



The Best Documents In Your Case May Be From Third Parties

By Wyatt Dowling

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Cases are built on evidence and evidence comes from discovery. But discovery is largely a voluntary process: You serve document requests, the other side makes some objections, it produces some sliver of what you're looking for, and then the questions start.

Did they collect from particular sources, like personal email used for business purposes? Did they look at paper files? Did they collect text messages, internet messages, etc.? In short, did they produce all relevant documents? If you ask these questions to the other side, you'll probably get the non-answer I got when asking this question recently: "We're collecting from all relevant sources." Sure.

The best way to test whether the opposing party is honoring the rules of civil procedure is to ask a third party: serve a document subpoena. In many civil cases, you are dealing with an opposing party who has ongoing, long-term communications with a multitude of third parties. These are lenders and vendors, investors and customers.

These organizations and persons have different priorities than the opposing side: They just want to comply with the subpoena efficiently. They are less likely to be withholding core documents for merits reasons. For them, it's a cost issue, not a liability issue, and compliance is more assured.

There may be skeptics. So I have an example. In 2013, my firm took on an antitrust case on behalf of a start-up company. Our clients were two gentlemen who put up a shingle in 2011 and were immediately the targets of a boycott, orchestrated by their competitors and suppliers. I was the associate looking through all the emails produced by the defendants. We knew what had happened, but the opposing side's emails were not reflecting the facts.

What to do? Serve document subpoenas on third parties. We prepared and served multiple, third-party document subpoenas on a variety of companies that had relationships to the defendants.

At the time we were a little light on evidence that the defendants had demanded that suppliers refuse to provide products to our client. Not any more. One of the third-party suppliers produced an email pursuant to our subpoena that was the single most important piece of evidence in the case. In it, it was reported that a defendant's top executive had said verbatim that "he will not put this in writing and he will deny it if asked. [He] said 'if [the supplier] sells to [our client], then [the defendant] will not buy anything from [the supplier].'" Bingo.

In another case handled by my firm involving a partnership dispute, we learned only through third-party discovery that the defendants had excluded their partner from a secret board meeting concerning a plan to sell the business. The defendants had consistently stated in depositions and elsewhere that the meeting was just a "duck hunt" at a lodge, but third-party discovery showed otherwise and resulted in a court-ordered forensic examination of defendants' files, to figure out why these documents were not produced.

This is not to say that any particular defendant is intentionally holding back on producing relevant documents. There may be other explanations, such as differences in the document retention policies of

the defendant versus the third party. But whatever the reason, the core goal is to get the documents, and pursuing third parties is in many situations the best option.

The information you get from third-party discovery can be put to many uses. Setting aside the case-making document, you learn from third parties the gaps that may exist in the productions of opposing parties. When all you have is a bare suspicion that you don't have everything, it is not likely that a judge will be receptive to a motion to compel. Indeed, the other side will easily have produced "thousands" of documents while withholding or omitting the core documents that make or break the case.

Third-party discovery upends this. Now you can compare what the other side has produced on a particular topic to what third parties have produced. This can raise real questions that, for example, encourage the court to allow a forensic examination of the other side's files, to figure out what relevant documents were not produced.

In terms of the mechanics of getting a third party's documents, it varies in complexity depending on the forum you are in. In federal court, it is simply a matter of preparing a standard subpoena form and serving it on the third party, wherever they are in the country. If your case is a state-court case, it's more complicated. In certain states, you have to prepare "letters rogatory," get the court to approve them and then provide them to the out-of-state court for approval before discovery on the out-of-state party can be conducted.

Local counsel may be required to accept production of the documents by the third party in its home state. Cumbersome. The takeaway is that with regard to any third-party discovery, you should have a team meeting early in the case, think about the third party discovery you want and serve it well in advance of when it's needed — meaning, months in advance.

Another consideration is objections. The third party will likely complain if the requests involve a lot of information. They may also complain if the subpoena appears to merely seek the same documents requested from the opposing party in the litigation, or if the requests seek competitively sensitive information.

Given the cost-shifting provisions of many statutes relating to third-party discovery, it is important to craft document requests that thread these potential pitfalls. A limited number of requests, limited in time, and — ideally — limited to documents probably only available to the third party is the best approach. This creates a defensible position in the face of complaints of burdensomeness and duplication if the issue comes before a court.

Discovery does not have to be about hammering the other side with discovery requests and hoping for the best when it comes to responses or motions to compel. An efficient and creative way to approach discovery is to perform a flanking maneuver and get discovery from third parties. It may not work for every case, but it should be on the menu.

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