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Non-Party Responses to Preservation Demands

Federal Rule of Civil Procedure (FRCP) 45 sets out the rules that parties must follow when issuing or responding to a subpoena in federal litigation. Yet non-parties are increasingly being asked to preserve potentially relevant electronically stored information (ESI) before a complaint has been filed or a subpoena has been served. To help these non-parties determine the best course of action and narrow their preservation obligations, counsel should be familiar with the FRCP 45 framework and common objections to non-party preservation demands.

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Individuals and organizations have long struggled to efficiently and defensibly preserve ESI before and during litigation. Indeed, many attorneys issue overbroad preservation demand letters to opposing parties, often directing recipients to preserve every byte of data in their possession that conceivably relates to a broad series of topics. The 2015 amendments to the FRCP sought to limit the potential for parties to over-preserve by clarifying that the scope of discovery itself is limited by proportionality factors and through the sanctions and curative measures framework set by FRCP 37(e). However, even well-meaning attorneys may cast a broad net in their preservation demands rather than let an opposing party overlook or destroy a potential source of relevant evidence.

As attorneys have become more comfortable issuing preservation demands, they have increasingly served these demands on non-parties, even before litigation has commenced.

In some circumstances, the non-party recipient may have an independent duty to preserve ESI because it anticipates suing or being sued at a later time in connection with the same dispute. But in many cases, the non-party recipient is a true, disinterested third party. For example, an organization such as a bank, a payroll company, an internet service provider, a phone company, or a law firm might possess information relevant to pending or anticipated litigation without having any reasonable expectation that the organization itself will sue or be sued.

While the practice of issuing non-party preservation demands has become more common, non-parties lack clear guidance on their obligations to preserve ESI. To best navigate this uncertain landscape, a non-party that receives a preservation demand should:

- Become familiar with the general framework for subpoena practice under FRCP 45.
- Consider potential ESI-related objections it can assert when served with a subpoena while litigation is pending.
- Assess its potential courses of action if no litigation is pending and the non-party has no forum or proceeding in which to raise ESI-related objections.

RULE 45 FRAMEWORK

FRCP 45, together with a developing body of case law, provides guidance on a non-party's obligation to preserve ESI when served with a subpoena. The rule provides the general framework for a non-party's response to a subpoena, including ESI-related issues.

Once a non-party receives a subpoena:

- The non-party may serve any written objections on the issuing party by the earlier of:
  - the return date listed in the subpoena; or
  - 14 days after the subpoena is served.

  (FRCP 45(d)(2)(B); see below *ESI-Related Objections to a Subpoena*.) A non-party's failure to timely object to a subpoena ordinarily constitutes a waiver of any objections (*Am. Federation of Musicians v. Skodam Films, LLC*, 313 F.R.D. 39, 43 (N.D. Tex. 2015); *Bailey Indus., Inc. v. CLJP, Inc.* 270 F.R.D. 662, 668 (N.D. Fla. 2010)).
- If the non-party makes an objection, the subpoena is null and void until the issuing party files a motion to compel (FRCP 45(d)(2)(B)(i)-(ii)).
- When defending against a motion to compel, the non-party must support its objections. If it objects that the ESI is inaccessible, for example, it must show that the information is not reasonably accessible because of undue burden or cost (FRCP 45(e)(1)(D); see below *Inaccessible Data*). Even if that showing is made, the issuing party can overcome objections if it establishes "good cause" (FRCP 45(e)(1)(D)). Separate burden shifting tests are applied for objections based on undue burden and those based on disclosure of trade secrets (FRCP 45(d)(3)(A), (B); see below *Undue Burden or Expense*).

Search Subpoenas: Using Subpoenas to Obtain Evidence (Federal) and Subpoenas: Responding to a Subpoena (Federal) for more on subpoena practice in federal court.

Search Subpoenas: Responding to a Non-Party Subpoena Checklist for more on key steps non-parties should take when responding to a subpoena.

FRCP 45 requires an issuing party (or its attorney) to take "reasonable steps to avoid imposing undue burden or expense" when issuing subpoenas to non-parties. If an issuing party fails to take these reasonable steps, the subpoenaed party may choose to file a motion to quash or modify the subpoena rather than objecting on these grounds and awaiting a motion to compel (FRCP 45(d)(3)(A)). If a motion to quash or modify is filed on the basis of an alleged undue burden, the court for the district where compliance is required must:

- Quash or modify the subpoena to alleviate the undue burden. Courts are more likely to modify a subpoena than to quash it altogether. (*W. Convenience Stores, Inc. v. Suncor Energy (U.S.A.) Inc.*, 2014 WL 1257762, at *10 (D. Colo. Mar. 27, 2014) (citing *Williams v. City of Dallas*, 178 F.R.D. 103, 110 (N.D. Tex. 1998)).)
- Impose "an appropriate sanction — which may include lost earnings and reasonable attorney's fees" on the offending party or attorney (FRCP 45(d)(1); see *W. Convenience Stores*, 2014 WL 1257762, at *21, *23).
- Deny the motion and order the non-party to comply, if the court does not find an undue burden.

Search Motion to Quash or Modify a Subpoena (Federal): Motion or Notice of Motion, Motion to Quash or Modify a Subpoena (Federal): Memorandum of Law, and Motion to Quash or Modify a Subpoena (Federal): Proposed Order for sample documents a non-party can use when moving to quash or modify a subpoena in federal court, with explanatory notes and drafting tips.

ESI-RELATED OBJECTIONS TO A SUBPOENA

Non-parties often overlook valid ESI-related objections to a subpoena. When crafting a strategy for responding to a subpoena, a non-party should consider whether:

- The efforts needed to comply with the subpoena will subject the non-party to undue burden or expense.
- The subpoena calls for the production of inaccessible data.
- The form of production specified in the subpoena is itself objectionable as unduly burdensome.
- The non-party can or must avail itself of any statute-based objections to disclosure.

A non-party that receives a preservation demand before litigation is pending should also consider whether compliance with the demand would be objectionable for any of these reasons (see below *Preservation Obligations Before Receiving a Subpoena*).

UNDUE BURDEN OR EXPENSE

When assessing whether a subpoena imposes an undue burden or expense, a non-party should consider whether compliance

with the subpoena would require the non-party to do any of the following:

- Suspend routine backup of its data or turn off auto-delete functions.
- Collect information from multiple custodians or departments.
- Preserve data that is frequently overwritten and would otherwise not be saved, such as point-of-sale data or last modified dates of documents.
- Forensically examine computers or otherwise collect data from devices in a manner that typically requires the engagement of outside vendors.

To object to a subpoena as unduly burdensome or expensive under FRCP 45, the non-party must demonstrate its grounds for those objections with specific evidence. A number of courts have overruled non-party objections and refused requests for fees and costs where the objecting non-party failed to provide sufficient evidence of its burden or expense (see, for example, *W. Convenience Stores*, 2014 WL 1257762, at *2, *10, *23 (denying a non-party's request to recover $122,202.50 in attorneys' fees and $26,546 of costs incurred in responding to several subpoenas, but modifying the subpoena to require the non-party to produce only "responsive information existing on active computer systems")).

INACCESSIBLE DATA

A non-party may object that data sought by a subpoena is "not reasonably accessible," provided the non-party specifically identifies the types of ESI that it deems inaccessible due to undue burden or cost (FRCP 45(e)(1)(D)).

As part of the Seventh Circuit Electronic Discovery Pilot Project, an e-discovery committee created a list of ESI that it deemed generally "not discoverable in most cases" due to inaccessibility, including:

- Deleted, slack, fragmented, or unallocated data on hard drives.
- Random access memory (RAM) or other ephemeral data.
- Online access data, such as temporary internet files, history, cache, or cookies.
- Data in metadata fields that are frequently updated automatically, such as last opened dates.
- Backup data that is substantially duplicative of data that is more accessible elsewhere.
- Other forms of ESI whose preservation requires extraordinary affirmative measures that are not used in the ordinary course of business.

(7th Cir. Electronic Discovery Comm., Principles Relating to the Discovery of Electronically Stored Information, Principle 2.04(d).)

However, as mentioned above, even if a court finds that a subpoena seeks inaccessible data, a non-party may be required to comply with the subpoena if the issuing party demonstrates good cause (FRCP 45(e)(1)(D)). If the issuing party makes a sufficient showing, a court may require the non-party to use forensic methods or other outside vendor services to preserve and collect data. In these circumstances, a court may be more inclined to permit a non-party to recoup costs related to these activities.

For example, in *Tener v. Cremer*, the plaintiff issued a subpoena to New York University (NYU) seeking the identity of all persons who accessed the internet through an internet portal controlled by NYU. Along with the subpoena, the plaintiff sent a preservation letter demanding that NYU halt any ordinary business practices that would destroy the requested information. NYU declined to produce the requested information, arguing in response to the plaintiff's motion for contempt that the relevant data was automatically written over every 30 days and NYU lacked the capability or tools to retrieve that inaccessible ESI. In its motion, the plaintiff argued that NYU could use a variety of forensic software solutions to recover the sought ESI. (89 A.D.3d 75, 77 (N.Y. App. Div. 2011).)

Ultimately, the court concluded that the record was insufficient to undertake a cost-benefit analysis under FRCP 45 and remanded the case for a hearing on whether the information should be retrieved and the cost of the data retrieval. However, the court directed that the plaintiff must bear the costs of the production, including any costs associated with any potential disruption to NYU's ordinary business operations. (*Tener*, 89 A.D.3d at 78-82.)

PROBLEMATIC PRODUCTION FORMAT

FRCP 45 permits an issuing party to specify the format in which the responding party should produce the requested ESI (FRCP 45(a)(1)(C)). A non-party's response options vary depending on whether the requesting party exercises this right. Specifically, if the requesting party requests a particular production format, the subpoenaed non-party may either:

- Comply with the format request.
- Object to the requested format within 14 days after being served with the subpoena (FRCP 45(d)(2)(B)).

However, requesting parties do not always specify a production format in a subpoena. In those circumstances, the subpoenaed non-party must produce ESI in either:

- The format in which the non-party ordinarily maintains the ESI.
- Another reasonably usable format.

(FRCP 45(e)(1)(B).)

When considering potential objections, a non-party should carefully consider whether the issuing party's requested production format is burdensome, expensive, or otherwise problematic because, for example, it calls for:

- **Native files.** The non-party may object if the subpoena demands production of all documents in native format, but the responsive data requires the non-party to redact privileged or confidential information.
- **Documents in image format with accompanying load files.** The non-party may object if it does not have the sophisticated in-house tools and personnel to produce load files and would instead need to hire an outside vendor.
- **Databases.** A non-party can most easily produce responsive database content by querying the database and producing a copy of the resulting query report. If the issuing party insists that all responsive ESI be produced in native format, the non-party may object to the format on the grounds that:

- the native database information is unusable outside of the database environment, as is often the case for proprietary databases; and
- producing the entire database to make the native files useful would require the production of large volumes of irrelevant or non-responsive information.

(The Sedona Conference Working Group Series, The Sedona Conference Database Principles, at 18 (Mar. 2011) (observing that "'native' format may not have as clear a meaning in a database context as it does for other forms of ESI.... [I]n many cases a truly native format production of database information is less usable to a requesting party than an alternative production format").)

- **Proprietary ESI.** Issuing parties sometimes seek information that the non-party generates or stores using proprietary software. If the issuing party insists on a native format production, the non-party may object to the format on the grounds that:
  - the native information is unusable without access to the proprietary software; and
  - producing the software is unduly burdensome.

A non-party need not produce ESI in more than one format (FRCP 45(e)(1)(C)). For this reason, a requesting party should also be mindful of its preferred form of ESI from the outset to avoid losing the opportunity to receive the information in the form it needs.

Search E-Discovery: Processing Electronically Stored Information for information on how production formats can influence the processing of ESI.

STATUTE-BASED OBJECTIONS

Certain laws may eliminate or modify a non-party's obligation to respond to a valid subpoena. For example, the Stored Communications Act (SCA) prohibits "providers of communication services" from disclosing the content of communications, and it does not include an exception for civil subpoenas (18 U.S.C. §§ 2701 to 2712; see, for example, *Mintz v. Mark Bartelstein & Assocs., Inc.*, 885 F. Supp. 2d 987, 993-94 (C.D. Cal. 2012) (holding that the SCA prevented a non-party service provider from disclosing the content of text messages in response to a subpoena)).

PRESERVATION OBLIGATIONS BEFORE RECEIVING A SUBPOENA

Although a subpoenaed non-party must preserve evidence that it reasonably expects is responsive to the subpoena, a non-party's duty to preserve ESI in the face of a boilerplate preservation demand when no litigation is pending is less clear.

For example, a non-party may receive a letter notifying it of a potential dispute and demanding that the non-party preserve all information in its possession relating to the dispute, or to any individuals or organizations involved in the dispute, such as customers or employees. The letter might even purport to require the non-party to preserve all sources of relevant information, including those on company and personal computers of its employees, data on external media, such as flash drives, and information stored on mobile phones, and to take forensic images of all data sources.

To protect its rights in any future litigation, a non-party who receives this type of preservation demand letter should:

- Evaluate whether it has a duty to preserve the information described in the preservation demand.
- Confer with the party who sent the preservation demand.
- Draft a formal response to the preservation demand.

FRCP 45 permits an issuing party to specify the format in which the responding party should produce the requested ESI. A non-party's response options vary depending on whether the requesting party exercises this right.

EXISTENCE OF A DUTY TO PRESERVE

After receiving a preservation demand, a non-party must first evaluate whether it is likely to become a party to any subsequent related litigation. If the non-party reasonably anticipates suing or being sued in connection with the potential dispute, it has an independent obligation to preserve potentially relevant data and should take immediate steps to do so. On the other hand, if the recipient merely holds information and is a true, disinterested third party, its obligation to respond to the preservation demand is unclear.

Search Litigation Hold Toolkit for a collection of resources organizations can use to preserve documents and implement a litigation hold.

Courts have taken varying approaches to the concept of a non-party duty to preserve in different scenarios. Some courts have found that a non-party has no preservation duty until it receives a subpoena. By contrast, others have held that a non-party may have a duty to preserve simply because it had notice of the dispute, even before a formal subpoena or demand letter was issued.

One Massachusetts court, for example, held that absent a subpoena, special duty, or contractual obligation to save data,

a non-party has no obligation to preserve evidence relevant to others' claims. In *Quincy Mutual Insurance Co. v. W.C. Wood Co.*, the court declined to find that a non-party that destroyed a refrigerator was liable for spoliation of evidence. Both parties were aware that the non-party had possession of the refrigerator and that it was relevant to litigation against the refrigerator's manufacturer. The court explained that non-parties "do not have a duty to preserve evidence for use by others" and that the parties had failed to impose such a duty "by serving [the non-party] with a subpoena duces tecum ... or by entering into a contract with it." (2007 WL 1829378, at *1-2 & n.3 (Mass. Dist. Ct. June 6, 2007) (citing *Fletcher v. Dorchester Mut. Ins. Co.*, 773 N.E.2d 420, 425-26 (Mass. 2002)).)

However, because many of these decisions address tangible evidence and not ESI, their application to ESI preservation is debatable. Indeed, the 2015 amendments to the FRCP excluded the destruction of physical evidence from its new sanctions regime (2015 Advisory Committee's Note to FRCP 37(e) (noting that the new rule applies only to ESI); see *In re Bridge Constr. Servs. of Fla., Inc.*, 185 F. Supp. 3d 459, 472-73 (S.D.N.Y. 2016)).

By contrast, some courts have found that a non-party does have a duty to preserve ESI even before being served with a subpoena, and have exercised their inherent authority to sanction non-parties for failing to preserve the relevant data. For example, in *Lofton v. Verizon Wireless (VAW) LLC*, the plaintiff alleged that non-party Collecto, Inc. obstructed class discovery by destroying certain call logs that were relevant in the putative class action under the Telephone Consumer Protection Act. Without specifying the precise source of Collecto's duty to preserve, or the exact time when the duty attached, the court found that Collecto was on notice that it should preserve the relevant ESI given the similarities in the allegations lodged against Verizon and those contained in a previous related litigation involving Collecto, and that it should have disclosed the existence of the previous litigation earlier in discovery. (308 F.R.D. 276, 287-88 (N.D. Cal. 2015).)

Relying on a court's inherent ability "to sanction the conduct of a non-party who participates in abusive litigation practices, or whose actions or omissions cause the parties to incur additional expenses," the court ultimately ordered the defendant and non-party Collecto to share the costs of having an expert reconstruct archived data for the allegedly spoliated call logs (*Lofton*, 308 F.R.D. at 285, 287-88; see also *Palmer v. Allen*, 2016 WL 5402961, at *2 (E.D. Mich. Sept. 28, 2016) (declining to impose spoliation sanctions on a party that was previously dismissed from the case)).

Notably, the drafters of the 2015 amendments to FRCP 37(e) intended to significantly curtail the inherent authority to impose sanctions relied on by the court in *Lofton*. However, the amendments do not address whether courts retain the inherent authority to impose sanctions where the elements for FRCP 37(e) sanctions have not been met.

Additionally, when assessing whether it has a duty to preserve ESI, a non-party must carefully consider its obligations under applicable state law. A handful of states recognize spoliation as an independent tort that may give rise to separate litigation (see, for example, *J.S. Sweet Co. v. Sika Chem. Corp.*, 400 F.3d 1028, 1033-34 (7th Cir. 2005) (noting that Indiana law recognizes a non-party's duty to preserve evidence where a "special relationship" exists)).

Search Reasonable Anticipation of Litigation Under FRCP 37(e): Triggers and Limits for information on when a party's duty to preserve ESI attaches.

Search Sanctions for ESI Spoliation Under FRCP 37(e): Overview for more on the sanctions and curative measures regime outlined by FRCP 37(e).

CONFERENCE WITH THE ISSUING PARTY

A non-party that receives a preservation demand should confer with the issuing party or its counsel. As a practical matter, the non-party may be able to resolve and substantially narrow the scope of ESI that is subject to the preservation demand.

During the conference, the non-party should attempt to reach agreement on the scope and nature of ESI subject to preservation by addressing:

- **Production formats.** For example, the non-party should try to determine whether the requested format requires it to preserve the potentially responsive ESI in a particular manner and, if so, whether the requesting party is willing to pay for any additional costs inherent in that preservation method.
- **ESI sources.** For example, if the relevant information in the non-party's possession is limited to certain phone records or financial records, the non-party should try to determine if it can eliminate email and other custodian-centric ESI from the preservation scope.

Proactively negotiating with the issuing party at this stage offers a tactical advantage as well. If the party that issued the preservation demand later serves a subpoena on the same non-party and the non-party wants to object to the subpoena as unduly burdensome, it must provide details on the burden under FRCP 45. A court may be more favorably inclined toward an undue burden argument if the non-party can demonstrate that it first attempted to narrow the scope or otherwise minimize the burden of a subpoena before it was served, and ultimately refused to produce the requested information only after negotiations failed. By engaging in a dialogue with the issuing party, even if the issuing party refuses to alter its request, the non-party can strengthen its position when it comes to recovering attorneys' fees and costs incurred in responding to a subsequently issued subpoena.

WRITTEN RESPONSE

A non-party typically should respond to the preservation demand letter in writing. In this response, the non-party should identify and describe the same objections it anticipates making in response to a subpoena (such as objections due to undue burden or expense, inaccessible data, or problematic production formats). The non-party should also describe its efforts to confer with the issuing party.

Although a responsive letter lacks the same effect as a formal objection to a subpoena or motion to quash, it may assist the non-party in defending against a later argument that it should have undertaken potentially expensive preservation steps.