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LITIGATION

Simplifying the Rules on Non-Party Discovery

CPLR Amendments Streamline Process Long Considered Source of Confusion to Lawyers

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A LONG-STANDING source of consternation and confusion among New York lawyers has been the requirements attending service of a pre-trial subpoena duces tecum upon non-parties during the discovery process. Despite the efforts of, among others, this publication (see Bliss, "Use and Abuse of the Disclosure Subpoena," New York Law Journal Aug. 5, 1997), there has persisted a widespread lack of understanding, or worse, on the part of New York practitioners regarding whether documents could be obtained from non-parties without a prior court order (i.e., by subpoena), whether non-parties could be compelled to produce documents without appearing for deposition, and even whether adversaries are entitled to notice that the subpoena has been served, or entitled to view the material thereby obtained.

Answering these questions and more, on Sept. 1, 2003, a series of amendments to CPLR §§2305, 3120 and 3122 took effect. These amendments substantially streamline and simplify the process of obtaining pre-trial discovery from non-parties. The rules are now much clearer. The price of that clarity, however, is a detailed set of new rules regarding, among other things, how documents are to be obtained, how notice is to be provided, and how the documents and things thereby obtained must be "shared" with other parties.

In the short time that has passed since enactment of the amendments, the courts have already recognized that the amendments represent "a substantial change in New York civil procedure." *Campos v. Payne*, No. 6283/97, 2003 N.Y. Misc. LEXIS 1295, *3 (Sup. Ct. Richmond Co. Oct. 7, 2003). Accordingly, the careful New York practitioner is well advised to review the amendments and to conform their practice accordingly.

A full appreciation of the new rules can only be gained by understanding the context in which they arose and the chronic abuses that led to their enactment. This article first sets forth the prior practice, with all of its problems, and then summarizes the new rules in that context.

Prior Rules

In the past, there were only two proper ways to obtain pre-trial document discovery from non-parties. If only documents were sought (with no deposition), a court order, on a noticed motion, was required under CPLR 3120(b) (a deposition could be accomplished merely by subpoena with notice to adversaries, and still can). This route was naturally unpopular because it required the preparation and service of a motion upon all parties, a time-consuming, potentially expensive, and uncertain process.

Some practitioners either were unaware of the requirements of CPLR 3120(b) or, in some cases, simply ignored the rule. Thus, subpoenas duces tecum routinely were prepared and served upon non-parties, with no motion having been filed. Often, the subpoenaed non-party, itself perhaps unaware of the statutory requirements, and fearful of the consequences of disobeying what looked like a facially valid subpoena, would produce documents and the matter would end there. On other occasions, however, the non-party (or an adversary) would object, leading to litigation. The results in the courts, unfortunately, were unpredictable and perhaps even on occasion irreconcilable.

In some situations, lawyers who failed to file the required motion under CPLR 3120 and to obtain a court order found themselves without an adequate remedy for non-compliance. See, e.g., *Tyrell v. Tyrell*, 54 A.D.2d 931 (2d Dept. 1976) ("Plaintiff never moved for an order pursuant to CPLR 3120 (subd [b]) directing the nonparty witnesses to produce documents for inspection. Accordingly, their failure to produce said documents cannot result in their being held in contempt.").

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Sometimes, however, the consequences of disregarding the rule were more severe. For example, in *Timoney v. Newmark & Co. Real Estate, Inc.*, 299 A.D.2d 201 (1st Dept. 2002), app. denied, 99 N.Y.2d 610 (2003), the First Department upheld the quashing of a subpoena duces tecum served upon a non-party, stating: "The correct procedure for requesting documents from a nonparty is set forth in CPLR 3120(b), and a party cannot avoid this procedure by serving a subpoena." (Note: The party's attempt to do just that seems to have provided part of the basis for the imposition of sanctions against that party under 22 NYCRR 130-1.1(c)(2).)

Similarly, in *Wilson v. City of Buffalo*, 298 A.D.2d 994, 997 (4th Dept. 2002), the Fourth Department held that a motion to quash a subpoena duces tecum served upon a non-party should have been granted because such a subpoena "cannot be substituted for the motion on notice required by CPLR 3120(b) in order to obtain nonparty discovery."

On the other hand, some courts criticized the improper use of a subpoena duces tecum served without a CPLR 3120 motion, but nevertheless upheld the discovery. For example, in *Matter of Kochovos*, 140 A.D.2d 180, 181 (1st Dept. 1988), the court roundly criticized the service of a document subpoena in lieu of a CPLR 3120 motion, and the fact that the results were apparently not immediately shared with the other side, as "deceptive," stating, "The deceptive practice of counsel in this type of covert discovery warrants severe criticism."

Nonetheless, the *Kochovos* court declined to disqualify counsel as the complainant had requested, or to suppress all of the material obtained through the improper subpoena.

Similarly, in *Di Marco v. Sparks*, 212 A.D.2d 965 (4th Dept. 1995), the court allowed the use of a subpoena in apparent circumvention of CPLR 3120, stating, "Although the documents were improperly obtained from the non-party without notice to plaintiffs … plaintiffs were not thereby prejudiced."

In summary, practice under the old CPLR 3120 could be wildly unpredictable, cumbersome, and very risky. The new amendments, discussed later, do away with the motion requirement of CPLR 3120 and make clear that a subpoena duces tecum may now be served upon non-parties without the need for a motion, thus eliminating the kind of inconsistent results discussed above.

Documents at the Deposition

Under the prior rules, if one wanted to avoid motion practice under CPLR 3120(b), an alternative existed, which itself led to abuse. Under CPLR 3111, a proponent of discovery could notice a deposition of the non-party, issue a subpoena testificandum, and request the subpoenaed non-party to produce a limited universe of documents at the deposition. (If no documents were involved, the party need only issue a subpoena testificandum and provide the other parties with notice, as noted above.)

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The principal advantage to the CPLR 3111 approach was that no motion was required. The principal disadvantage was that the universe of documents that could be requested was narrower, often defeating the purpose of a broad document request in the first place.

The two sections, CPLR 3111 and 3120, were (and are) aimed at two different things. Lawyers often tried to make a situation fit one section in order to bypass the requirements of the other. The courts were generally unimpressed with the maneuver. See, e.g., *Ramo v. General Motors Corp.*, 36 A.D.2d 693, 694 (1st Dept. 1971) ("Only those documents necessary to be used in aid of conducting a deposition are required to be produced on an examination before trial [under CPLR 3211]. Nor can such rule be subverted by seeking discovery and inspection pursuant to CPLR 3120 simultaneously with an examination before trial.").

On the other hand, sometimes courts would recognize the failure of a litigant to follow the rules, or to try to make one rule serve the purpose of the other, but hold that the material thereby obtained nevertheless ought to be made available in the litigation. See, e.g., *Matthews v. McDonald*, 241 A.D.2d 808, 809-10 (3d Dept. 1997) (reversing trial court's holding that proponent of discovery improperly noticed deposition and demanded documents in violation of CPLR 3120, holding that CPLR 3111 allowed for document production at deposition).

One common device that arose to circumvent the rules was the "pretend" deposition subpoena purportedly issued under CPLR 3111. A party would issue a subpoena testificandum under CPLR 3111, and request documents to be produced at the deposition. The party issuing the subpoena would then contact the non-party and informally "suggest" that if the documents were made available in advance of deposition, perhaps the deposition would be unnecessary. This practice, when caught, tended to draw sharp criticism from the courts.

In the well known case *Matter of Beiny*, 129 A.D.2d 126, 131-33 (1st Dept. 1987), a large New York law firm issued a CPLR 3111 subpoena upon a non-party, requesting an appearance at deposition and production of documents at the deposition. After it obtained the documents before the deposition, however, it canceled the deposition, and did not share the documents with the other side.

The First Department disqualified the law firm, referred the matter to the disciplinary authorities, and suppressed the material, saying, "We do not think that this provision [CPLR 3120(b)], designed to assure that nonparties will not be unduly burdened with discovery demands and that discovery from nonparties is conducted in a fair and open manner, can be avoided by resorting to the use of covertly issued attorneys' subpoenas."

The elimination of this particularly troubling, but time-honored, practice was apparently a driving force behind the new amendments. Thus, the 2002 Advisory Committee Notes expressly comment that the amendments "will bring to an end the unauthorized but longstanding practice of serving upon a non-party a subpoena for a deposition and following that up with an informal suggestion that the witness can avoid appearance at the deposition by mailing copies of the documents described in the subpoena to the attorney serving the subpoena. This practice carries with it a risk of confusion and worse."

At the same time that the amendments were taking aim at abuses under CPLR 3111, it was clear that CPLR 3120(b) needed to be amended because, as discussed above, the motion practice it required often led to a proliferation of litigation and invited abuse, all in connection with obtaining plainly useful discovery, at the end of the day, from non-parties. Thus, "[t]he amendments to the CPLR were designed to expedite the discovery process with respect to non-party witnesses and the production of their records…." *Campos v. Payne*, No. 6283/97, 2003 N.Y. Misc. LEXIS 1295, *7-8 (Sup. Ct. Richmond Co. Oct. 7, 2003) (noting that "expediency and judicial economy are the driving force behind these statutory changes").

Combating Abuses

As a result of the amendments to CPLR 3120, motions and court orders are no longer required before a party may serve a subpoena duces tecum on a non-party. The elimination of the motion requirement will likely promote judicial economy and minimize needless litigation.

Additionally, in order to combat the types of abuses that existed under the old CPLR 3111 practice, CPLR 3120 adds a new requirement that a copy of every subpoena duces tecum (and not merely notice thereof) be served not only on the non-party's custodian of records, but on all other parties (CPLR 3120(3)), upon at least 20 days' notice (CPLR 3120(2)). This allows time for any party so inclined, for example, to move to quash the subpoena or otherwise object.

A non-party that has received the subpoena need not, as had been the case under the old practice, affirmatively move to quash the subpoena in order to preserve its rights. See, e.g., *Riglioni v. Chambers Ford Tractor Sales, Inc.*, 304 A.D.2d 807, 808 (2d Dept. 2003) (denying non-party's cross-motion for a protective order because "[t]he non-party appellant failed to move to quash the subpoena.") Under the revised rules, however, within 20 days of service of the subpoena upon a non-party, the non-party may proffer objections and "serve a response which shall state with reasonable particularity the reasons for each objection." Thereafter, it is incumbent upon the party seeking discovery to proceed with a motion addressed to the objections (or other failure to comply). See CPLR 3122(a). Previously, only a party could expressly proffer such objections; the amendment explicitly extends the right to non-parties as well.

Next, the amendments guard against the "covertly issued attorneys' subpoenas" exemplified in *Matter of Beiny*, above, which had led to production being made and documents obtained, without notification to the other side. Thus, within five days following receipt of the subpoenaed records, notice must promptly be sent to all parties of the records that were actually produced and of their availability for inspection and copying at a specified time and place. See CPLR 3120(3).

The amendments were also designed to ease the process of admitting into evidence (if it is otherwise appropriate to do so) materials obtained as a result of the new processes. Thus, a new section, CPLR 3122(a), states that business records produced in response to a CPLR 3120 subpoena must be accompanied by a detailed certification from the producing party. The contents of the certification are aimed at, among other things, establishing a foundation of authenticity and establishing that the documents were created and maintained in the ordinary course of business.

Finally, CPLR 2305(a) has been amended specifically to authorize the issuance of a subpoena duces tecum with a subpoena testificandum, which as a practical matter had been happening to a greater or lesser degree under CPLR 3111, as noted above. Now, however, the subpoena need no longer be narrowly tailored solely to matters to be used at the deposition. Given this change, it is likely that the use of CPLR 3111's narrow document subpoenas will be reduced, and replaced in many cases by the broader subpoenas permitted under revised CPLR 3120.

In one fell swoop, the amendments to the CPLR have eliminated most of the potential for mischief and misunderstanding in obtaining discovery from non-parties that existed before. Properly utilized, the new additions to the CPLR provide an important tool for obtaining critical material during the discovery phase, and they ease the way for the use of that material at trial.