OUTSIDE PERSPECTIVES

Do Your Employees Have The Keys To The Kingdom? Document Discovery Against Your Individual Employees Should Not Serve As An Entrée Into Your Corporate Files

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AS A PARTY TO LITIGATION, DOCUMENT requests to your company and depositions go with the territory. But what happens when discovery is served on one of your employees relating to her work for the company? What duties do the employee and the company have to respond to discovery then? The issue can arise in three scenarios and, in each case, the answer rests upon the concepts of possession, custody and control. Discovery against your employees should not be used to gain access to corporate documents.

Discovery of Corporate Documents when the Corporation Is Not a Party

In the first scenario, your employee is a party to a suit, but the corporation is not. The plaintiff serves discovery on the employee and requests documents that the employee has access to by virtue of her position at the corporation. Here, while the employee has access to the documents of her employer, the employee does not have a legal right to the documents, and her access is limited to use in furtherance of her employer's work. A Texas court gave the following example: "Like a bank teller with access to cash in the vault, [the employee] has neither possession nor any right to possess [the employer's] trade secret [documents]." *In re Hal G. Kuntz,* 124 S.W. 3d 179, 183-84 (Sup. Ct. Tex. 2003). The Texas Supreme Court explained that mere access to the relevant documents did not constitute "physical possession" of the documents, and, therefore, the employee could not be compelled to produce documents from his employer. *Id*. at 184.

In the federal courts, Rule 34 provides that a party responding to discovery must only produce documents in his possession, custody, or control. Courts have held that documents are "within the possession, custody or control of a party if the party has 'actual possession, custody or control of the materials or has the legal right to obtain the documents on demand.'" *American Maplan Corp. v. Heilmayr*, 203 F.R.D. 499, 501 (D. Kansas 2001). In *American Maplan*, a corporation brought suit against its former president, alleging violation of a covenant not to compete and a nondisclosure agreement, among other things. American Maplan ("AMC") served discovery on Defendant Heilmayr, who had become president and a minority shareholder of its competitor, seeking documents belonging to the competitor. The competitor was not a party to the suit. The court found that Heilmayr did not physically possess the documents and that he had no legal right to obtain the documents on demand. The court stated "AMC cannot properly seek to obtain from one entity or individual what belongs to another." *Id.* at 502. The court further rejected the argument that Heilmayr had a right to the documents merely because he was a shareholder of the competitor. *Id.* Rather, the proper avenue for seeking the corporate employer's documents was through a subpoena to the corporation.

Discovery of an Individual Employee of a Corporate Party

In the second scenario, the corporation is a party to the suit. An opponent, perhaps having difficulty obtaining documents from the corporation or facing discovery limits, propounds document discovery directly on an individual employee. This approach is seriously flawed for a number of reasons. As an initial matter, the employee typically is not a party to the litigation. Thus, under this scenario, document requests to the employee should be

propounded as a subpoena (although as set forth in the next section, this approach may be a dead end as well). In *Contardo v. Merrill Lynch, Pierce, Fenner & Smith*, 119 F.R.D. 622, 623 (D. Mass. 1988), the court explained that the discovery served upon the employee of the defendant should be served under Rule 45 as a subpoena because the employee was neither a party nor an officer, director or managing agent of the defendant.

Putting aside that issue, the documents that the opponent is seeking again pertain to the employee's work for the corporation, and, as noted above, such documents are not the employee's documents. Rather, they are her employer's documents. Therefore, the employee has no duty to produce corporate documents under the Federal Rule 34. In *Invesco International, Inc. v. Paas*, 244 F.R.D. 374, 377 n.5 (W.D. Kentucky 2007), the court noted that a witness served with discovery in his personal capacity had none of the requested documents in his possession as the documents were instead in the possession, custody, and control of his current and former law firm employers.

Subpoenas on Individual Employees for Corporate Documents

In the third scenario, your employee is served with a subpoena duces tecum in his individual capacity for documents and testimony relating to his work for the corporation. As noted above, the inclusion of requests in the subpoena to an individual for corporate documents is generally misguided because the documents are not in the possession, custody or control of the individual employee. As the court in *Contardo* noted, "a party cannot secure documents from an opposing party by serving a deposition subpoena duces tecum on an employee of the opposing party commanding production of the party's documents . . . ." Moreover, the individual is protected by Federal Rule 45(c)(1) which provides that, "a party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena." The Rule also directs the court to protect the individual from undue burden: "The issuing court must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply." This rule can be used to contest a subpoena directed to an individual employee that is merely a path for taking a second shot at discovery against the corporation.

The burden on the individual is arguably excessive where, as provided in Federal Rule 26(b)(2)(C), the "discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive"; "the party seeking discovery has had ample opportunity to obtain the information by discovery in the action;" or "the burden or expense of the proposed discovery outweighs its likely benefit considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues." If the propounding party has sought documents from the corporation, a court may not be inclined to compel the individual employee to respond to a similar subpoena in light of Rule 45's directive. In any event, the employee is unlikely to have "possession, custody, or control" of any corporate documents, and, therefore, would have nothing to produce in response to the subpoena.

Conclusion

In sum, an employee's access to corporate documents does not translate to a duty for that employee to produce those corporate documents in discovery. Counsel should be alerted to efforts to use employees as back door access to discovery from the corporation. It would be wise to advise employees to contact their supervisors and/or the legal department if asked to produce corporate documents in a legal matter of any kind.

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