

THE COURT'S INVOLVEMENT WITH THE USE OF SUBPOENAE

BURTON N. LIPSHIE
STROOCK & STROOCK &
LAVAN LLP

TWO TYPES OF SUBPOENAE

- *AD TESTIFICANDUM* – FOR A WITNESS TO APPEAR AND GIVE LIVE TESTIMONY
- *DUCES TECUM* – FOR THE PRODUCTION OF DOCUMENTS OR THINGS
- ONE SUBPOENA CAN COMBINE BOTH PURPOSES

TWO PURPOSES FOR SUBPOENAE

- FOR DISCLOSURE
 - CPLR 3101(a) – DEPOSITION OF NON-PARTY
 - CPLR 3120 – PRODUCTION OF DOCUMENTS OR THINGS BY NON-PARTY
- FOR TRIAL
 - CPLR ARTICLE 23
 - DO ARTICLE 31 RULES APPLY?

THE DEPOSITION SUBPOENA

- CPLR 3101(a)(4) – DEPOSITION OF “ANY” PERSON, “UPON NOTICE STATING THE CIRCUMSTANCES OR REASONS SUCH DISCLOSURE IS SOUGHT OR REQUIRED.”
- DOES THE DEMANDING PARTY NEED TO SHOW “SPECIAL CIRCUMSTANCES”?

PICK THE DECISION - 1

- A. CANNOT OBTAIN DISCOVERY FROM NON-PARTY WITHOUT SHOWING THAT “SPECIAL CIRCUMSTANCES” WARRANT INTRUDING IN THEIR LIVES.
- B. CANNOT OBTAIN WITHOUT AT LEAST A SHOWING THAT IT IS THE ONLY WAY TO GET THE INFORMATION.
- C. CAN OBTAIN ON A SHOWING OF “MATERIAL AND NECESSARY”
- D. THE BURDEN IS ON THE NON-PARTY TO SHOW “UTTERLY IRRELEVANT”

THE DEPARTMENTS DIVIDE

- *BOSTROM v. WILLIAM PENN*, 285 A D 2d 482 (2d Dept. 2001) (“A PARTY SEEKING DISCLOSURE FROM A NONPARTY WITNESS MUST SHOW SPECIAL CIRCUMSTANCES”)
- *LANZELLO v. LAKRITZ*, 287 A D 2d 601 (2d Dept. 2001) (“SPECIAL CIRCUMSTANCES ARE SHOWN BY ESTABLISHING THAT THE INFORMATION SOUGHT CANNOT BE OBTAINED FROM OTHER SOURCES”)

FIRST DEPARTMENT

- *SCHRODER v. CONSOLIDATED EDISON CO.*, 249 A D 2d 69 (1st Dept. 1998)(SECOND DEPARTMENT CASES ARE “IN CONFLICT WITH THIS COURT’S OWN DECISIONS AND ARE THEREFORE NOT FOLLOWED”)

FOURTH DEPARTMENT

- *CATALANO v. MORELAND*, 299 A D 2d 881 (4th Dept. 2002) (“WE REJECT THE HOSPITAL’S CONTENTION THAT PLAINTIFFS WERE REQUIRED TO DEMONSTRATE SPECIAL CIRCUMSTANCES BEFORE BEING ENTITLED TO DISCLOSURE FROM A NONPARTY PURSUANT TO CPLR 3101[a][4]. CPLR 3101[a][4] WAS AMENDED IN 1984 TO ELIMINATE THE ‘SPECIAL CIRCUMSTANCES’ REQUIREMENT”)

AND THE COURT OF APPEALS RESOLVES

- *MATTER OF KAPON v. KOCH*, 23 N Y 3d 32 (2014). FIRST AND FOURTH DEPARTMENT RIGHT. SECOND AND THIRD DEPARTMENT WRONG. BURDEN ON NON-PARTY TO SHOW “UTTERLY IRRELEVANT”

PRODUCTION OF DOCUMENTS OR THINGS

- CAN BE PART OF A DEPOSITION SUBPOENA UNDER CPLR 3111.
- PRE-9/1/03 METHOD OF OBTAINING DOCUMENTS WITHOUT COURT ORDER
- THE AMENDMENT TO CPLR 3120 AND 3122

PICK THE DECISION - 2

- Defendant locates a custodian of relevant – and some privileged – documents. Serves a deposition subpoena, with CPLR 3111 demand, no notice to plaintiff. Tells custodian no need for deposition if produces documents. Obtains documents. Surprises plaintiff with documents during deposition. Plaintiff moves to suppress documents and disqualify counsel. How do you rule?

- A. Motion denied. Inasmuch as the deposition was canceled, there was no obligation to put plaintiff on notice. Informal discovery is permitted.
- B. Motion to suppress granted, but not disqualification. Can't take secret discovery by use of subpoena.
- C. Motion granted in its entirety. Conduct was egregious.

IT'S A REAL CASE

- *See, Matter of Beiny*, 129 A D 2d 126 (1st Dept. 1987), *rearg. den.*, 132 A D 2d 190 (1st Dept. 1987)

NEW CPLR 3120

- MOTION NO LONGER REQUIRED. “ANY PARTY MAY SERVE * * * ON ANY OTHER PERSON A SUBPOENA DUCES TECUM” [CPLR 3120(1)].
- SUBPOENA MUST GIVE 20 DAYS NOTICE [CPLR 3120(2)]
- COPY OF THE SUBPOENA MUST BE SERVED ON ALL PARTIES, AND, WITHIN 5 DAYS OF COMPLIANCE, NOTICE OF COMPLIANCE MUST BE SERVED [CPLR 3120(3)].

IS A MOTION TO QUASH NECESSARY?

- NO.
- CPLR 3122(a) – “WITHIN 20 DAYS OF SERVICE OF A * * * SUBPOENA DUCES TECUM UNDER RULE 3120 * * * THAT PARTY OR PERSON [WHICH] OBJECTS TO THE DISCLOSURE, INSPECTION OR EXAMINATION, SHALL SERVE A RESPONSE WHICH SHALL STATE WITH REASONABLE PARTICULARITY THE REASONS FOR EACH OBJECTION.”

MEDICAL RECORDS

- CPLR 3122(a) – “A MEDICAL PROVIDER SERVED WITH A SUBPOENA DUCES TECUM REQUESTING THE PRODUCTION OF A PATIENT’S MEDICAL RECORDS PURSUANT TO THIS RULE NEED NOT RESPOND OR OBJECT TO THE SUBPOENA IF THE SUBPOENA IS NOT ACCOMPANIED BY A WRITTEN AUTHORIZATION BY THE PATIENT.” AND THE SUBPOENA MUST STATE THAT LIMITATION, “IN BOLD-FACED TYPE”

OVERLAY OF FEDERAL LAW

- HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT (“HIPAA”)
- GENERALLY PROHIBITS DISCLOSURE OF MEDICAL RECORDS WITHOUT AUTHORIZATION, OR THE OPPORTUNITY TO FORMALLY OBJECT, ABSENT A COURT ORDER.
- A SUBPOENA SUFFICES, UPON A SHOWING OF AN ATTEMPT AT NOTICE.

WHAT IF AUTHORIZATION IS REFUSED?

- CAN A JUDGE SIMPLY “SO ORDER” A SUBPOENA? *CAMPOS v. PAYNE*, 2 Misc 3d 921 (Civ.Ct. Richmond Co. 2003)
- CAN A JUDGE ORDER DISCLOSURE UPON A MOTION? *HORN v. HERNANDEZ*, NYLJ, October 15, 2003, p. 19, col. 3 (Sup.Ct. Suffolk Co.)
- OTHER COMPLICATIONS – FEDERAL AND STATE LAWS DEALING WITH, FOR EXAMPLE, HIV RECORDS.

TRIAL SUBPOENAE – *AD TESTIFICANDUM*

- ANYONE “FOUND WITHIN THE STATE” [JUDICIARY LAW, §2-b].
- WHAT ABOUT AN OUT-OF-STATE EMPLOYEE OF AN IN-STATE PARTY?
23/23 COMMUNICATIONS CORP. v. GENERAL MOTORS CORP., 172 Misc 2d 821 (Sup.Ct. N.Y.Co. 1997).

PICK THE DECISION - 3

- A. The Court can enforce a subpoena served on a party to produce a non-NY employee. But not one served on a non-party.
- B. The Court can enforce a subpoena served in NY on a non-party to produce a non-NY employee
- C. None of the above.

TRIAL SUBPOENAE – *DUCES TECUM*

- NEW CPLR 2303(a). NOTICE OF A SUBPOENA MUST BE SERVED ON ALL PARTIES TO THE ACTION.
- THE DOCUMENTS MUST BE DELIVERED TO THE COURT, SUBJECT TO INSPECTION “PURSUANT TO THE RULES OR ORDER OF THE COURT” [CPLR 2306(b)].
- WHAT IF THE DOCUMENTS ARE DELIVERED TO COUNSEL? *WEINBERG v. REMYCO, INC.*, 9 A D 3d 425 (2d Dept. 2004).

SUBPOENAED BUSINESS RECORDS

- MUST BE ACCOMPANIED BY A “CERTIFICATION” OF THE CUSTODIAN THAT THEY ARE GENUINE COPIES, THAT THEY ARE ALL THE DOCUMENTS COMPLYING WITH THE SUBPOENA, THAT THEY WERE MADE IN THE REGULAR COURSE OF BUSINESS, AND THAT IT WAS THE REGULAR COURSE OF BUSINESS TO MAKE THEM [CPRL 3122-a(a)].

ADMISSIBILITY OF RECORDS

- THE CERTIFICATION IS ADMISSIBLE.
- UPON NOTICE GIVEN AT LEAST 30 DAYS BEFORE TRIAL, THE DOCUMENTS ARE ADMISSIBLE WITHOUT LIVE TESTIMONY.
- OBJECTION MAY BE MADE AT LEAST 10 DAYS BEFORE TRIAL [CPLR 3122-a(b)].
- WHAT HAPPENS IF OBJECTION IS MADE?

PROCEDURAL RULES

- GENERALLY, AN ATTORNEY, AS AN “OFFICER OF THE COURT,” OR THE CLERK OF THE COURT, FOR *PRO SE* LITIGANTS, MAY ISSUE A SUBPOENA [CPLR 2302(a)].
- A SUBPOENA IS SERVED IN THE SAME MANNER AS A SUMMONS [CPLR 2303(a)].
- FEES AND EXPENSES MUST BE PAID IN ADVANCE [CPLR 2303(a)].

SUBPOENAE ISSUED BY THE COURT

- TO COMPEL PRODUCTION OF AN ORIGINAL DOCUMENT WHEN A CERTIFIED COPY IS ADMISSIBLE
- TO PRODUCE A PRISONER
- ON ONE DAY'S NOTICE, UNLESS THE COURT ORDERS OTHERWISE [CPLR 2302(b)].

OTHER SUBPOENAE REQUIRING COURT ORDER

- SUBPOENA SERVED ON A LIBRARY, MUNICIPAL CORPORATION OR THE STATE
- CAN BE ISSUED BY A JUSTICE OF THE SUPREME COURT WHERE THE DOCUMENTS ARE LOCATED, OR THE JUDGE OF THE COURT WHERE ACTION PENDING
- 1 DAY'S NOTICE, UNLESS OTHERWISE ORDERED [CPLR 2307].