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Strategies for a Coordinated Response to Rule 45 Third Party Subpoenas

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Even with the explosion of electronically stored information (ESI) being exchanged by companies now facing litigation, it seems that certain litigants are continuously looking for additional methods by which they can obtain even more data during the discovery process.[1] This includes seeking documents from third parties via subpoenas duces tecum (subpoenas for written information) pursuant to **Federal Rule of Civil Procedure 45**. Third-party discovery can be a heavy and unwelcome burden and expense, as well as a strain on the business relationship between the third party (the recipient of the subpoena) and the party-company (the party to the litigation, but not to the subpoena).

The party-company will often have a strong interest in monitoring or objecting to discovery served on third parties who may be business partners, public-relations firms, vendors, suppliers, or former employees. **Rule 45(b)(1)** recognizes this interest by requiring that the issuing party notify all parties to litigation before a subpoena is served on the third party. Lack of prior notice alone is grounds for invalidating the subpoena.

But as the party-company, how do you go about monitoring or objecting to opposing counsel gathering information about your company from a third party? Rule 45 explicitly allows for "persons affected by the subpoena" to move to quash or modify the subpoena on grounds of privilege or confidentiality. **Rules 26(b)(1)** and **(b)(2)**, read along with Rule 45, allow the party-company to object in writing to a subpoena that exceeds certain limitations in much the same way that the party-company would object to direct written discovery.

Of course, the third party can also serve a motion to quash or written objections to the subpoena. It should also be noted that the third party is able to make objections not available to the party-company, such as lack of jurisdiction, undue expense, and inaccessibility of ESI. The motion to quash does have the potential to stop the subpoena definitively, rather than merely delay it indefinitely–which is all written objections can do in certain instances. But the bases for a motion to quash are generally limited to those found in **Rule 45(c)(3)**.

If you do not have an adequate basis for a motion to quash under Rule 45(c)(3), you can turn to written objections. While the bases for a motion to quash are limited, the bases for objection are numerous and confined only by the circumstances of your particular situation.

The Federal Rules of Civil Procedure allow both the party-company and the third party to submit written objections to a third-party subpoena. What will be the effect of objecting to the subpoena? If you are the party-company, you may succeed in preserving your rights as to the documents and ESI produced by the third party (e.g., claims of attorney-client privilege, confidentiality, or trade secret). But if the third party lodges objections, the process effectively stops and the burden shifts to the issuing party to move to compel or to propose modifications to the subpoena.

As a starting point for potential objections (for both the third party and the party-company), look carefully for issues on the face of the subpoena. Often the issuing party has neglected to complete all the steps necessary for a valid subpoena. The following questions are merely the tip of the iceberg when analyzing the validity of a subpoena on behalf of either the party-company or the third party:

- Does the subpoena specifically list the documents to be produced (**Rule 45(a)(1)(iii)**)?
- Did you receive the notice required to be given to all parties to the litigation before service on the third party (**Rule 45(b)(1)**)?

- Is the subpoena issued from the proper court, with the proper permissions, by an authorized person (**Rules 45(a)(2)** and **45(a)(3)**)?
- Was service proper (**Rules 45(b)(2)** and **45(b)(3)**)?
- Is there a date specified for compliance (**Rule 45(a)(1)(iii)**)?
- Is the place of production specified (**Rules 45(a)(1)(iii)** and **45(c)(2)**)?
- Is the place of production within the proper jurisdiction (**Rules 45(c)(2)(A)** and **45(b)(2)**)?
- Has the format of the production of ESI been specified (**Rule 45(d)(1)(B)**)?
- Is the information reasonably accessible (**Rule 45(d)(1)(D)**)?
- Does the subpoena subject the third party to undue burden or expense (**Rule 45(c)(1)**, **45(d)(1)(D)**, and **Rule 26(B)(2)(C)(iii)**)?
- Is the discovery sought unreasonably cumulative or duplicative, or can it be obtained from another source that is more convenient, less burdensome, or less expensive (**Rule 26(B)(2)(C)(i)**)?
- Has the issuing party had ample opportunity to seek discovery from the party-company during discovery in the action (**Rule 26(B)(2)(C)(ii)**)?

Note that **Rule 45(c)(2)(B)** requires written objections to be served within 14 days of service of the subpoena (or earlier if there is less than 14 days between service and the designated time to produce), and with the frequent delays in notification, deadlines may be looming from the minute the party-company becomes aware of the third-party subpoena. In fact, the third party may have already taken steps to respond to the subpoena. So time is of the essence for the party-company.

Some level of coordination with the third party will almost always be in the best interests of the party-company. Remember that while prior notice of the subpoena is required by Rule 45, once the subpoena process moves forward, there is no notice mechanism for the third party's production of documents. Without coordination, you may not get a chance to review information concerning your company and possibly including your documents before it is produced. Once the third party voluntarily complies with the subpoena, you are generally left with fewer rights to challenge the production.

Even though the subpoena is not directed to you, you have a clear interest in what is produced about your company by your vendors, suppliers, marketing agencies or other business partners. The party-company should always ask to review in advance of production the documents to be produced by the third party in order to identify your company's privileged or confidential information. If such a review is not possible, consider an agreement with the opposing party to allow a certain period post-production for such review.

Beyond the simple review of the documents, coordination between the party-company and the third party has other benefits. For example, pursuant to Rule 26, the documents and ESI sought by the third-party subpoena must still be relevant to the underlying litigation and be reasonably calculated to lead to the discovery of admissible evidence. These determinations may be difficult for the third party to make without the guidance and input of the party-company. Because the third party will have no way of determining the relevance of the requested material, there may be some reluctance to lodge such an objection without more information. Therefore, you must be prepared to explain the litigation in some detail to the third party.

In some cases, the third party may even see objecting as more expensive and time-consuming than simply handing over the documents because of the threat of a motion to compel from the issuing party. In the third party's view, it might appear to be easier to simply gather the documents requested and produce them. The third party may also fear that the court will see the attempt to coordinate as interference by a non-party to the subpoena. Yet such coordination is perfectly appropriate and even authorized by Rule 45 based on the prior notice provision.

In addition, you may find some third parties to be surprised at the suggestion to object to the subpoena, rather than move to quash. The reality is that objecting can be faster and more effective in stopping the expensive process inherent in responding to a subpoena than a motion to quash. Objections by the recipient of the subpoena will stop the process and shift the burden immediately to the issuing party. Once the objections are served, the issuing party will be required to address the objections or move to compel. By returning the ball to the issuing party's court, you force him to determine what he really needs from the subpoena and how far he is willing to go to fight for the information.

Whether you are the recipient of a third-party subpoena or the party-company, the following are some questions you should be asking yourself and, most likely, discussing with each other. This will aid in establishing a coordinated plan for responding to a third-party subpoena and protecting the interests of both entities. The answers to these questions will assist in determining what the coordination plan should be. For example, consider if objecting is worth the effort based on what the third party plans to produce. Publicly available information or a small number of documents may not be worth the potential loss of credibility if the issuing party decides to challenge the objections.

- What is the relationship of the third party to the subject matter of the litigation? Is this third party likely to have many relevant documents because it was involved in a significant aspect of the subject of the litigation? Or is the third party truly tangential such that it is unlikely that it would possess highly relevant information?
- What is the relationship of the third party to the business? It is particularly important to determine whether any confidentiality, joint defense, or indemnity agreements exist between the party-company and the third party.
- Is this subpoena so harassing as to interfere with the business relationship?
- What is the status of discovery in the litigation?

- Is the number of subpoenas upsetting an established discovery plan?
- What is the possible content of the production? Is it likely that this third party will have confidential or privileged information? Or is the majority of the information publicly available?
- Are the materials sought by the subpoena duplicative of discovery already completed by the company?
- How will objections be received by opposing counsel or the court in your litigation?
- When was the third party served? What is the current deadline for response or production? Is an extension necessary to provide time for a motion or objections?
- Has the third party discussed the response with or made any representations to the issuing party?
- What is the scope of the response? Has the third party begun gathering documents?
- In what format are the documents kept?
- In what format does the third party plan to produce? How quickly will the documents be ready for review and production?

In these days of complex litigation and outsourcing, third-party subpoenas are virtually inevitable. Just because you are not a party to the subpoena, however, does not make you a helpless bystander. Active coordination with the third party benefits all concerned and affords greater control over the entire discovery process–after all, you are the party to this litigation.

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[1] Whether the requesting party actually believes this data is necessary for advocating the merits of the claims or defenses is a question for another day.