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The Ballad of the Sad Non-Party:

Practical Guidance for True Non-Parties Handling Documents Subpoenas

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Here's a scary campfire story that in-house counsel recount late at night: "It was a dark and stormy night. There we were, just standing around, minding our own business, and *boom* out of nowhere jumps a Rule 45 subpoena[1], baring its teeth and imposing unbudgeted costs. Eek!"

For some companies, this scary story does indeed come to life, but a proper response need not be a nightmare. For companies that routinely receive non-party document subpoenas, it makes sense to have a repeatable process in place, and we frequently guide clients through the process of establishing such procedures. For those companies that may be receiving one for the first time, here is some general guidance.

1. Fast Action Is Essential.

In most jurisdictions, a non-party recipient of a documents subpoena is entitled to substantial protections from undue burden and expense. But prompt action – usually within 14 days – is vitally important.

A non-party has three options upon receipt of a documents subpoena: object, comply, or move to quash. Objecting, if reasonable grounds are available, optimizes the company's position.

Accordingly, **within no more than 14 days[2] from receipt of a subpoena**, when you are a non-party recipient of a documents subpoena:

- **Review** and evaluate both the subpoena (including the breadth of the materials requested), and your relationship to the parties, as these issues may significantly affect your rights and duties;

- **Consult** with in-house counsel, your IT department, and outside counsel (if there is one assigned for the matter) to evaluate in good faith the anticipated burdens associated with making the requested items available; and

- **Object** in writing to some or all the requested items, with specificity and explanations of the bases for the objections, unless the requests are narrowly tailored and seek readily identifiable and accessible items. If the subpoena seeks "any and all documents" in numerous categories, it may be patently overbroad, and appropriate for a motion to quash, but there is no rush to move to quash; file objections first;

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[1] A subpoena for documents or electronically stored information under Federal Rule of Civil Procedure 45 ("Rule 45"). State law may also allow similar subpoenas, although the details of the rules vary. By a "true non-party" we mean an entity that has no relationship with any party to the litigation from which the subpoena issued.

[2] The objection must be filed by the date for performance if that is less than 14 days from receipt.

- If the analysis of the documents subpoena and associated burdens requires additional time, consider seeking an extension of the time for a response; there is some risk in relying on an agreed-upon extension of time.[3]

- If objecting, also address the form or forms in which electronically stored information ("ESI") is requested.[4]

Once a timely objection is served, the subpoena cannot be enforced except at the direction of the court, upon a duly-noticed motion. Usually, a motion to compel may not be filed without a certification that the moving party has met and conferred in a good faith effort to resolve disputed issues.

2. Work to Narrow Scope & Cover Costs by Using a Meet-and-Confer Process Wisely.

A second beneficial course of action – which can be initiated before the time to object or after an objection, and even in connection with the issuing counsel's plan to move to compel production – is to explore whether good faith meet-and-confer efforts can help narrow the scope of the subpoena, and obtain coverage for your costs of producing materials. If those inquiries are not productive, a timely objection will have shifted the burden to the issuing party.

During a meet-and-confer process, seek to understand what the issuing party *really needs*,[5] and how that is within the permissible scope of discovery (relevant to claims or defenses and proportional to the needs of the case).

Whenever the meet-and-confer occurs, do not stonewall, but in response to issuing counsel's explanation of relevance and proportionality, reciprocally explain the burdens and costs associated with the requested production. Unless those burdens and costs are insubstantial,[6] demand full compensation for the expense incurred to produce information as may be required, whether under a narrowed scope of requests or otherwise.[7] Also seek an agreement that you may return the

[3] There is *some* authority for the proposition that an objection filed after the date indicated by rule may be considered, in unusual circumstances and for good cause shown, such as where the documents subpoena recipient has been in contact with the issuing counsel before the due date. E.g., *Leader Techs., Inc. v. Facebook, Inc*, No. C10-8002, 2010 WL 761296 at *2 (N.D. Cal. Mar. 2, 2010) (not for citation to court) (no bar to considering objections in unusual circumstances for good cause shown; objections orally communicated before deadline); *Nat'l Coal. for Students with Disabilities Educ. & Legal Def. Fund v. Taft*, No. Civ.A. 2:00-CV-1300, 2002 WL 31951263 at *2 (C.D. Ohio Nov. 18, 2002) (counsel for subpoena recipient in contact with counsel for issuing party at all relevant times).

[4] Rule 45(d)(2)(B); Rule 45(e)(1)(B).

[5] *See* Justice John Roberts, *2015 Year-End Report on the Federal Judiciary*, at 7, THE SUPREME COURT OF THE UNITED STATES (2015), https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf ("the pretrial process must provide parties with efficient access to *what is needed to prove a claim or defense*, but eliminate unnecessary or wasteful discovery") (emphasis added).

[6] They could be insubstantial if issuing counsel agrees to a narrowing of scope.

[7] In *In re Gladstone Consulting, Inc.*, Case No. 17-80845, 2018 WL 7820218 at *4 (S.D. Fla. September 21, 2018), the court awarded the non-party more than $36,000, including the costs to host data, while the parties negotiated scope and before the subpoenas were released (due to a settlement of litigation in a different district) because the process the non-party used to retain the information "was known to [the issuing party] from the outset and [it] potentially stood to benefit from it had the production ultimately occurred. Moreover, the Parties met and conferred, and apparently they agreed to move forward with [the non-party's] method pending a ruling on cost-shifting)" *Id*.

documents and ESI to normal lifecycle retention management following production so you do not have to preserve them for longer than you need them for your own purposes.

If the issuing party insists on moving to compel, in addition to a reasoned and principled opposition, there may be some benefit to a cross-motion to quash, particularly where the requested information was complex. Specifically, you may need more ink than is allotted to you in a brief responding to a motion to compel. Use caution, however, because judges faced with too many pages about eDiscovery topics may stop reading, throw up their hands, and split the baby as evenly as possible. If that outcome is to your benefit, write away.

3. Retain the Requested Materials, Pending Resolution of the Scope of any Required Production.

Pending (a) a successful negotiation of a modified scope and production, or (b) resolution of motions before the court, do not destroy requested items. Safeguard and retain them. In *Flatow v. The Islamic Republic of Iran*, 196 F.R.D. 203, 209 (D.D.C. 2000), the court stated that a "recipient of a subpoena has a duty to safeguard documents that are the subject of the request" and expressed "great disappointment" at the Treasury Department's destruction of requested documents. *Id.*[8] What it means to safeguard requested materials will vary with the circumstances.

a. Consider sending a short notice to persons identified in the subpoena.

In most cases, initiating a litigation response plan and issuing legal hold notices will not be necessary. In fact, in some cases, you need do nothing out of the ordinary. For example, if your company can obtain all the material requested from a database source of record that retains all information including changes, no action need be taken.[9] On the other hand, if the requested items exist in a repository that is subject to frequent changes, or are within the sole control of a few persons, notify those responsible for managing the items about the subpoena and the need to retain and protect the materials, because noncompliance with a valid subpoena is punishable by contempt. Rule 45(g). The notice can be simple, informing the select recipients that a subpoena has been received and is being evaluated, and that, until you revert to them, they should retain materials identified in the subpoena. Assuming the subpoena identifies a reasonable number of individuals, speak with them directly to facilitate your assessment of the burdens and costs associated with the requested production and to help frame a possible objection – all within 14 days (maximum) of receiving the subpoena.

You may also consider sending a short note to the counsel that issued the subpoena, advising of when you received the subpoena and that you are evaluating it, and requesting a reasonable extension of the time to object or otherwise respond. *But see* fn.3 above.

[8] In *Flatow* the court declined to impose sanctions either for failing to produce promptly because a timely objection had been filed, or for destroying documents because the court found the destruction was inadvertent at worst. The receipt of a subpoena, however, usually does not trigger implementation of a full preservation protocol. *See* The Sedona Conference, *Commentary on Legal Holds, Second Edition: The Trigger & The Process*, 20 SEDONA CONF. J. 341, 363 (2019) ("Sedona Commentary on Legal Holds, 2d ed.").

[9] *See The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 SEDONA CONF. J. 1, 104 (2018).

b. Consider initiating a legal hold.

There are circumstances in which you, as a non-party recipient of a documents subpoena, should initiate a full legal hold protocol. For instance, doing so it appropriate when – upon evaluating the documents subpoena and surrounding circumstances – it appears reasonably likely that the non-party *itself* will be swept up in litigation. *See* Sedona Commentary on Legal Holds, 2d ed., at 362, n.44, discussing *In re Napster, Inc. Copyright Litig.*, 462 F. Supp. 2d 1060, 1068-69 (N.D. Cal. 2006). Such an analysis will obviously be highly fact-specific, and made on a case-by-case basis. There is no requirement to initiate a full legal hold protocol simply because a subpoena was received.

c. Evaluate whether responsive data is controlled by another party or subject to protection under a contractual duty such as an NDA.

A third possible scenario, requiring still different action is when you, as a non-party recipient of a documents subpoena, have possession of requested items and have a contractual or special relationship with a either (a) another party to the matter who has control over the requested items or (b) a completely unrelated entity to whom your company owes a duty to protect the requested items from disclosure.

In the first instance, it is the other party to the matter who has control over the materials – and not you, the non-party – that has the preservation obligation and should make the production.[10] In those cases, you should inform the party to which the contractual or other duty is owed about the subpoena, and take reasonable steps to preserve the requested items until an agreement can be reached on a course of action – either with the party who controls the items or the requesting party.

In the second instance, the non-party should alert the entity to whom the non-disclosure duty is owed about the subpoena (as is often required in the contractual arrangement) and inform the requesting party that part of its request is subject to independent contractual obligations.

4. <u>If Cost Recovery is Important, Do Not Produce Requested Items Before Obtaining an Agreement from Issuing Counsel or a Court Order.</u>

Rule 45 is designed to protect true non-parties from undue burden and significant expense in complying with subpoenas. *See* Rule 45(d)(1) & 45(d)(2)(b)(ii); 1991 Advisory Comm. Note to Rule 45 (regarding Purposes of Revision, Subdivision (a), and Subdivision (c)). These protections reflect that, while parties to a lawsuit normally bear their own discovery costs, true non-parties are strangers to the litigation and "have no dog in that fight." *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 717 (1st Cir. 1998).[11]

If you are seeking compensation for your efforts, do not produce the requested materials until either you have an agreement for compensation with the issuing party or attorney, or you obtain a

[10] *See The Sedona Conference Commentary on Rule 45 Subpoenas to Non-Parties, Second Edition* (January 2020 Public Comment Version), at pp. 9-10, *available at* https://thesedonaconference.org/publication/Commentary_on_Non-Party_Production_and_Rule_45_Subpoenas ("Sedona Rule 45 Commentary, 2d ed.").

[11] "Although discovery is by definition invasive, parties to a law suit [sic] must accept its travails as a natural concomitant of modern civil litigation. Non-parties have a different set of expectations." *Cusumano v. Microsoft Corp.*, at 717; *see also Nitcsh v. DreamWorks Animation SKG Inc.*, No. 5:14-cv-04062, 2017 WL 930809, at *2 (N.D.

court order. Early production may negate your right to obtain compensation. *See In re: Modern Plastics Corp. v. Dickinson Wright, PLLC*, 890 F.3d 244, 252 (6th Cir. 2018), cert. denied sub nom *New Products Corp. v. Dickinson Wright, PLLC*, 289 U.S. __, 139 S. Ct. 289 (Oct. 1, 2018) and cases cited there.

If you cannot obtain an agreement to shift costs to the requesting party and the issue requires court intervention, you may be able to recover "significant expense resulting from compliance". *See* Rule 45(d)(2)(b)(ii). What constitutes significant expense will vary with the circumstances. In determining whether an expense resulted from compliance, the "touchstone" is whether the attorney fees and other expenses were incurred for the producing party's benefit, as opposed to work that benefited the requesting party. *Steward Health Care Sys. LLC v. Blue Cross & Blue Shield of Rhode Island*, No. 15-272, 2016 WL 8716426, at *4-5 (E.D. Pa. Nov. 4, 2016) (awarding only $4,077.65 of $30,603.55 requested); *Bridgestone Americas, Inc. v. International Business Machines Corporation*, at p. 10, Case No. 1:16-cv-2618 (June 16, 2017 N.D. Ga.) (Alexander Proudfoot Company, Objector) (unreported) ($4,446.12 awarded of $78,778.42 requested).[12]

5. Consider Having a Written Process in Place for Handling Documents Subpoenas.

Finally, to foster consistency in approach and efficiencies, consider establishing a written process and workflow for handling documents subpoenas. This would include at a minimum having a process to ensure that incoming subpoenas are promptly funneled to one (or a few) point persons who can manage a quick review and assessment of the reasonableness of the requests as noted above, and who are knowledgeable about the company's general organization and management of documents and ESI, and thus able to assess likely burdens. How the work flows from there will vary with the size and complexity of the organization and the other issues discussed above.

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Cal. Mar. 9, 2017) (citing *United States v. Columbia Broadcasting Sys., Inc.*, 666 F.2d 364, 371 (9th Cir. 1982) where the court stated, "Nonparty witnesses are powerless to control the scope of litigation and discovery, and should not be forced to subsidize an unreasonable share of the costs of a litigation to which they are not a party.").

[12] For a robust discussion of opportunities for and obstacles to recovering the costs and expenses of complying with a documents subpoena, *see* Sedona Rule 45 Commentary, 2d ed., at pp. 20-40.