Guidance from Sedona and Recent Case Law

By Mark S. Sidoti, Mara E. Zazzali-Hogan and Stephen J. Finley Jr.

The essential theme has been whether the attorneys and parties on both sides of a subpoena exhibited a spirit of cooperation and reasonableness.

E-Discovery Under FRCP 45

Two famous quotes can summarize subpoena practice as it relates to electronically stored information (ESI) under the Federal Rules of Civil Procedure: “You can’t always get what you want,” and “You gotta give a little to get a little.”

In other words, a party seeking ESI from a nonparty must recognize that courts tend to be more amenable to easing a nonparty’s burdens in electronic discovery practice than they are to the litigating parties by, for example, permitting cost shifting or narrowing the scope of a request. At the same time, a nonparty receiving a subpoena must also appreciate that despite the slightly preferential treatment of nonparties in the discovery arena, courts generally favor allowing discovery of some relevant ESI even if it burdens a nonparty.

Some of the 2006 amendments to the Federal Rules of Civil Procedure pertained to ESI. The amended Federal Rule 45 specifically addressed discovery of ESI from nonparties through subpoenas and expressly authorized parties to obtain ESI from nonparties. Since the amendments became effective, the handful of reported cases addressing ESI under Federal Rule 45 have illustrated that nonparties can become involved in lengthy, expensive and sometimes onerous productions in responding to subpoenas. Courts appear generally aware of the costs that nonparties may bear in responding to subpoenas seeking ESI, and they seek to strike a proper balance between ensuring litigants’ access to relevant ESI and imposing costs on nonparties.

Drawing in part on the work of the Sedona Conference, this article examines the provisions of amended Federal Rule 45, discusses the experiences of attorneys and parties of subpoenas under the amended rule, reviews relevant precedent resolving disputes surrounding subpoenas seeking ESI under the rule, and proposes some best practices for preparing and responding to subpoenas requesting ESI.

Mark S. Sidoti, chair of DRI’s Electronic Discovery Committee, is a director at Gibbons P.C. in the firm’s New York City office. He heads the firm’s E-Discovery Task Force and frequently publishes and lectures on e-discovery and information management best practices. He is a member of the Sedona Conference Working Group on Electronic Document Retention and Production and numerous other e-discovery organizations. Mara E. Zazzali-Hogan is a director in the firm’s Newark, New Jersey, headquarters. Stephen J. Finley, Jr., is an associate in the Philadelphia office of Gibbons P.C. The authors are all members of the Gibbons E-Discovery Task Force.
The 2006 Amendments to Federal Rule 45

While the amended Federal Rule 45 specifically authorizes discovery of ESI from nonparties, its dictates do differ from Federal Rule of Civil Procedure 34’s directives governing discovery of ESI from a party. Federal Rule 45’s advisory committee note to the amendment makes clear that the rule as amended relies upon the definition of ESI contained in Federal Rule 34(b) and imports Federal Rule 34’s form requirements as exemplified by the following: “Rule 45(a)(1) is amended to provide that the subpoena can designate a form or forms for production of electronic data. Rule 45(c)(2) is amended, like Rule 34(b), to authorize the person served with a subpoena to object to the requested form or forms.” Fed. R. Civ. P. 45 advisory committee note. Interestingly, while Federal Rule 45 was amended to include Federal Rule 34’s form requirements, the amended rule does not refer to the manner of production.

Further, the advisory committee notes to the Federal Rule 45 amendment specifically indicate that a subpoenaed party ordinarily will not have to produce ESI in more than one format:

In addition, as under Rule 34(b), Rule 45(d)(1)(B) is amended to provide that if the subpoena does not specify the form or forms for electronically stored information, the person served with the subpoena must produce electronically stored information in a form or forms in which it is usually maintained or in a form or forms that are reasonably usable. Rule 45(d)(1)(C) is added to provide that the person producing electronically stored information should not have to produce the same information in more than one form unless so ordered by the court for good cause.

Id.

The amendments to Rule 34 added section (d)(1)(D) to protect nonparties from having to produce ESI that is not reasonably accessible, absent a court order directing production for “good cause, considering the limitations of Rule 26(b)(2)(C), on terms that protect a nonparty against significant expense.” Fed. R. Civ. P. 45 advisory committee note. This limitation offers specific protection to nonparties faced with subpoenas requesting data that, while in their possession, is not readily accessible and the production of which would be unduly costly. Of course, litigating whether documents are “readily accessible” can be an expensive, drawn out process, as the amended rules do not define the term.

The amendments left in place the non-party protections available before, including the basis to object to subpoenas that are vague or overly broad, seek confidential or privileged information, or violate any rule against discovery.

Experience of Parties and Attorneys Regarding Nonparty Subpoenas


Before outlining the major issues evolving in nonparty subpoena practice and suggesting best practices, the Sedona Conference commentary authors had surveyed lawyers and parties on their experience with ESI and subpoena practice. As noted in the commentary, the results provided “interesting insight” but “neither sample size nor the response rate was sufficient to draw any scientific conclusions.” Blakely et al., supra, at 9. In the survey, the Sedona Conference sought information about four issues: undue costs, production format, cost shifting or cost sharing, and conclusion of non-party obligations. The survey also solicited “practice pointers.”

Undue Costs

Despite the purpose and principles of Federal Rule 45, 73 percent of the survey respondents “witnessed” nonparties experiencing undue burdens or incurring undue costs when collecting, preserving, and producing information responsive to a Federal Rule 45 subpoena. See Blakely et al., supra, at 1–10. The survey results demonstrated that courts were not only unsympathetic to the cost argument, particularly when raised by a large corporation, but that a nonparty prevailed less than one-third of the time when filing a motion to quash or a motion to limit an e-discovery request. The survey results also suggested that a nonparty can best position itself to resolve a dispute by narrowing the scope of a discovery request, such as by asking a court to limit the number of custodians it must search or narrowing the relevant time period. Id. Another successful tactic based on the survey results is establishing that the litigants requesting ESI already had access to it, or that they could obtain it from a less expensive source.

Production Format

The survey results were unclear about whether parties were availing themselves of the Rule 45 amendment that allows them to specify a production format. According to the survey, when a litigant requested a specific format, the production was requested in “native electronic format” half of the time; in “TIFF/PDF (with searchable text),” with most of the TIFF/PDF requests including metadata, a little more than one-third of the time; and in paper format approximately one-fifth of the time. Blakely et al., supra, at 10. Although nonparties often objected to the format request, the nonparty and party were able to meet and confer and ultimately resolve the dispute without seeking judicial intervention. The majority of survey respondents indicated that they had not asserted or even heard of ar-
Arguments based on the grounds that ESI was “not reasonably accessible because of undue burden or cost,” adding that these disagreements were generally resolved before commencement of motion practice. See id.

Cost Shifting or Cost Sharing

Although the issue of cost shifting or cost sharing arose for more than half the respondents to the survey, none actually litigated the issue because they generally were able to resolve it with the ESI-seeking party. Frequently the party requesting ESI would offer to assume the production costs.

Conclusion of Nonparty Obligations

Interestingly, more than 70 percent of the survey respondents informed the authors of the Sedona Conference commentary that it was difficult to discern when the discovery issues were resolved and when their duties under a Federal Rule 45 subpoena ended. Id.

Nonparty Discovery Obligations

In analyzing Federal Rule 45, the Sedona Conference commentary highlighted four issues that bear on ESI generally and are relevant in the nonparty context—undue burden or cost; preservation; cost shifting; and possession, custody, or control. Id. at 2–4. First, the authors noted that the amended rule reflected courts’ recognition that when a nonparty receives a discovery-related subpoena, a court must accord special consideration to whether the request unfairly burdens that witness. Id. at 2. That principle is based upon the recognition that someone who is not a party to a litigation should not have to finance it if he or she does not have a stake in the results. Consequently, a nonparty has a right to timely object to a request for ESI, which then shifts the burden to the party seeking that information to file a motion to compel production, preferably after good-faith meet and confer attempts. Id.

Undue Burden or Cost

Historically, courts have held that a court could not compel a nonparty to honor a subpoena if the party seeking the information failed to show that the production already received from parties in the case was insufficient. See, e.g., Braxton v. Farmer’s Ins. Group, 209 F.R.D. 651, 653 (N.D. Ala. 2002). Similarly, even if a party offers to assume production costs, some courts may grant a motion to quash if a subpoena requested inaccessible data contained on backup tapes on the ground that a nonparty’s burden of restoring backup tapes constitutes an undue burden. See, e.g., United States v. Amerigroup Ill., Inc., No. 02-C-6074, 2005 WL 3111972, at *2 (N.D. Ill. Oct. 21, 2005) (granting a motion to quash granted when a subpoena sought data from backup tapes despite an offer to bear costs by requesting party). For example, in Natural Gas Commodity Litig., a nonparty objected to a request to produce significant amounts of “electronic legacy data,” and the court ordered the party seeking the information to negotiate a search and sampling protocol with the nonparty to ease the burden of the request. 235 F.R.D. 199, 220 (S.D.N.Y. 2005).

Without a doubt, burden and cost go hand-in-hand in the discovery of ESI. In Whitlow v. Martin, 263 F.R.D. 507, 508–11 (C.D. Ill. 2009), one of a handful of opinions dealing with discovery of ESI under Federal Rule 45, the court faced objections to a subpoena by the Illinois Secretary of Transportation, a nonparty target of the plaintiffs’ subpoena. The underlying suit concerned allegations of improper hiring and firing by former Illinois Governor Rod Blagojevich. The subpoena sought a wide range of documents related to job descriptions and salary information for employees hired over a one-year period. Id. at 509. The data sought was maintained on two Microsoft Exchange Servers, over 200 servers located at the Illinois Department of Transportation’s data center, approximately 50 servers maintained at regional offices throughout Illinois, and on backup tapes, which the secretary claimed the department would have to restore before it could retrieve any of the data. Id. The secretary raised a number of objections, contendong that the information that the plaintiffs sought was confidential, the requests vague and overly broad, and some of the information sought was not reasonably accessible, which made the request unduly burdensome. Id. at 511–12.

The court looked to the United States Court of Appeals for the Seventh Circuit’s standard for resolving disputes about Federal Rule 45 subpoena practice applying a “relative burden” test. Id. at 512. Despite the secretary’s burden arguments, the court found that the information requested held significant relevance and warranted production. Specifically, the court ordered the department to produce personnel records, salary data, and the sponsors of over 2,000 employees hired during the germane time period because the information was central to the plaintiffs’ claims. Id. at 513.

In DeGeer v. Gillis, No. 09C6974, 2010 U.S. Dist. Lexis 129745 (N.D. Ill. Dec. 8, 2010), United States Magistrate Judge Nan R. Nolan provided an extremely detailed review of the dispute before her. Nonparty Huron Consulting Services LLC was the former employer of all of the parties in the suit, which involved breach of contract claims. Id. at *2. The defendants served Huron with a broad subpoena seeking documents in 15 separate categories. Huron sought to limit its response, arguing that the scope of the proposed search was vague and that completing the production would require review of approximately 330 backup tapes. Id. at *7–*8.

A lengthy meet and confer ensued. The defendants’ chief complaint was that Huron was unwilling to disclose the search terms it used to initially gather data. Id. at *8. Huron, in turn, asked the defendants to propose search terms while declining to fully disclose the identity of the custodians searched. Huron also insisted that due to the cost of searching and the time involved in arranging the production, Huron would need an outside vendor to handle further
ESI searches, and the defendants should bear all associated costs. *Id.* at *9–*12.

To resolve the dispute, Judge Nolan considered Federal Rule 45 and the Sedona Conference's commentaries on ESI. *Id.* at *20–*22. She admonished the parties for not addressing how to obtain ESI from Huron during the scheduling conference and faulted the defendants and Huron for their conduct during their meet and confer efforts. *Id.* at *23–*33. Judge Nolan meticulously examined individual custodians whose ESI Huron searched and she evaluated the additional search terms proposed by the defendants. She concluded that the search terms would not yield additional results and ordered the parties to engage in a meaningful, in-person, meet and confer effort to resolve the majority of the disputes raised in the motion. *Id.* at *36–*37.

Preservation

Although nonparties are generally granted some protection related to ESI discovery, that protection is limited when they have a duty to preserve evidence due to a contract or some other special relationship. See, *Blakely et al.*, at 3. Absent those circumstances, the scope and duration of a third party’s preservation obligation, however, is not always clear. For example, as pointed out in the Sedona Conference commentary, some courts impose the burden on a *party* to ensure that a nonparty preserves the evidence while other courts impose a legal duty on the *nonparty* to preserve the evidence. *Id.*

As for the duration of the preservation obligation, the Sedona Conference commentary noted that generally, a nonparty is not required to continue to preserve information after engaging in reasonable efforts to produce responsive information. However, where a nonparty is on notice that it may be joined in a litigation, the nonparty must ensure that in addition to preserving materials related to the subpoena, it must also preserve materials that could be responsive within “the potential broader scope of the proceeding.” *Id.* At the same time, citing *In re Napster, Inc. Copyright Litig.*, No. CMDL-00-1369 MHP, 2006 WL 3050864, at *6 (N.D. Cal. Oct. 25, 2006), the Sedona Conference commentary concluded that when a nonparty is served and has complied with a subpoena, those actions insufficiently constitute notice of future litigation.

Cost Shifting

The Sedona Conference commentary also noted that to alleviate the burden on a nonparty, courts have discretion under Federal Rule 45 to limit a production, shift part or all of the costs to the party making the request, or both, which can resolve a dispute in which a nonparty argues that a discovery request is unduly burdensome. *Blakely et al.*, at 3. Courts do not have a specific formula, however, for making such a determination. Rather, courts must consider the nature and scope of a discovery request and the depth of its invasiveness; what the nonparty will need to do before producing such information—for example, engage in a privilege review; whether the nonparty has any financial interest in the litigation; who ultimately prevails; the relative resources of the party and the nonparty; whether the costs sought are reasonable; and the “public importance of the litigation.” *Id.* at *3–*4. See, e.g., *Tessera, Inc. v. Micron Tech., Inc.*, No. C06-80024 MISC-JW, 2006 WL 733498, at *10 (N.D. Cal. Mar. 22, 2006). The Sedona Conference commentary highlighted that the Federal Rules of Civil Procedure do not specifically have a provision that requires a party and a nonparty to meet and confer before serving a subpoena or engaging in motion practice relating to one. *Blakely et al.*, *supra*, at 4. As discussed in *DeGeer*, however, it is recommended that a meet and confer occur, at the very least, before filing motions. *DeGeer*, 2010 U.S. Dist. Lexis 129745, at *2.

As mentioned, the possibility that a nonparty may become joined to a litigation may trigger additional obligations to preserve and produce ESI. In *Universal Del., Inc. v. Comdata Corp.*, No. 01-1078, 2010 U.S. Dist. Lexis 32158 (E.D. Pa. Mar. 31, 2010), United States Magistrate Judge Henry S. Perkin resolved a dispute between the plaintiff and the nonparty Ceridian Corporation. The plaintiff’s subpoena sought ESI from 5 custodians whose data was maintained on backup tapes and 21 custodians whose data was maintained on active databases. *Id.* at *4–*8. Following a lengthy meet and confer process, the plaintiff agreed to limit the production to data from active databases and from a backup database maintained by Ceridian’s outside e-discovery vendor. The parties further agreed to employ 17 search terms and stipulation of dismissal, had an “interest in the outcome” of the litigation and was not a disinterested third party. *Id.*

In opposing the motion to compel, Ceridian argued that it had already spent approximately *$100,000* to comply with the plaintiff’s subpoena and that anticipated costs of complying with the additional requests would approach *$1 million*. *Id.* at *12–*14. Ceridian stated that the database being preserved by its vendor had been prepared for an unrelated matter and was only being maintained to ensure compliance with the plaintiff’s subpoena, at a cost of over *$8,000* per month.

The effective meet and confer efforts between the plaintiff and Ceridian, which included participation of Ceridian’s ESI vendor, won the praise of the court. *Id.* at *12–*20. The court determined that creation of a separate database by Ceridian’s ESI vendor was the appropriate step, and cost sharing was appropriate. Central to the court’s holding was that the parties had worked to narrow the scope of the requests,
The possibility that a nonparty may become joined to a litigation may trigger additional obligations to preserve and produce ESI.

court that the cost of complying with the subpoena already exceeded $130,000 and had resulted in the production of approximately 40,000 pages of documents. DeGeer, 2010 U.S. Dist. Lexis, at *2–*8. In determining that some cost shifting was appropriate to cover the cost of Huron’s further response, Judge Nolan cited the parties’ failure to cooperate, including Huron’s failure to specify custodians targeted and search terms used, and the defendant’s failure to respond to Huron’s request for search terms. Id. at *22–*37. Ultimately, the court ruled that the defendants and Huron should share the cost of future production of certain data, but Huron should bear the cost for recovery of certain data that was deleted.

Possession, Custody, or Control

Nonparties face challenges similar to those faced by parties when they are served with discovery requests that seek specific responsive information that, while not directly in their physical possession, may be considered within the nonparty’s “possession, custody or control.” As noted in the Sedona Conference commentary, it can trigger control and privacy issues for a nonparty when a party seeks information from an Internet service provider such as AOL or Yahoo, or a business or social networking site, such as Facebook or LinkedIn. Blakely et al., supra, at 4. Likewise, a subpoena may raise issues regarding contractual obligations, ownership issues, and international data protections.

In re Subpoena Duce Decum to AOL, Inc., 550 F. Supp. 2d 606,609 (E.D. Va. 2008), concerned a subpoena served on AOL for the e-mails of its subscribers, Cori and Kerri Rigby. The Rigbys worked as insurance adjustors for a contractor hired by State Farm, a defendant in the underlying fraud litigation pending in the Southern District of Mississippi. Id. at 606–08. State Farm’s subpoena sought production of e-mails from a six-week period. A magistrate judge quashed the subpoena and State Farm challenged that ruling.

The district judge found that State Farm’s subpoena was properly quashed, noting that the Federal Privacy Act precluded the discovery of the e-mails. Id. at 609. The court further noted that private parties and “governmental entities are prohibited from using Rule 45 civil discovery subpoenas to circumvent the Privacy Act’s protections.” Id. at 611; see also Crispin v. Christian Audigier, Inc., 717 F. Supp. 2d 965 (C.D. Cal. 2010) (detailing discovery protections afforded parties and non-parties under the Stored Communications Act).

Best Practices

The Sedona Conference commentary articulated practice pointers derived from the survey results and best practices for handling ESI under Fed. R. Civ. P. 45, which we have further expanded below based upon subsequent case law. Blakely et al., supra, at 4–8. The clear message from the Sedona Conference commentary and case law is that both a requesting and the responding party must act reasonably and in good faith when dealing with subpoenas for ESI.

Best Practices for a Party Seeking ESI

We have five specific suggestions for a party seeking ESI.

Raise Potential Third-Party Discovery Issues at the Federal Rule of Civil Procedure 16 Conference

A party seeking discovery should raise any potential third-party discovery issues—particularly related to ESI—as early in the litigation as possible. Often, a court can assist in defining the scope and format of third-party discovery. Blakely et al., supra, at 4.

Narrowly Tailor an ESI Request to a Nonparty

Keeping in mind the fundamental principle that a litigation must not unnecessarily burden a third party if it does not have a financial stake in the outcome, narrowly tailor requests for ESI, restricting a request to the relevant time period, relevant subject matter, and, to the extent possible, relevant custodians. A party seeking discovery should also always specify the form of production, as it is entitled to under Federal Rule 45, or it risks production in a less than ideal format chosen by the third party. Blakely et al., supra, at 10–11.

Follow Up Promptly with a Nonparty

Shortly after serving a subpoena, a party seeking discovery of ESI should follow up with the nonparty. Almost every subpoena recipient views compliance with a subpoena as a significant inconvenience, particularly when the recipient does not have a stake in how the litigation is ultimately resolved. Early, effective discussions can forestall or eliminate the need for judicial intervention and delays in production. For example, cooperate by jointly selecting search terms.

Minimize a Nonparty’s Burden of Related Administrative Tasks

A party has many ways to facilitate a nonparty’s production. For example, if a requesting party needs to have ESI authenticated, the requesting party can provide copies of what it needs authenticated and produced as an original by the nonparty to ease the nonparty’s search for the specific information. Similarly, if a requesting party becomes aware of privacy issues, the requesting party might offer a confidentiality agreement for the nonparty’s benefit.

Assume Some or All of the Costs Associated with Production

Although the Sedona Conference survey results on nonparty subpoenas indicated that courts are not always sympathetic to arguments regarding cost and burden, Federal Rule 45 permits a subpoenaed party
FRCP 45, from page 12
to object if the discovery “is not reasonably accessible because of undue burden or cost.” Fed. R. Civ. P. 45(d)(1)(D). If feasible, one way to deter or counter such an argument is to offer to assume all or part of the costs of production. A court will almost certainly view this favorably if motion practice occurs.

Best Practices for a Subpoenaed Party
We have five specific recommendations for a subpoenaed party.

Meet with Your IT Professionals and Appropriate Administrative Personnel
Upon receiving a subpoena, a nonparty should contemplate sending out a litigation hold notice. Counsel for the nonparty client should also meet with the client’s IT department and the appropriate administrative personnel, which may include in-house counsel or members of a litigation response committee, when contemplating how best to respond to a subpoena and whether to issue a litigation hold. A subpoena recipient should clearly understand what the requesting party seeks and the obligations of a nonparty under the federal rules. In-house resources, in turn, can educate counsel on what ESI is available, how to obtain it, and the most efficient way to manage the production.

Confer with the Party Serving the Subpoena
Either before or after conferring with in-house personnel, a subpoena recipient should speak with the attorney who served the subpoena to confirm the scope of the request and begin to negotiate the terms of production. This early phase of the proceedings is the optimal time for a responding party to educate the requesting party about the scope of the relevant ESI that is reasonably accessible and the ideal form of production. A responding party should attempt to come to agreement with the requesting party on search terms if possible. The more a subpoenaed party can show that it genuinely met in good faith with the requesting party to resolve differences, the more credibility it will have if relief is sought from the court.

Raise Specific Objections
When a subpoena appears overly broad, a recipient or its counsel should explain how it can be more narrowly tailored. This entails more than simply objecting to a subpoena as vague or overly broad. If meet and confer efforts are not successful, a subpoenaed party can advise a court of those good-faith efforts to limit the scope by, for example, limiting the custodians or specifying a different form of production. Similarly, if information is “not reasonably accessible” because of undue burden or cost, a subpoena respondent should certainly have concrete evidence to support that argument in the form of affidavits from document custodians and cost estimates from outside vendors.

Offer to Conduct a Sampling
If a subpoena appears to be a classic “fishing expedition” or is overly broad, a respondent might offer to conduct a sampling rather than a full review of the purportedly relevant data. This idea is suggested in the 2006 advisory committee note to Federal Rule 45 and in the Sedona Conference commentary. Offering this solution lends credibility to an overbreadth objection while offering a proactive step toward compliance. If nothing else, this approach will stand a respondent in good stead with a court.

Request Cost Shifting
Because courts are inconsistently sensitive or responsive to undue cost as the basis of an objection to a subpoena, when appropriate, a subpoena recipient should request early on and in writing that the requesting party assume the costs, and a responding party should obtain detailed cost estimates for complying with a subpoena as drafted. This will lay the groundwork for a future application to a court and will improve a responding party’s chances of obtaining at least partial shifting of compliance costs.

Conclusion
As with e-discovery practice generally, the essential theme that has evolved with amended Federal Rule of Civil Procedure 45 and ESI has been whether the attorneys and parties on both sides of a subpoena exhibited a spirit of cooperation and reasonableness. Reasonableness and cooperation require attorneys and key players involved in a litigation—parties and nonparties alike—to become educated about the ESI sought, their information technology and document management infrastructures, the forms in which they maintain ESI, and all related costs. Amended Rule 45 and the Sedona Conference’s work, along with some recent decisions, provide readily available and useful guidance in this process.