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Meeting Discovery Responsibilities When Your Records Are Managed by Third-Party Providers

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Non-Party Discovery

Most organizations that are involved periodically in litigation and regulatory discovery have developed at least an awareness of the issues surrounding the discovery of electronically stored information and have developed some form of litigation response model

Most of these organizations, however, have focused their efforts inwardly on their own electronic data sets and have not developed broader models or response processes for responsive data that may reside with third-parties

As practitioner's familiarity with electronic discovery increases—and as data continues to spread throughout business relationship networks—the need to be able to identify, locate, retrieve, assess and review data from outside the organization in a timely, cost-effective and defensible manner is becoming increasingly important

Sedona Non-Party Production Survey—Undue Costs

- Over 73% of the respondents witnessed situations in which non-parties experienced undue costs or burdens responding to Rule 45 subpoenas because of the need to preserve, collect, review and produce ESI.
- A significant number of the respondents answered that such undue burdens and costs occurred "frequently" or "very frequently"
- A number of respondents have generally found that courts are not sympathetic to undue cost arguments, especially when claimed by large corporations
- Less than one third of the respondents have seen non-parties succeed in quashing or limiting a Rule 45 subpoena based on the argument that production of ESI is per se unduly burdensome or costly
- The respondents reported that the most successful arguments relating to undue burden and cost have concerned the subject matter and/or attempt to narrow the time frame or number of custodians. If the third party can argue that the parties have access to the ESI themselves or can acquire it from a less costly source than the third party, this is often successful in arguing to quash or limit a subpoena.



NOTES

Sedona Non-Party Production Survey—Production Format

- Although Rule 45 was amended to clarify the right to ask for a specific production format, it is not yet clear that those serving subpoenas are taking advantage of this change. Approximately 68% of the respondents reported that requesting parties “occasionally (20-40%)” or “seldom (less than 20%)” specified the production format in their subpoenas
- When a form of production is specified in a Rule 45 subpoena, 50% of the respondents indicated that form was “native electronic format.” 37% said the form requested was “TIFF/PDF (with searchable text),” and another 20% said the format requested was paper
- If a subpoena requests production in TIFF or PDF, nearly 85% of the answering respondents said the request included a request for any metadata
- A majority of respondents (64% of those who responded) had not argued or heard arguments resisting ESI production pursuant to a Rule 45 subpoena on the grounds that the source is not reasonably accessible because of undue burden or cost. Several respondents said this issue has generally been resolved short of motion practice



Sedona Non-Party Production Survey—Production Format

- When a Rule 45 subpoena requests a specific form of production, 36% of the respondents reported that the non-party agrees to the requested form of production.
- Over half of the respondents (54%) reported that in their experience the non-party initially objects to the requested form of production, but that despite an initial dispute, the requesting party and the responding non-party generally reach an agreement.
- None of the respondents believed courts were needed to resolve this dispute



Sedona Non-Party Production Survey—Cost Shifting / Cost Sharing

- More than half (58%) of the respondents have been involved in a Rule 45 subpoena where the issue of cost-shifting or cost-sharing was raised in connection with the production of ESI. No one reported having litigated the issue, but rather indicated that the parties generally negotiated the issue and in many cases the party serving the subpoena actually offers to pay production costs
- Nearly 80% of the answering respondents believe that the threshold for cost-shifting or cost-sharing is lower when a non-party asserts undue burden or cost arguments related to the production of ESI



NOTES

Sedona Non-Party Production Survey—Conclusion of Non-Party Obligations

- Over 70% of the answering respondents reported that in their experience non-parties have difficulty determining when a matter is resolved such that their obligations under a Rule 45 subpoena are at an end



Sedona Non-Party Production Survey—Practice Pointers

- Respondents suggested that responding non-parties:
 - adopt an open, cooperative, transparent approach;
 - be proactive, not reactive;
 - involve legal counsel and e-discovery professionals in the procurement of IT applications;
 - educate internal counsel and risk management professionals regarding issues;
 - be specific, as broad-based arguments couched in vague notions of burden or cost are not well received; and,
 - talk early
- Respondents suggested that in making Rule 45 requests, counsel should take extra precautions to tailor requests narrowly; meet the subpoena recipient as soon as possible to negotiate production issues; and discuss cost-shifting if necessary
- A number of respondents reported anecdotal situations in which select samples of data sources (e.g., time periods, custodians, backup tapes) were used to see if any responsive documents were found before proceeding to a full-blown review



Reducing the Risk Associated with Third-Party Data

Do you know who has your data?

- Conduct an audit of existing contracts and relationships to determine who has custody of any of your data
- Create a central knowledge database regarding 3rd-party data
 - Custodian information
 - Type of data
 - Data use
 - Other sources of same data
 - Retention metrics
- Map 3rd-party data to your litigation need profile

NOTES

Reducing the Risk Associated with Third-Party Data—Going Forward

Every new contract and/or relationship that will result in a 3rd-party creating, using, and/or storing your data should include specific provisions that address:

- Clear ownership of data
- Access to data — who, when, where, how
- Cost to deal with data for discovery — time, software, hardware
- Retention of data — minimum and maximum retention, format
- Destruction and/or data return process and verification
- Data storage, segregation, and security requirements
- Discovery and/or meet-and-confer participation
- Data preservation capabilities—identifying, locating, retrieving, saving
- Compliance auditing for all the above
- Penalties for non-compliance

Reducing the Risk Associated with Third-Party Data—Going Forward

Include the concept of third-party data in your discovery model:

- Identify using knowledge database
- Consider when developing selection criteria
- Notify Custodians that third-party data is included
- Ask Custodians if they are aware of any potentially responsive third-party data
- Identify alternative sources
- Notify affected third-parties early
- Address in meet-and-confer

“Perfection is the Enemy of Progress”

Even modest increases in your ability to include third-party data in your electronic discovery efforts pursuant to a defined and defensible model can result in significant risk-reduction, increased defensibility of process, and decreased costs
