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Nonparty Subpoenas: Why The Requestor Should Pay

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Your client has just been served with a nonparty subpoena seeking broad categories of electronic documents and emails over many years. The mere search, review, and production of such ESI will be costly and time-consuming. The first question many clients ask is, who's paying for this?

As electronic discovery costs continue to rise, the question also becomes one of equity. As courts recognize, "nonparties should not have to subsidize the costs of litigation in which they are not a party"[1] and instead, the party seeking discovery should bear most of the costs.[2] While these principles certainly demonstrate a trend favoring cost sharing (or payment by the requestor) in the subpoena context, case law in this area is an evolving process. Definitive answers as to whether cost sharing is required and what costs should be shared depend on particular circumstances. Is such a fact-intensive analysis even necessary? In some circumstances, the answer appears to be no.

Cost Sharing Under The Federal Rules Of Civil Procedure

Federal Rule 45 requires that "[a] party . . . serving a subpoena . . . take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena." Nothing in Rule 45, however, requires the allocation of costs to the requestor or identifies which costs could or should be borne by the requestor. The federal rules also fail to recognize that the search, collection, and production of even "accessible" ESI is time-consuming and costly.[3] In cases where a nonparty objects to a subpoena as unduly burdensome or expensive, federal courts apply a balancing test to determine whether cost allocation (and the types of costs that should be allocated) is appropriate[4] by examining "(1) whether the nonparty has an interest in the outcome of the case; (2) whether the nonparty can more readily bear the costs; and (3) whether the litigation is of public importance."[5] Courts generally conclude that cost-shifting or allocation to the requestor is appropriate for the "quintessential, innocent, disinterested bystander."[6] In other words, nonparties that have no interest or connection with the underlying litigation will likely recover subpoena-related costs.

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For corporate clients involved with the underlying facts or transaction, satisfying this threshold, however, could prove difficult. Courts frequently require such nonparties to pay for most, if not all, of related subpoena costs[7] based on the notion that nonparties involved in the underlying transactions should have "reasonably anticipated being drawn into subsequent litigation."[8] As one federal court recently concluded, only a "minimal shifting of costs" was warranted because the court determined that the nonparties had "an interest in the outcome of the case . . . the litigation [was] a matter of public importance . . . [and] each party [could] equally bear the cost of production."[9] That court found that shifting a mere 15 percent of the estimated cost of production would render the expense non-significant.

As for which costs are recoverable, while there appears to be a lack of unanimity, most federal courts seem to agree that, at a minimum, disinterested nonparties should not bear production costs.[10] In awarding production costs, and also costs related to the search and collection, a recent decision found that neither nonparty had "any

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interest in the litigation; neither [was] in a better position than [plaintiff] to bear the costs; and the litigation involve[d] a purely private dispute." [11] Citing to *Zubulake,*[12] the court was careful to note that the nonparties should, however, "bear their own costs of reviewing the documents for privilege" since it is "[g]enerally . . . not appropriate to shift such costs because 'the producing party has the exclusive ability to control the cost of reviewing the documents.'"

Mandatory Allocation To The Requestor – The State Court Model

While the federal rules do not explicitly mandate cost-shifting, certain state rules do require shifting of certain types of subpoena-response costs. One of the best examples for the application of mandatory cost-shifting is New York's CPLR 3111 and 3122(d), which provide clear guidance that, at a minimum, reasonable production expenses will be recoverable: "[t]he reasonable production expenses of a nonparty witness shall be defrayed by the party seeking discovery."[13] Courts in New York have interpreted these cost-sharing provisions broadly. In *Finkelman v. Klaus*, while the court confirmed that "reasonable production expenses" of a nonparty are recoverable, the court also opined that while the Practice Commentaries to CPLR 3122 contain no reference to attorneys' fees, "[t]he court would be empowered to direct such a payment, particularly where any substantial right of the nonparty witness is involved and representation by an attorney is needed."[14] The court in *Finkelman* reasoned that "nonparties should not have to subsidize the costs of litigation in which they are not a party and parties should be deterred from engaging in fishing expeditions for marginally relevant documents." A requestor-pays approach will deter unnecessary discovery.

New York's cost-shifting philosophy even extends to a nonparty that had some interest or connection with the underlying litigation. In *In re Maura*, a widow sought documents in connection with a dispute concerning the terms and enforceability of a prenuptial agreement by serving a nonparty law firm with a subpoena seeking documents, records, and information contained on the hard drive of one of its attorneys – the drafter of the disputed agreement. Despite the law firm's connection and interest in the matter, the court held that "[t]he CPLR provides that the party seeking discovery should incur the costs incurred in the production of discovery material."[15]

Benefits Of Mandatory Cost Allocation

While courts expect parties to engage in good faith negotiations as to the allocation of costs in the subpoena context, mandating, at a minimum, the recovery of production costs (like New York's CPLR) makes practical sense on many levels. For one, mandating the shifting of certain costs to the requestor, regardless of the nonparty's interest or relationship with the matter (and without consideration of the nonparty's ability to pay) provides clarity as to the probable costs and consequences associated with issuing and responding to a subpoena. Such a rule should also deter parties from serving unnecessary or overly broad and burdensome requests.[16] Mandating the shifting of certain costs to the requestor will reduce the number of cost-shifting-related litigations, recognize that even the collection of "accessible" ESI from a nonparty will likely result in substantial costs, and is consistent with general principles of equity. Nonparties should not have to foot the bill for discovery in actions where they are not parties. Implementing such a rule in both the federal and state courts will provide consistency, efficiency, and clarity for the entire subpoena process.

1. *See Finkelman v. Klaus*, 17 Misc. 3d 1138(A), 856 N.Y.S.2d 23 (N.Y. Sup. Ct. 2007); *see also Linder v. Calero-Portocarrero*, 183 F.R.D. 314, 322-23 (D.C. Cir. 1998).

2. *See Linder v. Calero-Portocarrero*, 251 F.3d 178, 182 (D.C. Cir. 2001); *see also Phillip M. Adams & Associates, L.L.C. v. Fujitsu Ltd.*, 1:05-CV-64 TS, 2010 WL 1064429 (D. Utah Mar. 18, 2010).

3. *See* Fed. R. Civ. P. 45(e)(D) (which relieves the responding party from providing ESI from sources "not reasonably accessible because of undue burden or cost.")

4. *See United States v. Blue Cross Blue Shield of Michigan*, 10-CV-14155, 2012 WL 4838987 (E.D. Mich. Oct. 11, 2012) ("the court must determine (1) if compliance with the subpoena imposes an expense on the nonparty, and (2) if so, whether that expense is 'significant.'") (citation omitted).

5. *See, e.g, In re Law Firms of McCourts & McGrigor Donald*, M. 19-96 (JSM), 2001 WL 345233 (S.D.N.Y. Apr. 9, 2001); *see also Linder v. Calero-Portocarrero*, 183 F.R.D. 314, 322 (D.C. Cir. 1998).

6. *See In re First American Corp.*, 184 F.R.D. 234, 242 (S.D.N.Y. 1998); *see also Dow Chem. Co. v. Reinhard*, M8-85, 2008 WL 1968302 (S.D.N.Y. 2008).

7. *See, e.g, First American Corp.*, 184 F.R.D. at 243 (nonparty auditors); *JP Morgan Chase Bank v. Winnick*, 03 CIV. 8535, 2006 WL 3164241 (S.D.N.Y. Nov. 2, 2006) (nonparty financial institution had the ability to pay and had an interest in the litigation); *In re Honeywell Int'l, Inc. Sec. Litig.*, 230 F.R.D. 293, 302 (S.D.N.Y. 2003) (nonparty accounting firm).

8. *See Dow Chem. Co. v. Reinhard*, M8-85, 2008 WL 1968302 (S.D.N.Y. 2008).

9. *See United States v. Blue Cross Blue Shield of Michigan*, 10-CV-14155, 2012 WL 4838987 (E.D. Mich. Oct. 11, 2012).

10. *See, e.g., In re Application of the Law Firms of McCourts and McGrigor Donald*, No. M. 19-96 (JSM), 2001 WL 345233 (S.D.N.Y. Apr. 9, 2001).

11. *US Bank Nat. Ass'n v. PHL Variable Ins. Co.*, 12 CIV. 6811 CM JCF, 2012 WL 5395249 (S.D.N.Y. Nov. 5, 2012) (citation omitted).

12. *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 290 (S.D.N.Y. 2003).

13. Similarly, in Texas, "a party requiring production of documents by a nonparty must reimburse the nonparty's reasonable costs of production." *See* Tex. R. Civ. P. 205.3(f).

14. *Finkelman v. Klaus*, 17 Misc. 3d 1138(A), 856 N.Y.S. 2d 23 (Sup 2007). In *Tener v. Cremer*, 89 A.D.3d 75, 82 (1st Dep't 2011), the First Department also directed the lower court to consider whether the CPLR also includes the cost of disruption to the nonparty's business operations.

15. *In re Maura*, 17 Misc. 3d 237, 247, 842 N.Y.S.2d 851, 859 (Sur. 2007).

16. *Linder v. Calero-Portocarrero*, 183 F.R.D. 314, 322-23 (D.D.C. 1998) ("[w]hen nonparties are forced to pay the costs of discovery, the requesting party has no incentive to deter it from engaging in fishing expeditions for marginally relevant material."); *see also Finkelman v. Klaus*, 17 Misc. 3d 1138(A), 856 N.Y.S.2d 23 (Sup 2007).