from undertaking unreasonable expense in response to discovery requests. Some courts examine a list of factors when determining whether to shift the cost of discovery from the responding non-party to the requesting party.⁷ It is difficult to separate the concept of cost-shifting from the general examination of undue burden. Both issues are open to interpretation and further clarification by the courts; however, case law suggests that considerations of undue burden and cost often favor non-parties.

While this should provide non-parties with some level of reassurance, particularly when faced with unreasonably broad and significantly expensive electronic discovery requests in third-party subpoenas, the unspoken rule that non-party respondents should understand how their obligations and defenses differ from those of party respondents remains.

Non-parties to litigation are understandably reluctant to assume the time and financial burdens associated with discovery. Although the law recognizes this fact, there are times when the benefit to the litigation party may outweigh the burden to the non-party. In such instances, the non-party should strongly advocate for cost shifting and the use of search technologies and processes that reasonably limit the scope of discovery and volume of documents for the review.

¹ It is also important to note the similarities between Rules 26 & 34 and Rule 45. The amendments not only carve out a unique and clearly defined space for non-party responses, but they also directly incorporate into Rule 45 critical changes to Rules 26 & 34. Worthy of mention are the subparts

corporate initiatives. Her varied work experience with the bank sparked her interest in the field of labor and employment law.

Elizabeth later left the banking industry to become the director of human resources of a software development company. While employed there, Elizabeth participated in an international merger, which led to a further interest in legal matters. After the merger, she was involved with the integration of the U.S. company and its new international parent. Elizabeth then participated in the creation of a spin-off company and an initial public offering.

Elizabeth pursued her law degree from Regent University and has spent the last eight years working in the fields of litigation and e-discovery. After law school, she worked for a large law firm, where she learned the nuts and bolts of litigation and e-discovery. More specifically, she was exposed to the ever-increasing effect that e-discovery has on litigation and other areas of the law. Having begun her legal career at the onset of the burgeoning e-discovery field, Elizabeth has gained invaluable experience in every aspect of this rapidly changing area of law.

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related to "not reasonably accessible data," inadvertent privilege disclosure and production format, all of which can operate as strategic and practical advantages in non-party discovery.

²See *Phillip M. Adams & Associates, LLC v. Fujitsu Ltd.*, 2010 U.S. Dist. LEXIS 25417 (D. Utah Mar. 17, 2010) (requiring the requesting party to pay the nonparties' cost of complying with the subpoenas issued under Fed. R. Civ. P. 45 in order to protect the nonparties from undue burden or cost).

³*Braxton v. Farmer's Ins. Group*, 209 F.R.D. 651, 653 (N.D. Ala. 2002). See also *Richardson v. Sexual Assault/Spouse Abuse Research Center, Inc.*, 2010 U.S. Dist. LEXIS 117342 (D. Md. Oct. 28, 2010) (finding a subpoena is not a proper means for obtaining documents previously sought through a Rule 34 production request).

⁴See *Auto Club Family Ins. Co. v. Ahner*, 2007 U.S. Dist. Lexis 63809 (E.D. La. Aug. 29, 2007) (finding that despite having no stake in the outcome of the litigation and the Rule 45 financial protections, the obligation to fully respond to the subpoena remained because the nonparty had not met its burden to make "a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements").

⁵Rule 45(c)(2)(B) states that objections are due 14 days after service, unless a later time is noted on the subpoena.

⁶See *Degeer v. Gillis*, "Degeer II", 2010 U.S. Dist. LEXIS 129745 (N.D. Ill. Dec. 8, 2010) (discussing "the importance of candid, meaningful discussion of ESI at the outset of the case, including discovery of ESI from non-parties" and the need for collaboration with nonparties on search terms and custodians).

⁷See *Tessera, Inc. v. Micron Technology, Inc.*, 2006 WL 733498 (N.D. Cal. March 22, 2006) (examining cost shifting by weighing a list of eight factors, including the reasonableness of the costs sought and the non-party's financial interest in the litigation).

[back to top](#)

Document Collection Interviews: Ask the Right Questions

E-discovery professionals use a variety of checklists in their practices, and among the most important checklists are those used during document collection interviews with company employees ("custodians"). By asking the right questions, e-discovery team members are able to accurately identify sources of relevant information.

There are standard questions that most attorneys ask during document collection interviews, including questions pertaining to the custodian's employment and whether the custodian has particular documents. Although these questions are important, they often do not tell the whole story.

While this list certainly is not exhaustive, following are examples of additional questions attorneys may want to ask during a custodian interview. These questions will enable e-discovery teams to gather the information necessary to make informed and defensible decisions regarding data collection.

1. Did you receive the legal hold notice for this matter, and are

you preserving documents that are subject to the hold notice?

This question allows the opportunity to discuss document preservation with the custodian, stress the importance of preservation and remind the custodian of his obligations under the hold notice. The custodian's response to this question also indicates whether the client's legal hold protocol is effective.

2. Do you have the ability to create .PST files?

A .PST file (Personal Storage Table) is a format used to store e-mail messages and calendar events within Microsoft systems such as Outlook. PST files are usually stored on a computer hard drive but could be stored on any number of portable media (see Question #3).

Companies have varying protocols regarding e-mail preservation. While some companies may not have a policy regarding .PST files, companies with enterprise e-mail archiving systems often restrict or limit employees' ability to create .PST files. However, some custodians may have .PST files from before the enterprise system was employed. Also, sometimes employees save .PST files in violation of company policies. In addition to ascertaining if the custodian has .PST files, it is important to know where they are stored for document collection purposes.

3. Do you have relevant information saved on portable media?

Portable media includes CDs, DVDs, external hard drives, floppy disks, and so on. During document collection interviews, e-discovery professionals tend to focus on large data environments such as Exchange servers, structured databases, off-site paper repositories, and individual computers. However, custodians often maintain relevant information on portable media. Identifying information stored on portable media is a critical component of the document collection, review and production process.

4. Do any of your documents contain privileged information such as communications with the legal department or outside counsel?

Identifying privileged documents at the time of collection can help create a more efficient document review process and ensure that privileged documents are not inadvertently produced. If a custodian's documents contain a large volume of privileged information, expedite the review process and have a senior attorney perform a privilege review of these materials.

[back to top](#)

DSP Blog Post Wins "Pick of the Week" in *LitigationWorld*

A recent blog post about e-discovery malpractice, written by LeClairRyan's Dennis Kiker, has been selected as the "Pick of the

Week" by the publishers of *LitigationWorld*, a popular weekly email newsletter.

LitigationWorld first selected Dennis' article as a link in one of its recent newsletters and then voted the article the best of the links for that week. Dennis' article "E-Discovery Malpractice – Probably More Widespread Than Most People Think" appeared in the June 28, 2011 issue of *LitigationWorld*.

[Click here](#) to read Dennis' blog post in The e-Discovery Myth.

[back to top](#)

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