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Third Party Subpoenas: Reversing a Cost Center in the Law Department

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45

CHEAT SHEET

- ***Feel the burden.*** FRCP 45(d) (1) states 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.”
- ***Covering the bill.*** To maximize cost recovery, an organization should outline limitation agreements for document production, object to burdensome discovery requests, and enlist electronic discovery tools.
- ***Hand of the government.*** Courts will only impose compliance recovery costs in government cases when the request results in an excessive financial burden for the non-party.
- ***International considerations.*** While countries like Australia and Brazil provide cost-shifting protocols for non-party compliance, other countries like Germany have yet to finalize any

formal cost-shifting procedure.

Receiving a third party subpoena is like being caught in the crossfire of someone else's dispute. Civil investigative demands produce significant unplanned risks, expenses, and logistical challenges for companies. Yet, many organizations view responding to third party subpoenas as a "cost of doing business."

The days when third party recipients could quickly "copy and send" files without significant burden no longer exist. Instead, for in-house lawyers and their corporate clients, responding to discovery — with consideration for document production and electronically stored information (ESI) requests — can feel tantamount to fueling a forest fire with hard-earned money

Even prior to the 1991 Amendments to the Federal Rules of Civil Procedure (FRCP), the Ninth Circuit noted that, "[n]on-party 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." For example, in *US v. Columbia Broad. Sys., Inc*., the Ninth Circuit awarded the reimbursement of discovery costs to non-party witnesses, after a broad range of subpoenas resulted in the production of more than six million documents at the cost of more than US$2,000,000. Corporate legal departments must now advocate new third party subpoena cost recovery models as a way to allocate the discovery costs to the requesting party.

High "named party" expenses: The "Death Star" of discovery

Organizations already feel the pain of named party discovery. The discovery burden of the data deluge and over-preservation has escalated the cost to preserve, search for, sift through, and process electronically stored information (ESI). In a comment submitted to the Federal Civil Rules Committee in support of the 2015 Federal Rules of Civil Procedure (FRCP) Amendments, GE Vice President for Litigation and Legal Policy Bradford Berenson cited examples of cases where participatory preservation and discovery costs ranged in the millions.

In response to named party discovery expenses, the recent 2015 Amendments to Rule 26(b)(1) and 37(e) have focused named litigants on proportionality and have provided pathways to sanction avoidance for good-faith conduct. Also, FRCP 16 and 26(f) now require the parties to agree on the preservation and discovery of ESI in their case management plan and discovery conferences.

Cost recovery for third party discovery under the federal legal system emanates from Federal Rule of Civil Procedure 45 and Federal Rule of Criminal Procedure 17. Case law tends to dictate when cost allocation is appropriate for government agency-issued subpoenas or "civil investigative demands" that impose non-party discovery burdens on true non-parties. Yet, receipts of third party discovery requests usually arrive late to the negotiations, if they are involved at all, and rarely have appearance in the matter. Fortunately, and as previously mentioned, FRCP 45, as well as many state and foreign court rules, provide a cost allocation mechanism for the third party recipient to seek reimbursement from the requesting party.

Federal Rule of Civil Procedure 45

A number of organizations, both big and small, leave significant unrecovered costs on the table due to the simple fact that these organizations lack a set process for handling non-party subpoena requests and cost-shifting demands. FRCP 45(d)(1) states 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 court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party who fails to comply."

As Darth Vader put it: "The Force is strong with this one." The Rule 45 "undue burden" standard requires sensitivity on the part of district courts supervising discovery, in terms of the costs imposed on third parties. In addition, Federal Rule of Civil Procedure 26(b)(1)-(2) requires district courts in "[a]ll discovery" to consider a number of factors potentially relevant to the question of undue burden, including but not limited to:

- Whether the discovery is "unreasonably cumulative or duplicative;"
- Whether the discovery sought is "obtainable from some other source that is more convenient, less burdensome, or less expensive;" and,
- Whether "the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues."

With these tools, district court cases that involve third party subpoenas can adequately protect both the requesting party's right to evidence, and the responding party's right to the avoidance of unplanned risks, expenses, and logistical challenges.

Cost-shifting mechanics under Federal Rule of Civil Procedure 45

In today's "storage-happy world," courts must find remedies for non-parties that object to a subpoena, and in turn, request that the court compel the requesting party to bear any significant expense related to production. District courts around the country face this question fairly regularly — especially due to the ever-increasing costs associated with searching for and processing electronically stored information (ESI).

In *Tessera, Inc. v. Micron Technology, Inc.*, the Northern District of California set forth eight factors to determine whether to shift the cost to the requesting party: (1) the scope of the request; (2) the invasiveness of the request; (3) the need to separate privileged material; (4) the non-party's financial interest in the litigation; (5) whether the party seeking the production of documents ultimately prevails; (6) the relative resources of the party and the non-party; (7) the reasonableness of the costs sought; and (8) the public importance of the litigation. While some courts have enumerated multiple factors to define undue burden and cost-shifting, the Ninth Circuit, in *Legal Voice v. Stormans, Inc.*, found only two considerations to be relevant:

"(1) whether the subpoena imposes expenses on the non-party, and (2) whether those expenses are significant." If satisfied, a court "must order the party seeking discovery to bear at least enough of the cost of compliance to render the remainder non-significant."

Without such set processes, organizations can face a host of unpleasant issues, such as, (1) missing important objection and response deadlines, and (2) missing out on opportunities to shift some of the cost burden to the requesting party. While Rule 45 exists to protect non-parties from the burdensome

expense of these requests, the protection provides no guarantees. The extent to which costs are found to be recoverable by the courts remains uncertain. For these reasons, respondents would benefit greatly from having cost-effective processes in place that standardize objections and cost-shifting demands, while tracking updates to jurisdictional rules.

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In turn, a company should be able to immediately:

(1) Make an initial cost demand and put the issue on the table upon receiving the subpoena;

(1) Communicate with counsel for the requesting party and encourage voluntary agreement to pay at least a portion of the reasonable costs of compliance; and,

(1) Be prepared to file objections and/or a motion to quash where justified if required in the jurisdiction to project cost-shifting entitlement.

However, and as previously mentioned, Rule 45 does not affirmatively allocate costs to the requestor, and does not identify which costs, if any, the requestor should bear. Despite courts having shown a willingness to allocate costs, the prevailing presumption remains: “The responding party must bear the expense of complying with the discovery request, including requests for electronic data.” Therefore, cost-shifting “should [only] occur when an order requiring compliance subjects a non-party to ‘significant expense.’”

The organization should also keep in mind that — despite these enumerated factors — courts retain a substancial amount of discretion to award or deny cost-shifting processes. The driving consideration ultimately rests on whether a disinterested third party “subsidizes” a litigation irrespective of the outcome. Courts will ultimately try to advance the goals of the litigation while protecting disinterested parties.

Recovery steps

Despite the Rules Committee amending Federal Rule of Civil Procedure 45 to make cost-shifting a matter of the courts, organizations must still be mindful by outlining an anticipated approach to production. For an organization to maximize cost-shifting and recovery it should:

(1) Raise objections to unreasonably or unduly burdensome requests quickly, specifying the specific categories of ESI being objected to;

(2) When objecting to requests, specify the context of the search and what steps are required to locate and preserve ESI;

(3) Clearly outline the limits of the production and use written correspondence and agreements to confirm these limitations with the requesting party; and,

(4) Enlist electronic discovery tools and resources, as well as an attorney or another individual familiar with the documents, to identify the most relevant material.

A party that takes these steps will have a better chance at recovering its costs. With notice of the anticipated costs, the requesting party lacks the incentive to object knowing that a court will likely shift the cost burden if it appears that the non-party acted in a cooperative and transparent manner.

Even so, uniformity amongst the courts remains an issue. In fact, courts have taken a variety of approaches to address it. Most courts display a willingness to permit cost-shifting in the following scenarios: inspection, copying, vendor costs and expenses, and lost earnings. Select courts have even permitted recovery of attorney costs incurred to conduct privilege review for the purposes of production.

However, courts continue to remain hesitant to consider whether or not to permit cost-shifting requests for activities like reviewing documents for privilege and preparing objections.

While some courts have permitted attorney review fees, others have adopted the view that the party best able to control these costs — the non-party — should absorb them.

When Uncle Sam calls, can an undue burden argument save your organization money?

"Hello, [insert your organization]. It's your good friend, Uncle Sam."

The dreaded government non-party subpoena often includes a daunting request for bank statements, financial statements, and other documents prepared or generated in transactions with others. Cases like *US v. Morton Salt Co.,* and *SEC v. Arthur Young & Co.*, and their progeny, have interpreted Rule 45 in the context of non-parties responding to government subpoenas. Many Internet Service Providers (ISPs), financial services organizations, telecom providers, and large employers face these requests fairly regularly.

Relying on *Arthur Young & Co.*, courts will impose compliance costs on the government only when the request results in an excessive financial burden for the non-party. Thus, your organization must argue that "the financial burden of compliance exceeds that which a party ought to reasonably shoulder in light of the facts and circumstances of the particular case."

Recovering the costs for complying with a government subpoena can be difficult if the materials sought are not "clearly irrelevant or immaterial" to the subject of the investigation, especially if the underlying case has some public significance. However, government agencies do not have carte blanche to issue sweep untargeted requests, and the non-party has several arguments at its disposal to lobby for at least partial reimbursement. The non-party's arguments should depend, in part, on the following: (1) "courts have wide discretion in these matters"; (2) "the role or the relationship of the non-party to the litigation is not an ancillary target but a mere repository of the information sought"; and, if applicable, (3) "the request is disproportionate to the needs of the particular case."

For example, if a non-party considers its role in the ongoing litigation as nothing more than tenuous, it should present a strong argument to the government in its initial response that, "it is being asked to shoulder more than it ought to as a mere repository of the information." Establishing such "lack of responsibility" requires the nonparty organization to first determine whether or not it describes itself as an "ancillary target" of the executive agency's investigation. The organization should then emphasize that — in the context of the particular case — the costs involved in complying with the subpoena "exceeds that which the respondent may reasonably be expected to bear as a cost of

doing business." While courts typically grant wide latitude to an agency prior to imposing costs, the complying party's argument will win if it can demonstrate that the requested information exceeds the scope of the agency's congressionally authorized purpose.

Cost-shifting under Federal Rule of Criminal Procedure 17

What if your organization receives a subpoena in a criminal matter?

Attorneys of organizations unfamiliar with the federal criminal process feel an understandable amount of anxiety when served with a non-party subpoena. While Federal Rule of Criminal Procedure 17 provides some guidance, the seemingly simple and straightforward language of the rule conceals the practical realities of the response process.

Under Rule 17(c)(1), "[a] subpoena may order the witness to produce any books, papers, documents, data, or other objects the subpoena designates." Rule 17(c)(2) also states that when a motion is "made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive." The courts draw a distinction between subpoenas issued for the purpose of preparing for trial, and subpoenas issued in furtherance of a grand jury investigation, with the burden of contesting a Rule 17 "trial" being lower.

According to the US Supreme Court in *Nixon*, "a pretrial Rule 17(c) subpoena is not intended to provide a means of discovery for criminal cases." Such a subpoena — whether issued by the defendant or by the government — should not be delivered unless it meets three criteria: "(1) relevancy; (2) admissibility; (3) specificity."

In contrast with a Rule 45 civil subpoena, or a trial subpoena issued under Rule 17, a grand jury subpoena issued by the government remains a matter of public duty for its recipient. In fact, some courts have exhibited a reluctance to award costs to a responding party, stating that there exists a "well-established premise that the subpoenaed party must bear the costs of compliance," and that courts have "exercised the power to quash or modify (or condition enforcement of on the advancement of costs) only where there has been a clear showing of unreasonableness or oppressiveness." Thus, a non-party's burden in recovering costs expended to comply with a requesting party remains very high.

Absent of the implication, case law in which courts *actually* award costs to the responding non-party remains scarce. For a large organization, the amount of cost-shifting available declines depending upon the amount of resources at your disposal. To make matters worse, courts continue to refuse to shift the costs of compliance once they have categorized the requested information as "relevant and reasonable," as well as if the requesting party has offered to mitigate the costs — e.g., travel to review the information, rather than have the subpoenaed party produce it. Yet, all hope is not lost. Courts have shown a willingness to grant reimbursement requests to a non-party receiving a "trial" subpoena from the government during litigation, especially when the government had unlimited investigatory power prior to filing the litigation.

In Rule 45 we (mostly) trust: Cost-shifting at the state level

On December 1, 2015, the US federal judiciary achieved sweeping reform of the Federal Rules of Civil Procedure's discovery obligations. The amendments sought to emphasize proportionality into the civil discovery process. While Federal Rule of Civil Procedure (FRCP) 45 creates a uniform

mechanism for non-parties facing a large production request, states still vary widely as to the availability of protections and reimbursement rights for nonparties. For example, many states have adopted Rule 45-like provisions that purport to protect subpoenaed parties from overly burdensome requests. Meanwhile, other states have retained their own unique rules that may not address cost-shifting. Case law clarifying the issue is often difficult to find.

However, neutral parties drawn into litigation still have a chance to understand the complexities of cost-shifting. In fact, some of the larger, litigation-heavy states like New York, as well as some less often thought-of jurisdictions, like Arizona and Florida, appear to have taken a much needed proactive approach to developing articulated rules and precedent to assist parties in determining who bears the cost burden of non-party subpoena compliance.

Amongst the various state courts, the overarching trends relating to cost-shifting for non-party compliance appear to fit into two major categories: (1) Favorable to cost-shifting; and (2) In need of further development but potentially favorable to cost-shifting.

(1) Favorable to cost-shifting

Arizona: Ariz. Rev. Stat. Ann. § 12-351(A) expressly states, “All reasonable costs incurred in a civil action by a witness who is not a party to the action with respect to the production of documents pursuant to a subpoena for the production of documentary evidence shall be charged against the party requesting the subpoena if the witness submits an itemized statement to the requesting party stating the reproduction and clerical costs incurred by the witness.” More specifically, the Arizona statute defines “reasonable costs” as, “25 cents for each page of standard reproduction of documents and the actual costs for reproduction of documents that require special processing plus the reasonable clerical costs incurred in locating and making the documents available billed at the rate of twenty-five dollars per hour per person.”

Florida: Fla. R. Civ. P. 1.351(c) expressly states, “The person upon whom the subpoena is served may condition the preparation of copies on the payment in advance of the reasonable costs of preparing the copies.” More specifically, the Court in *Quin Grp., Inc. v. 2020 Ponce, LLC* authorized “reasonable costs” of US$40 per hour for an employee of the non-party to use good faith in reviewing 35 boxes of construction documents and limiting time needed for the review.

New York: N.Y. C.P.L.R. 3122(d) (McKinney) expressly states, “The reasonable production expenses of a non-party witness shall be defrayed by the party seeking discovery.” And therefore, the New York statute is unequivocal in requiring the party seeking production of documents from a non-party to pay the “reasonable production expenses.” However, the statute does not require the requesting party to inform the nonparty of its obligation to defray the costs of production, which could lead to some mischief. Therefore, and to avoid any accusations in this regard, the requesting party must notify the non-party in writing that it has an obligation to pay the “reasonable production costs.”

(2) In need of further development but potentially favorable to cost-shifting

Illinois: Despite the absence of a clear ruling, 735 Ill. Comp. Stat. Ann. 5/2-1101 gives an indication as to Illinois’ potentially favorable stance on cost-shifting: “For good cause shown, the court on motion may quash or modify any subpoena or, in the case of a subpoena duces tecum, condition the denial of the motion upon payment in advance by the person in whose behalf the subpoena is issued of the reasonable expense of producing any item specified therein.”

Cost-shifting at the international level

It’s a bird, it’s a plane, it’s a … non-party subpoena, via an international organization?

Non-party subpoenas — and the cost-shifting that ensues — at the international level do not reach Godzilla-like proportions of complexity, as countries around the globe appear to have taken a much needed proactive approach to developing articulated rules and precedent to assist parties in determining who bears the cost of non-party subpoena compliance.

Amongst the countries around the world, the overarching trends relating to cost-shifting for non-party compliance appear to fit into the following categories: (1) Clear and favorable to cost-shifting; and (2) In need of further development but potentially favorable to cost-shifting.

(1) Clear and favorable to cost-shifting

Australia: Queensland Uniform Civil Procedure Rule (UCPR) 417 expressly states, “On application to the court, the court may make an order for the payment of any loss or expense incurred in complying with a subpoena.” In other words, if a court finds that a non-party has incurred, or believes that a non-party may incur a substantial expense in complying with a subpoena, the court may order the requesting party to pay for all, or part, of the losses (including legal costs) incurred by the nonparty in complying with the subpoena. Using this system “provide[s] reasonable monetary compensation for the burden of complying with a notice of non-party disclosure and to provide a mechanism for resolving any dispute about what is reasonable in the circumstances.”

Brazil: Brazil Civil Procedure Code (CPC), Article 82, expressly states: “Except for provisions concerning gratuidade de justiça” (a program for free legal representation for the less advantaged) “it is the responsibility of each party to provide the expenses of any act they realize or require in the procedure, advancing their payment, from the beginning until the final judgment, or in its execution, until the right recognized in the title is satisfied.” Article 82 § 1 further enforces the “cost-shifting mentality,” stating, “It is the responsibility of the interested party to advance the expenses relative to an act whose realization the judge determines to be necessary, or by requirement of the Ministry of the Public, when its intervention happens as supervisors of the judiciary.” In other words, the requesting party must advance the payment of the necessary costs of production. In the end, the losing party shall reimburse such costs.

(2) In need of further development but potentially favorable to cost-shifting

Germany: Although case law is scant, the German legal system, in general, does not use any procedure akin to standard discovery. In fact, parties will plead the facts on which they rely, and only if those facts are controverted do parties lodge the relevant documents. In further support of potential cost-shifting, and in the context of expert witnesses, the German legal system does not usually require that the parties themselves appoint or retain their own experts. If so, however, the parties bear the costs of doing so. Thus, if a party seeks to include a third party witness, the requesting party should bear the cost.

Getting to green

Law department leaders at large data holding organizations might lack awareness of the real cost

and expense incurred when responding to third party discovery requests. Oftentimes, third party subpoena costs are tracked into the litigation budget or worse — not tracked at all. Effective cost allocation programs begin with an analysis of discovery spending combined with policies and processes to allocate appropriately. Partnering with outside counsel to help manage a cost allocation program, object to overbroad requests (or file a motion to quash as needed), and provide assistance in chasing down requesting parties for reimbursement, is a valuable component when organizations don't have the resources to manage a cost allocation project themselves. For a large organization with a broad footprint, the cost recoupment can amount to hundreds of thousands of dollars in savings. The first step is understanding that your organization is leaving money on the table and has a real opportunity to reduce costs. For law departments seeking to cut subpoena compliance costs, Yoda probably has the best advice: "Do or do not — there is no try."

> Law department leaders at large data holding organizations might lack awareness of the real cost and expense incurred when responding to third party discovery requests. Oftentimes, third party subpoena costs are tracked into the litigation budget or worse — not tracked at all.

Further Reading

1 *U.S. v. Columbia Broad. Sys., Inc*., 666 F.2d 364, 371 (9th Cir. 1982).

2 Id. at 372.

3 Response by the General Electric Company to the Request to Bench, Bar and Public for Comments on Proposed Rules (August 2013) 4-5, http://www.regulations.gov/contentStreamer?documentId= USC-RULES-CV-201300020599&attachment Number=1. ("Where litigation had not yet even been filed GE reported in 2011 that GE had incurred fees of $5.4 million to collect and preserve 3.8 million documents."; "GE reported on a second matter in 2011, where the cost to preserve and collect data was $5 million for fewer than 250 custodians. Notably, the $5 million cost cited in 2011 excluded review."; and "In a third example presented in 2011, GE had incurred discovery costs of nearly $6 million to produce more than 700,000 documents, representing an estimated 15 million pages of paper and ESI. The cost to the company to complete discovery in that matter has exceeded $11 million.").

4 See, e.g., *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 717 (1st Cir.1998) ("concern for the unwanted burden thrust upon non-parties is a factor entitled to special weight in evaluating the balance of competing needs" in Rule 45 inquiry); *Misc. Docket Matter No. 1 v. Misc. Docket Matter No. 2*, 197 F.3d 922, 927 (8th Cir.1999) (quoting id.); see also Fed.R.Civ.P. 45(c)(2)(B) (any court order to compel compliance with document subpoena "shall protect any person who is not a party or an officer of a party from significant expense" of compliance).

5 *Watts v. S.E.C.*, 482 F.3d 501, 509 (D.C. Cir. 2007).

6 *Tessera, Inc. v. Micron Technology, Inc.*, 2006 WL 733498 (N.D. Cal. March 22, 2006).

7 *Legal Voice v. Stormans, Inc.*, 738 F.3d 1178, 1184 (9th Cir. 2013) (adopting the rule set out by *Linder v. Calero–Portocarrero*, 251 F.3d 178, 182 (D.C.Cir.2001)).

8 Id. (citing Linder, 251 F.3d at 182).

9 *U.S. v. Cardinal Growth, LLP*, No. 11-C-4701, 2015 WL 850230 at *2 (N.D. Ill. Feb. 23, 2015).

10 Id. (emphasis added).

11 *U.S. v. Morton Salt Co.*, 338 U.S. 632, 641 (1950); *SEC v. Arthur Young & Co.*, 584 F.2d 1018, 1030, 1032-34 (D.C. Cir. 1978), cert. denied, 439 U.S. 107 (1979); see also *Hurtado v. U.S.*, 410 U.S. 578, 589 (1973) (These cases marked a departure from earlier administrative law cases which sought to protect companies from requests described as “roving inquiries into private books and records” or otherwise considered “mere fishing expeditions.”).

12 See e.g., *Warshay v. U.S.*, 1999 WL 250777, at *1 (E.D.N.Y. 1999) (denying reimbursement request); See also, *U.S. v. Cmty. Bank & Trust Co*., 768 F.2d 311 (10th Cir. 1985).

13 *SEC v. Arthur Young & Co.*, 584 F.2d 1018, 1032-34 (D.C. Cir. 1978), cert. denied, 439 U.S. 107 (1979); See *Hurtado v. U.S.*, 410 U.S. 578, 589 (1973).

14 See *FTC v. Winters Nat. Bank and Trust Co.*, 509 F. Supp. 1228, 1231-32 (S.D. Ohio 1981).

15 Id.

16 See *SEC v. OKC Corp*., 474 F. Supp. 1031, 1038 (N.D. Tex. 1979).

17 *United States v. Nixon*, 418 U.S. 683, 700 (1974).

18 Id.

19 See In re Grand Jury Investigation, 459 F. Supp. 1335 (E.D. Pa. 1978) (citing *United States v. Hurtado*, 410 U.S. 578, 588-89 n.10 (1973)).

20 See In re Grand Jury Proceedings, 744 F.3d 211 (1st Cir. 2014); See also In re Subpoenas Duces Tecum Nos. A99-001, A99-002, A99-003, and A99-004, 51 F. Supp.2d 729 (W.D. Va. 1999).

21 *Quin Grp., Inc. v. 2020 Ponce, LLC*, 152 So. 3d 795 (Fla. Dist. Ct. App. 2014).

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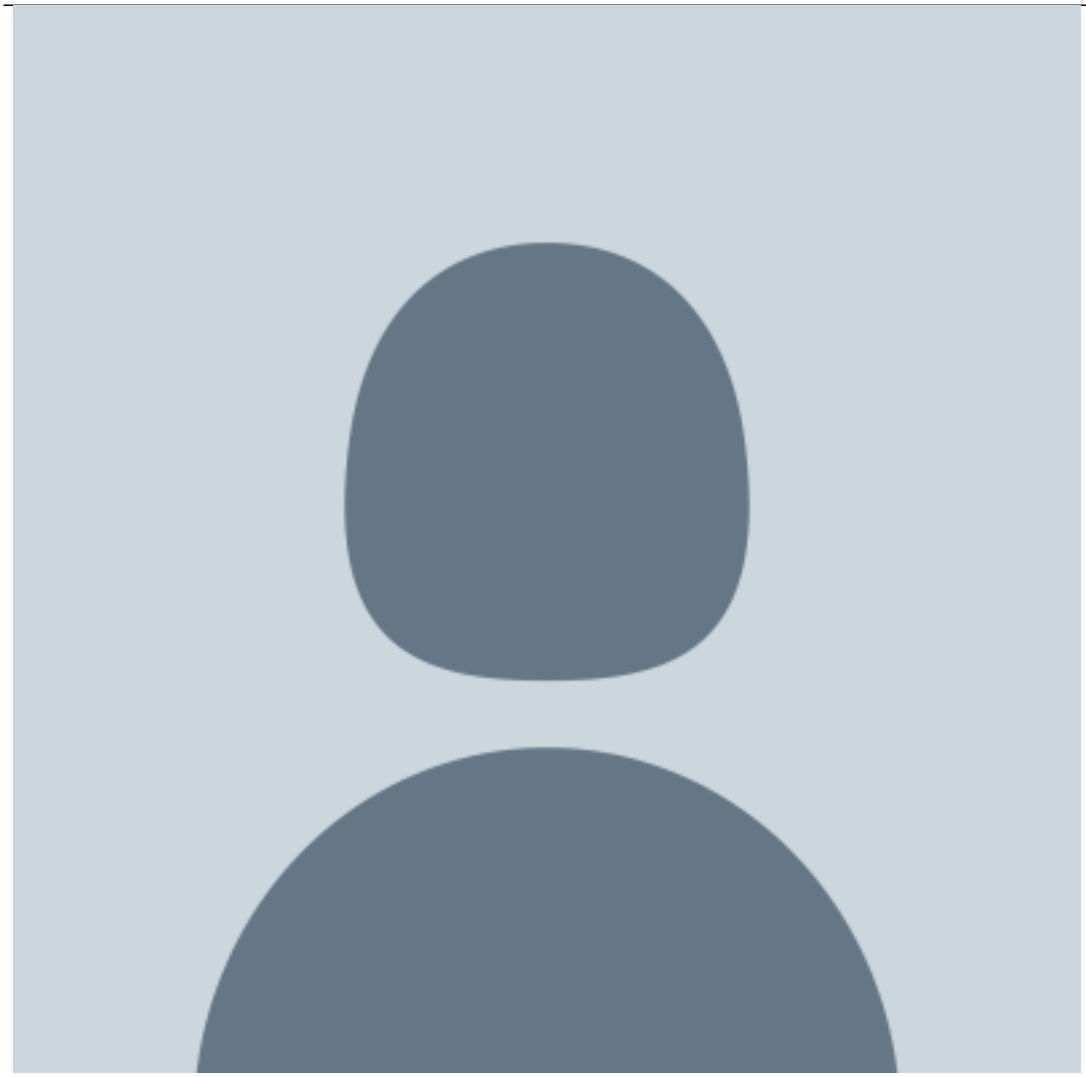

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She created and leads the GE Discovery Center of Excellence and works closely with cross-functional teams across the company to develop strategy and policy related to the full spectrum of the life cycle of discovery and data management. The GE Discovery Center of Excellence was named a 2016 ACC Value Champion.

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