

Litigation, Professional Perspective - Considerations & Pitfalls of Non-Party Subpoenas in the Age of ESI, by Elizabeth Marchionni, Esq. and Adam Perlin, Esq., published on Bloomberg Law, 12-2023

Society's move away from hard copy documents and our increasing reliance on purely digital copies has blurred the distinction between electronically stored information (ESI) and other discoverable documents. The loss of this distinction creates special problems for litigators in the context of non-party subpoenas, where courts have required requesting parties to pay for all costs related to ESI, including attorney's fees and data vendor costs. These costs can be prohibitively expensive and, more than protecting a non-party from unreasonable requests, may thwart the liberal discovery rules favored by New York courts, and could result in courts deciding cases without relevant, material information. This article will explain the impact of the modern-day paperless culture on non-party subpoenas and will provide practical advice for today's practitioners seeking ESI via non-party subpoenas.

A Brief History of ESI

Section 3101(a) of the Civil Practice Law and Rules requires the “full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof.” Effective as of 1963, the CPLR echoed the broad approach to discovery ushered in by the Federal Rules nearly 30 years earlier and thereafter embraced by most states.

In 1996, the Judicial Conference launched the Discovery Subcommittee of the Judicial Conference Advisory Committee on Civil Rules to address the emergence of e-discovery. As noted by the Conference at that time, “the real discovery issue is email.” As individuals increasingly relied on email as the primary means of communication, the need sometimes arose for parties to use outside vendors to collect, process, and produce large volumes of emails that could be relevant in a lawsuit.

These ESI vendors typically charge monthly hosting fees based on the size of the data hosted, as well as user fees and other fees associated with collecting and processing the data. Depending on the size of the data and the vendor, ESI-related fees may be very costly and, along with attorney's fees and costs and other cost variables, play a large role in determining a party's ability to pursue litigation.

In 2006, the Conference of Chief Justices issued “Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information” to further grapple with issues related to e-discovery. The Report included a dose of reality: “Most documents today are in digital form. ‘Electronic (or digital) documents’ refers to any information created, stored, or best utilized with computer technology of any sort’ ... There are significant differences, however, between conventional documents and electronic documents – differences in degree, kind, and costs.” Specifically on costs, the Conference noted in the Report that the “cost to responding parties of locating, reviewing, and preparing vast digital files for production is perceived to be much greater than in conventional discovery proceedings.”

While New York state courts have attempted to provide some degree of clarity to e-discovery rules, uncertainty persists. Whereas the Advisory Committee in 1996 recognized that the real discovery issue was email, in the decades since, companies have increasingly moved towards entirely “paperless” systems. Indeed, companies now may keep only minimal hard copy records, and even those hard copies may be reproductions or scanned into a computer, effectively eliminating the once useful distinction between hard copy documents and ESI.

The result has been an explosion of ESI, in both volume and costs. As practitioners attempt to assess the contours of ESI, they contend with ever-larger databases of documents and rising vendor costs. To paraphrase the Advisory Committee, if the real discovery issue in 1996 was email, the real discovery issue in 2023 is that now almost *everything is ESI*.

Effect of Rising Costs

In light of e-discovery's significant costs, the 1996 Judicial Conference adhered to the traditional rule that the producing party typically bears the cost of producing its own ESI, but recommended that state courts adopt the seven-factor test articulated in 2003 by Southern District of New York court Judge Shira Scheindlin in *Zubulake v. UBS Warburg LLC* to evaluate those circumstances where it might be appropriate to shift costs to the requesting party.

The Appellate Division, First Judicial Department followed suit and adopted the *Zubulake* test for parties to a lawsuit in state cases. The *Zubulake* test requires courts to consider the following factors before shifting the costs to the requesting party:

- (1) the extent to which the request is specifically tailored to discover relevant information
- (2) the availability of such information from other sources
- (3) the total cost of production, compared to the amount in controversy
- (4) the total cost of production, compared to the resources available to each party
- (5) the relative ability of each party to control costs and its incentive to do so
- (6) the importance of the issues at stake in the litigation
- (7) the relative benefits to the parties of obtaining the information.

Zubulake v. UBS Warburg LLC, 217 F.R.D. 309 (S.D.N.Y. 2003)

New York state law provides no analog for nonparty subpoenas. Rather, the CPLR provides, in relevant part, that “the reasonable production of expenses of a non-party witness shall be defrayed by the party seeking discovery.” If a court finds that a non-party is required to provide the information sought, including ESI, the court will “allocate the costs of this production to [the party seeking the information].” See *Tener v. Cremer*, 89 A.D.3d 75, 82, 931 N.Y.S.2d 552 (1st Dep’t 2011).

Courts note that in assessing costs, they will consider “disruption to [the non-party’s] business operations” and the party’s delay in seeking the discovery. See *Tener*, 89 A.D.3d at 82. Moreover, while the CPLR does not define “reasonable production expenses,” courts have held that production costs can include the costs for locating documents and producing documents. See *Zimmerman v. 410-57 Corp.*, 2023 N.Y. Slip Op. 31920(U), at *4 (Sup. Ct. N.Y. County 2023) (collecting cases). Section VII(B) of Appendix A to the Commercial Division Guidelines for Discovery of Electronically Stored Information clarifies that “reasonable production expenses” for ESI may include “fees charged by outside counsel and e-discovery consultants.” 22 NYCRR 202.70.

The combination of New York’s liberal discovery and the cost-shifting rule of CPLR 3122(d) can have particularly expensive consequences in the realm of non-party discovery. For example, take a construction matter where a subcontractor sues for damages incurred as a result of impacts to the project schedule and other changes to the job. To establish its claim, the subcontractor needs access to the general contractor’s project files. If the general contractor refuses to provide the information, the subcontractor may be tempted to obtain the information elsewhere via subpoena, including from the owner of the project or other representatives with access to general project information.

In the age before ESI, project files like those sought by the subcontractor would have been kept in hard copy format in a file cabinet or office. The subpoenaed party would merely have pulled the files and produced them. But now, many of these documents are electronically generated or else scanned and stored electronically, therefore becoming part of “ESI.” With project management being digitized completely through cloud-based programming, almost all project records may be digital and stored across various platforms and locations. If a requesting party seeks “any and all documents” pertaining to a specific issue, a non-party may simply conduct a keyword search of its emails and network drives, which could return a multitude of irrelevant documents that now need to be reviewed by the non-party’s attorney.

Exacerbating matters is the fact that the non-party’s records may be disorganized or scattered across various digital locations, servers, or devices. The consequence of a non-party’s poor digital recordkeeping will now be borne by the requesting party. Under the current

framework, the requesting party would pay not only the costs of production, but also the fees for attorneys to review the non-party's files for relevancy and privilege, as well as any ESI vendor costs for the owner to locate, collect, host, and process the data. The result is a pyrrhic victory for the requesting party who, now in possession of the information it needs, could find that the cost to obtain the information surpasses the value of the lawsuit.

As the above example illustrates, practitioners unaware of these rules can be placed in the untenable position of obtaining all the information sought only to confront an exorbitant bill they had not expected, particularly given the rising costs of ESI. Even worse, parties may be forced to make strategic litigation decisions to forego non-party discovery based on the risk associated with unbudgeted costs.

*Indeed, even courts outside the Commercial Division have required requesting parties to bear non-parties' costs. For example, in the case of *The Walt Disney Co. v. Peerenboom*, the court permitted the non-party to recoup attorney's fees and data-vendor costs because, "[w]hile specific reference to attorneys' fees or data-vendor costs is omitted from [the CPLR], the court's review of the case law did not reveal any prohibition on the allocation of such fees or costs." See, 2019 N.Y. Slip Op. 30181(U) (Trial Order), at *5 (Sup. Ct. N.Y. County 2019). Accordingly, every practitioner must be aware of the rule and should assess its impact on a case-by-case basis.*

Practical Considerations

For practitioners navigating the current landscape, note that courts will consider the following factors when allocating production costs between parties and non-parties:

- The cost of disruption to the non-party's business caused by responding to the subpoena, including the accessibility and volume of the information sought.
- Any delay in the party's request for discovery from the non-party.

Courts have held the following costs are "reasonable production expenses" for which requesting parties should prepare to reimburse non-parties:

- Vendor costs, including production costs, and which may also include data collection fees, monthly hosting fees, user fees, and vendor time to review ESI protocols or otherwise assist with discovery.
- Attorney's fees, which many include reasonable attorney's fees to review client documents for relevance and privilege; but do not include attorney's fees for conferences, hearings, or motions.

Given the stated aim of the CPLR and the preference of courts to receive all relevant, material information, it is recommended that attorneys representing parties seeking discovery from non-parties additionally ask the court to consider a modified version of the *Zubulake* factors. While courts have not yet explicitly adopted the *Zubulake* factors in the context of non-party subpoenas, practitioners may ask the courts to consider them to determine whether it is appropriate for the requesting party to bear the full costs of a non-party's production. The recommended factors are as follows:

- *The extent to which the request is specifically tailored to discover relevant information.*
- *The availability of such information from other sources.*
- *The total cost of production, compared to the resources available to each party.*
- *The relative ability of each party to control costs and its incentive to do so.*
- *The importance of the issues at stake in the litigation.*

The current rules that shift the brunt of non-party subpoena costs onto the requesting party may have an unintended effect undesirable to courts and practitioners alike. These rules may render parties more hesitant to request from non-parties information that nonetheless may be critical to a party's ability to prosecute or defend a case. This not only thwarts the broad discovery intended by the CPLR, but also deprives the court of information that would greatly enhance its ability "to ascertain the truth and accelerate disposition of suits." Allen v. Crowell-Collier Pub. Co., 21 N.Y.2d 403, 408 (1968). It is therefore imperative that practitioners understand the costs associated with non-party subpoenas, and adjust their litigation strategies accordingly.

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