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The authors examine a court decision from late 2011 that suggests that third-party status will not necessarily enable non-parties to successfully resist a subpoena for electronically stored information that has been deleted in the ordinary course of business.

Non-Party . . . Party? When it Comes to Deleted ESI, Is There a Difference Anymore?

By Jennifer H. Rearden and Brooke Myers Wallace

Non-parties to a litigation have long taken comfort in rules and guidelines that generally have protected them against unduly burdensome subpoenas, including when it comes to collecting and producing electronically stored information (''ESI'').

Federal Rule of Civil Procedure 45, for example, expressly protects non-party subpoena targets who are able to establish that requested ESI is ''not reasonably accessible because of undue burden or cost.''[1] Federal courts may, of course, order discovery of such material ''if the requesting party shows good cause.''[2]

Nevertheless, non-party status itself has proved to be a ''significant factor to be considered in determining whether the burden imposed by a subpoena is undue.''[3] Indeed, in jurisdictions across the country, the burden of proving inaccessibility has for years seemed a bit lower for non-parties than for parties, primarily because courts seem to have taken into account non-party status when making the inaccessibility determination.[4]

[1] Fed. R. Civ. P. 45(d)(1)(D); *see also United States v. Friedman*, 532 F.2d 928, 937 (3d Cir. 1976) (counseling that Rule 45 ''serves as significant precedent disclosing a broad congressional judgment with respect to fairness in subpoena enforcement proceedings'').

[2] Fed. R. Civ. P. 45(d)(1)(D).

[3] *Whitlow v. Martin*, 263 F.R.D. 507, 512 (C.D. Ill. 2009).

[4] *See, e.g., United States v. CBS*, 666 F.2d 364, 371-72 (9th Cir. 1982) (''Although party witnesses must generally bear the burden of discovery costs, the rationale for the general rule is inapplicable where the discovery demands are made on non-parties. Nonparty witnesses are powerless to control the scope of litigation and discovery, and should not be forced to subsidize an unreasonable share of the costs of a litigation to which they are not a party. . . . [W]e nevertheless emphasize that a witness's nonparty status is an important factor to be considered in determining whether to allocate discovery costs on the demanding or the producing party.''); *EEOC v. Kronos, Inc.*, No. 09 mc0079, 2011 BL 126169, *4 (W.D. Pa. May 3, 2011)

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The *Tener* Decision

A 2011 decision by New York's Appellate Division, First Department, however, may suggest that the weight previously accorded to this factor is diminishing.

Tener v. Cremer, 89 A.D. 3d 75 (N.Y. App. Div. 2011), represents the New York appellate court's first look at a non-party's obligation to produce ESI that is not simply ''not reasonably accessible,'' but that has, in fact, been deleted in the ordinary course of business.[5]

The *Tener* Facts. In *Tener*, the plaintiff subpoenaed non-party New York University (''NYU'') for the identity of all persons who had accessed the Internet from a particular internet protocol address on the day that allegedly defamatory statements about the plaintiff were posted on a website.[6]

In opposing a motion for contempt filed by the plaintiff after NYU refused to produce the requested information, NYU argued that the ESI at issue had been deleted in the ordinary course of business, and that any deleted ESI that could be recovered was not reasonably accessible because NYU did ''not possess the technological capability or software, if such exists, to retrieve'' it.[7]

Non-Parties Must Try to Find Data. Importantly, NYU ''offered no evidence that it made any effort at all to access the data,'' nor did it determine what such retrieval would cost.[8] As the First Department saw it, NYU rested its opposition on its status as a non-party, apparently believing that it simply did not need to make any concerted effort to retrieve the deleted data.[9]

The First Department seemed to have little patience for NYU's reliance on its non-party status in deciding not to ''install forensic software on its system.''[10] Dismissing NYU's cases as ''outdated,'' and citing the 2006 Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information, the New York Uniform Rules,[11] and the Nassau Guidelines,[12] the First Department essentially dispensed with the practice of affording a non-party special treatment.[13]

Non-Party Status Only One Factor. Instead, the court determined that the accessibility of all ESI, whether from a party or non-party, should be assessed by comparing the burden and expense of recovering and producing the ESI with the relative need for the ESI.[14] ''Non-party status'' was not a trump card, but only one factor to be considered and weighed against the ''good cause'' shown by the movant.[15]

The court determined that the accessibility of all ESI, whether from a party or non-party, should be assessed by comparing the burden and expense of recovering and producing the ESI with the relative need for the ESI.

The First Department also rejected NYU's argument that deleted data was *per se* inaccessible, observing instead that ''[d]eletion usually only makes the data more difficult to access.''[16]

Declining to follow certain federal courts that have suggested strict limits on the discovery of particular types of ESI that are frequently overwritten or ephemeral (including deleted or unallocated ESI on hard drives),[17] the First Department held that the ''cost/benefit analysis'' provided for by the Nassau Guidelines (and the Federal Rules[18]) is the appropriate way to ''giv[e] the court flexibility to determine literally

(forcing the subpoenaing party to split the costs of compliance equally with the non-party subpoena target and expressly citing the target's non-party status explicitly in explaining its decision); *United States v. Amerigroup Ill., Inc.*, No. 02 C 6074, 2005 BL 45670, at *8 (N.D. Ill. Oct. 21, 2005) (citing several cases in support of the proposition that, ''[i]n keeping with the text and purpose of Rule 45(c)(3)(A), it has been consistently held that 'non-party status' is a significant factor to be considered in determining whether the burden imposed by a subpoena is undue''); *Certain Set-Top Boxes and Components Thereof*, Int'l Trade Comm'n Inv. No. 337-TA-454, Order No. 16, at 1–2 (July 2, 2001). *But see* Conference of Chief Justices, Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information (2006) (applying to parties and non-parties alike the same standard with respect to the accessibility of ESI).

[5] *Id.* at 76.

[6] *Id.* at 76-77.

[7] *Id.* at 77.

[8] *Id.* at 77-78.

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[9] *Id.* at 78.

[10] *Id.*

[11] Uniform Rules for Trial Courts, 22 N.Y.C.R.R. § 202.12(c)(3).

[12] New York State Supreme Court, Commercial Division, Nassau County, Guidelines for Discovery of Electronically Stored Information (ESI), II(c)(4) (effective June 1, 2009) (hereinafter the ''Nassau Guidelines'').

[13] *Tener*, 89 A.D.3d at 79-80.

[14] *Id.* at 79-80 (citing the Nassau Guidelines, at IV); *id.* at 80 (citing The Sedona Conference Working Group, The Sedona Conference Commentary on: Preservation, Management and Identification of Sources of Information that are Not Reasonably Accessible, at 9 (July 2008)).

[15] *Id.* at 80; *id.* at 82 (''That NYU is a nonparty should also figure into the equation.'').

[16] *Id.* at 79.

[17] Seventh Circuit Electronic Discovery Committee, Seventh Circuit Electronic Discovery Pilot Program, at 14-15 (Oct. 1, 2009).

[18] *See* Fed. R. Civ. Proc. 26(b)(2)(B), 26(b)(2)(C)(iii).

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whether the discovery is worth the cost and effort of retrieval.''[19]

Because the record before it in *Tener* did not contain the necessary information for the court to undertake such an analysis, the First Department remanded to the Supreme Court to determine a host of issues.[20]

Long Term Implications. The true significance of the First Department's decision in *Tener* is not yet known. It may signal the start of a trend toward requiring greater specificity and reliability in the evidence supporting a non-party's (or any litigant's) argument that requested ESI is ''not reasonably accessible due to undue burden or cost.'' Now more than ever, parties or non-parties advancing arguments regarding inaccessible ESI may deem it advisable to provide courts with substantiated accounts of the anticipated cost and technological feasibility of data recovery.

Moreover, if *Tener* is any indication, then non-party status will continue to be a factor—but certainly not the only factor—in evaluating a motion to quash or a response to a motion to compel.

[19] *Tener*, 89 A.D.3d at 81 (also citing Fed. R. Civ. Proc. 26(b)(2)(C)(iii) and *Zubulake v. UBS Warburg, LLC*, 217 F.R.D. 309, 316 (S.D.N.Y. 2003)).

[20] *Id.* at 82.