

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS

STATE OF NEW YORK

MATTER OF JOHN KAPON, et al.

Appellants,

-against-

No. 63

WILLIAM I. KOCH,

Respondent.

20 Eagle Street
Albany, New York 12207
February 19, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

PAUL SHECHTMAN, ESQ.
ZUCKERMAN SPAEDER LLP
Attorneys for Appellants
1185 Avenue of the Americas
31st Floor
New York, NY 10036

MOEZ M. KABA, ESQ.
IRELL & MANELLA LLP
Attorneys for Respondent
1800 Avenue of the Stars
Suite 900
Los Angeles, CA 90067

Sharona Shapiro
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 63. Counsel,
2 are you ready to proceed?

3 MR. SHECHTMAN: I am, Your Honor.

4 CHIEF JUDGE LIPPMAN: Good. Do you want
5 any rebuttal time, counselor?

6 MR. SHECHTMAN: Two minutes, Your Honor.

7 CHIEF JUDGE LIPPMAN: Two minutes. You
8 have it. Go ahead, you're on.

9 MR. SHECHTMAN: May it please the court.
10 Paul Shechtman, and I represent appellants John Kapon
11 and Justin Christoph.

12 I suppose I should begin with two
13 announcements. First, a jury has found Rudy
14 Kurniawan - - - if I say his name right - - - guilty
15 of manufacturing and distributing counterfeit wine,
16 which should confirm one's faith in the jury system.
17 And in the case of Koch v. Acker - - -

18 CHIEF JUDGE LIPPMAN: Right.

19 MR. SHECHTMAN: - - - which is the separate
20 - - -

21 CHIEF JUDGE LIPPMAN: Right.

22 MR. SCHECHTMAN: - - - action involving
23 five bottles of counterfeit wine - - -

24 JUDGE GRAFFEO: Is that the California
25 action?

1 MR. SHECHTMAN: That's the New York action.

2 My - - -

3 JUDGE GRAFFEO: The New York action.

4 MR. SHECHTMAN: That's the New York action.

5 JUDGE READ: Discovery's been reopened,
6 right?

7 MR. SHECHTMAN: Reopened, to the extent
8 that it - - - it is permitted as to Acker's
9 relationship with Kurniawan through 2006.

10 JUDGE READ: So that's narrow enough that
11 it doesn't affect your argument here, is that - - -

12 MR. SHECHTMAN: I think, Your Honor, it is
13 narrow enough. It - - - it affects the use argument
14 somewhat. I think the argument still has some life,
15 but it - - - it certainly makes it less important to
16 us.

17 CHIEF JUDGE LIPPMAN: Counselor, whose
18 burden is it, in these kinds of situations, with an
19 out-of-state action and - - - who - - - who has to
20 show that it's relevant or not relevant? Where - - -
21 where does the burden lie in - - - in our present
22 case law? And you know, obviously, the statutory
23 framework has changed. Where are we today?

24 MR. SHECHTMAN: It seems to me it's just
25 the right first question.

1 CHIEF JUDGE LIPPMAN: Okay.

2 MR. SHECHTMAN: It - - - and the - - - I
3 don't know where this court's case law is, because
4 this court has not had a chance to really look at
5 this since - - -

6 CHIEF JUDGE LIPPMAN: On this really exact
7 point, yeah.

8 MR. SHECHTMAN: - - - the 1984 amendment.
9 I know where the Appellate Divisions are, and
10 respectfully, they're all over the lot. And what one
11 learns, for example, is - - - I think what's clear is
12 after 1984, it is very hard to say that where you're
13 - - - there's a subpoena to a nonparty, special
14 circumstances have to be shown. I don't know how one
15 can argue that, given that those words were taken
16 from the statute - - -

17 JUDGE GRAFFEO: What does the uniform
18 interstate statute do? Where does that put the
19 burden?

20 MR. SHECHTMAN: It - - - it - - - when I
21 started this, Judge, I thought it mattered greatly.
22 I don't think it does. I think it takes you back to
23 3101(a), and so the question here is the same as
24 subpoenaing a nonparty in New York. What it does
25 say, though - - -

1 JUDGE GRAFFEO: And on material?

2 MR. SHECHTMAN: No, and I - - - if you give
3 me one second; I apologize. What it does say,
4 though, is the New York court is the decider, and
5 that's very important, because I don't think the
6 judge here or the - - - saw himself as the decider.
7 But I think what controls here is 3101 - - -

8 JUDGE ABDUS-SALAAM: The decider of what,
9 though, counsel?

10 MR. SHECHTMAN: The decider of relevance
11 and use. And I - - - that - - - what I think matters
12 here is 3101(a)(4). When the advisory committee
13 first proposed a change in this law, which is 1983,
14 the change that was proposed was to eliminate the
15 enumeration, so New York law would look like federal
16 law. Parties and nonparties would be treated alike.

17 What happened in 1984 wasn't that. The
18 enumeration remained. What changed, though, was the
19 word "special circumstances" dropped out of (a)(4).

20 CHIEF JUDGE LIPPMAN: So how did the
21 legislative intent change?

22 MR. SHECHTMAN: I think the legislative
23 intent changed in the following fashion. The
24 legislature wanted to keep a distinction; that's what
25 all of the Appellate Divisions have recognized. It

1 wanted to keep a distinction, but it didn't want to
2 keep the same high bar. It didn't want to keep
3 special circumstances.

4 CHIEF JUDGE LIPPMAN: Oh, it's a more
5 nuanced distinction - - -

6 MR. SCHECHTMAN: It - - -

7 CHIEF JUDGE LIPPMAN: - - - between a party
8 and a nonparty? How - - - how nuanced?

9 MR. SHECHTMAN: I think the answer is in
10 the language. It says, "Any person, upon notice
11 stating the circumstances or reasons such disclosure
12 is sought or required". Initially - - -

13 JUDGE RIVERA: You read that - - - read
14 that from where? Where did you read that from?

15 MR. SHECHTMAN: "Any person" - - -

16 JUDGE RIVERA: No, no, where did you read
17 it from?

18 MR. SHECHTMAN: 3101(a)(4).

19 JUDGE RIVERA: (a)(4), okay.

20 MR. SHECHTMAN: And if - - - after that was
21 passed in 1984, the Appellate Divisions were - - - as
22 I say, were all over the lot. There were some that
23 still required special circumstances. I don't see
24 how you can say that; those words were eliminated.
25 There were some - - - and that's where the Second

1 Department and the Third Department are now - - -
2 that said we don't require special circumstances, but
3 we do require a showing that you're unable to obtain
4 it from another party. And that, to be honest - - -

5 CHIEF JUDGE LIPPMAN: Is that the same as
6 special circumstances?

7 MR. SHECHTMAN: I think it's the same, and
8 Mr. Connors, who writes the Practice Commentary,
9 quotes from a - - - the legal giant "The Who", the
10 rock group, and says, "Meet the new boss. Same as
11 the old boss". Right? So - - -

12 JUDGE RIVERA: Okay. But other than Pete
13 Townshend, I'm a litt - - - I'm still not clear as to
14 what you say - - -

15 MR. SHECHTMAN: I think - - -

16 JUDGE RIVERA: - - - is the standard.
17 What's the criteria?

18 MR. SHECHTMAN: I think your answer is
19 this. There is a difference. If there wasn't a
20 difference, we would have gotten rid of the
21 enumeration and gone to the federal standard.

22 JUDGE RIVERA: Okay. But then what's the
23 standard?

24 MR. SHECHTMAN: I think the standard is
25 something like this, and I take it from the words

1 "sought or required" - - -

2 JUDGE RIVERA: Um-hum.

3 MR. SHECHTMAN: - - - that first the burden
4 is on the issuing party. It's not, as in the part -
5 - - as in the party situation, the burden is on the -
6 - -

7 JUDGE RIVERA: To show what? What's the
8 standard?

9 MR. SHECHTMAN: The burden is there to show
10 a demonstrable need to obtain evidence to prepare for
11 trial.

12 CHIEF JUDGE LIPPMAN: At what point do they
13 - - - if that is the burden, at what point do they
14 meet that burden?

15 MR. SHECHTMAN: It's - - - there needs to
16 be notice in the subpoena itself.

17 CHIEF JUDGE LIPPMAN: Is it in the notice
18 that they - - -

19 MR. SHECHTMAN: But I think - - -

20 CHIEF JUDGE LIPPMAN: - - - say why they
21 need it?

22 MR. SHECHTMAN: I think the notice
23 provision in this state has become so minimal, and
24 the cases say that, that I don't think this is really
25 about the notice, Your Honor.

1 CHIEF JUDGE LIPPMAN: So when do they come
2 in and show what you're say - - -

3 MR. SHECHTMAN: I think it happens on a
4 motion to quash - - -

5 CHIEF JUDGE LIPPMAN: Okay.

6 MR. SCHECHTMAN: - - - which is what
7 happened in this state.

8 CHIEF JUDGE LIPPMAN: So the purpose of the
9 notice is to give the opportunity to move to quash,
10 and then you meet this issue - - -

11 MR. SHECHTMAN: And then the question is,
12 at that stage, the motion to quash, who has the
13 burden and what? And the answer here is - - -

14 JUDGE RIVERA: Well, they have to say
15 something in the motion, right?

16 MR. SHECHTMAN: The motion to quash is - -
17 -

18 JUDGE RIVERA: It can't be "I want it
19 quashed". They have to say something, yes? They
20 must have some burden.

21 MR. SHECHTMAN: Well, they have a burden of
22 going forward, which is to say that we move to quash;
23 we don't think - - - we think this subpoena is
24 overbroad. Now the question is whose burden is it to
25 - - - to satisfy the - - -

1 JUDGE GRAFFEO: So all you have to - - -
2 all your clients have to say is the subpoenas are
3 overbroad?

4 MR. SHECHTMAN: I think that's all that has
5 to be said. And I think, under this provision, which
6 as I say, treats parties - - -

7 JUDGE GRAFFEO: But the purpose of the
8 Interstate Act was to avoid litigation, correct?

9 MR. SHECHTMAN: The purpose of the - - -

10 JUDGE GRAFFEO: To have discovery - - -

11 MR. SHECHTMAN: The purpose of the - - -

12 JUDGE GRAFFEO: - - - without having to
13 secure a court order, right?

14 MR. SHECHTMAN: The purpose of the
15 Interstate Act was to simplify this, but it wasn't to
16 change the underlying distinction between party and
17 nonparty. As I said, that could have been changed
18 easily in 1984. That's what the advisory committee
19 wanted. That's what didn't happen. So if there is
20 to be any distinction, it seems to me the distinction
21 is found in two places. One, whose burden is it on
22 the motion to quash? I think the answer is it's
23 their burden. And what is their burden? Their
24 burden is to show that they need this for purposes -
25 - -

1 CHIEF JUDGE LIPPMAN: But now to show that
2 there are special circumstances, right?

3 MR. SHECHTMAN: Not to show that there are
4 special circumstances. Look, it seems to me there's
5 some situations where you're able to obtain it from
6 another party but you're still entitled - - -

7 CHIEF JUDGE LIPPMAN: Well, is - - -

8 MR. SHECHTMAN: - - - to get it from this
9 person.

10 CHIEF JUDGE LIPPMAN: - - - is relevance
11 the test? I've got to show it's relevant? Is that
12 what they have to do?

13 MR. SHECHTMAN: I - - - I think they have
14 to show something more than - - - Judge, I don't
15 think they have to show we're seeking admissible
16 evidence, right, because this, after all, is
17 discovery. I think they have to say here is why we
18 need this to prepare for trial.

19 JUDGE GRAFFEO: So it's more than 3101(d).
20 It's more than that test, because that would just be
21 the material and relevance.

22 MR. SHECHTMAN: That - - - that's correct.
23 And - - - and that, as to a party, we know is a very
24 low standard. It's the federal standard. It's
25 basically - - - it's reasonably calculated to lead to

1 - - - to admissible evidence. But here we retain a
2 distinction, and the question becomes what life to
3 give to the distinction.

4 JUDGE READ: So is it theirs to show - - -
5 their burden to show why it was sought or required?
6 Is that what you're saying?

7 MR. SHECHTMAN: I'm saying that that, I
8 think, is where it comes from, Judge. It's not - - -
9 that that is why it was retained in there. It was
10 the legislature's way of saying in this state, unlike
11 in the federal courts, we distinguish between parties
12 and nonparties for purposes of subpoena litigation.

13 JUDGE RIVERA: What - - -

14 JUDGE PIGOTT: All of your - - -

15 JUDGE RIVERA: What would they - - - what
16 would be necessary to show that they "need" this?
17 That sounds almost like a minimal standard to me, but
18 I may be misunderstanding you.

19 MR. SHECHTMAN: What would be - - - answer
20 would be some showing, which is to say, in this case,
21 why do you need testimony about events that occurred
22 after you purchased these bottles?

23 JUDGE RIVERA: So is that equivalent to you
24 can't get this information anywhere else?

25 MR. SHECHTMAN: I don't - - - I don't think

1 nec - - - it is, Your Honor, because I think there
2 will be cases in which you can get something
3 somewhere else, but you're still entitled to get it
4 from this - - - from this source, right?

5 JUDGE PIGOTT: You're - - -

6 MR. SHECHTMAN: But I - - -

7 JUDGE PIGOTT: I'm sorry, Mr. Shechtman.

8 MR. SHECHTMAN: No, just - - - my
9 apologies.

10 JUDGE PIGOTT: I understand your argument
11 perfectly, and I think you may be right, even up to
12 the Appellate Division level, except that when - - -
13 when your client came in, they raised issues that
14 were then addressed. In other words, they didn't
15 come in, as you're suggesting, saying, you know, I -
16 - - I have this subpoena; I know I have a burden of
17 going forward, but you know, they can't demonstrate
18 why I'm needed. Instead, they said it was defective
19 because it was served before Koch had taken Mr. K.'s
20 EBT. They said that they need information - - -
21 they're seeking information that's not material and
22 necessary. They said the motive is wrong, it seeks
23 information for the New York suit, and they said that
24 it failed to state particularly why disclosure is
25 sought. So then the - - - the judge addressed those,

1 which I think he had to do in order to properly
2 decide this motion.

3 MR. SHECHTMAN: Well, they - - - they also
4 said that there's no need for information that goes
5 beyond the 149 bottles at issue here.

6 JUDGE PIGOTT: Right, but what my - - - my
7 point was that I - - - I think you're exactly right
8 that there's a burden of going forward, not a burden
9 of proof, and that - - - that what the Appellate
10 Division then did may be incorrect, but it was - - -
11 it was your client that then said I've got - - - I've
12 got other - - - I realize I don't have to say
13 anything, but I'm saying this; and this is the four
14 reasons why I should not be deposed. And - - - and
15 he rejected them.

16 MR. SHECHTMAN: But one of the reasons that
17 he said, Judge, was it shouldn't be more than 149
18 bottles, right? And the answer that came back - - -
19 and this is the bottom of page 17 and 18 in the
20 appendix - - - "There's no meaningful way for this
21 court to delineate in advance the matters which might
22 be permissible." Right? He said, "Based on the
23 pleadings give in this case, this court cannot say
24 the questions of Acker's historical practices would
25 be irrelevant or not reasonably calculated." As soon

1 as you go to that language, "irrelevant" and "not
2 reasonably calculated", and as soon as you say that
3 we haven't shown, for example, the causes of action
4 based on California law which petitioners had not
5 given - - -

6 JUDGE PIGOTT: That's right, and - - -

7 MR. SHECHTMAN: - - - to say that is to put
8 the burden on us.

9 JUDGE PIGOTT: And the Appellate Division
10 agreed with that. They - - - they said that - - -
11 that you failed to show that the requested deposition
12 testimony - - - so - - -

13 MR. SHECHTMAN: Is not utterly irrelevant.

14 JUDGE PIGOTT: Right, and that's - - - and
15 that's the wrong standard; that's your point.

16 MR. SHECHTMAN: I - - - that's - - - that's
17 the main point, Judge, that no one in this case,
18 either at the initial level or at the Appellate
19 Division, has applied the right standard.

20 JUDGE ABDUS-SALAAM: Mr. Shechtman, if we
21 disagree with that and we think that the legislature
22 wanted to equalize parties and nonparties with
23 respect to disclosure, then you lose?

24 MR. SHECHTMAN: I lose.

25 JUDGE ABDUS-SALAAM: Okay.

1 CHIEF JUDGE LIPPMAN: Okay, counselor.

2 JUDGE GRAFFEO: But - - -

3 CHIEF JUDGE LIPPMAN: You'll - - - oh, go
4 ahead, Judge Graffeo.

5 JUDGE GRAFFEO: Can I just ask one - - -
6 can I just ask you on substance? Is it that your
7 clients don't want to provide any discovery, or is it
8 that there's a certain identifiable - - -

9 MR. SHECHTMAN: Look, my - - - my clients
10 have a - - - have an underlying concern here, which
11 is there is a separate action against them in which
12 discovery was closed and now is sharply limited. We
13 have a deposition in a California matter, right, in
14 which depositions as to my client seem to be wide
15 open; there are no limits imposed on them. And that
16 is the underlying concern here. But - - -

17 JUDGE GRAFFEO: Yeah, I'm trying to cut to
18 the chase. What are the - - - what are they - - - do
19 we know what they're willing to do or - - -

20 MR. SHECHTMAN: I think what we're - - -

21 JUDGE GRAFFEO: - - - they haven't revealed
22 that yet?

23 MR. SHECHTMAN: - - - we're - - - we're
24 willing to do and I think we're required to do is to
25 provide depositions that give Koch information that

1 he needs to litigate against Kurniawan in California.
2 Now, I have to say I think it's probably much less
3 than he thinks, because we now have a guilty verdict.
4 So one of the questions here, for example, is should
5 we have to testify about other people to whom we sold
6 counterfeit wine. The answer is yes, there could be
7 similar-act evidence in California. It's hard to
8 think one needs similar-act evidence after a guilty
9 plea and with a fellow whose sink contained, you
10 know, all sorts of manufacturing equipment.

11 CHIEF JUDGE LIPPMAN: Okay, counsel.
12 You'll have your rebuttal time. Let's hear - - -

13 MR. SHECHTMAN: So I guess - - -

14 CHIEF JUDGE LIPPMAN: - - - from your
15 adversary.

16 MR. SHECHTMAN: - - - it comes down to the
17 question of whose burden - - -

18 CHIEF JUDGE LIPPMAN: Yes.

19 MR. SHECHTMAN: - - - and - - - and what
20 that standard is. Thank you, court.

21 CHIEF JUDGE LIPPMAN: Thank you, counselor.
22 Counselor, whose burden is it?

23 MR. KABA: Your Honor, may it please the
24 court. Moez Kaba on behalf of respondent William
25 Koch.

1 We think the burden is - - - is quite
2 clear; one - - - one looks at the statutory context
3 and history, as this court is to do. The burden - -
4 -

5 CHIEF JUDGE LIPPMAN: How so?

6 MR. KABA: The burden is on the party
7 seeking to quash the subpoena - - -

8 JUDGE PIGOTT: Why would that - - -

9 MR. KABA: - - - and deny - - -

10 JUDGE PIGOTT: Why would that be? If you
11 subpoenaed me to testify in this case, I've got to
12 somehow go get a lawyer and I've got to move to - - -
13 and say, you know, they shouldn't be deposing me
14 because of whatever reason I can possibly think of,
15 when you would then come in and say, well, we're not
16 deposing them for that reason at all; we want to
17 depose him because want to prove he wasn't where he -
18 - - where this person says he was.

19 MR. KABA: Well - - -

20 JUDGE PIGOTT: That shouldn't be my burden;
21 I'm - - - I'm just a citizen of the State of New
22 York. If you want to depose somebody, it seems to
23 me, as Mr. Shechtman's pointing out, they can come in
24 and say this is an improper subpoena; we - - - we
25 don't want to respond. And it would be your burden

1 to say it's not frivolous, it's not - - - it's not
2 litigious, it's - - - it's legitimate - - - it's
3 legitimately seeking information. And I think you'd
4 win. But I don't know that you can say to every
5 nonparty that all of a sudden they have a burden in a
6 lawsuit in which they're not a party.

7 MR. KABA: Well, Your Honor, that - - -
8 frankly, that would turn the legislature's intent
9 right on its head. The legislature said - - - there
10 are three regimes here: the pre-1984 regime, where
11 one had to go to court to subpoena - - -

12 CHIEF JUDGE LIPPMAN: What's the purpose of
13 the notice, though? The purpose of the notice is to
14 allow them the opportunity to move to quash.

15 MR. KABA: Exa - - - the purpose of the
16 notice - - -

17 CHIEF JUDGE LIPPMAN: So once - - -

18 MR. KABA: - - - is so you - - -

19 CHIEF JUDGE LIPPMAN: - - - once they do -
20 - -

21 MR. KABA: - - - you're a nonparty - - -

22 CHIEF JUDGE LIPPMAN: - - - once they do
23 that, what is your obligation?

24 MR. KABA: Our obligation is to respond.

25 JUDGE PIGOTT: But they don't - - -

1 MR. KABA: If they are able - - - if they
2 are able - - -

3 JUDGE PIGOTT: They don't - - -

4 MR. KABA: - - - to prove under irrelevance
5 - - -

6 JUDGE PIGOTT: They don't know what
7 questions you're going to ask. I mean, if you - - -
8 if you just, you know, go to depose someone, I mean,
9 how do - - - how does anybody know what - - - what
10 the purpose of your - - - of your question is?

11 MR. KABA: Your Honor, in no - - -

12 JUDGE ABDUS-SALAAM: Could I just - - -

13 MR. KABA: - - - deposition is that known.

14 JUDGE ABDUS-SALAAM: Could I just add to
15 that? How does it work in the federal court? This
16 was designed to kind of track Federal Rule 26, right?
17 So how does it work in the federal court?

18 MR. KABA: Your Honor, I'll give you an
19 example from the Southern District of New York; it's
20 the U.S. v. IBM. The burden is on the party seeking
21 to limit the discovery. And it is consistent with
22 the rule in many other states. And I - - - I - - -

23 CHIEF JUDGE LIPPMAN: And after they say -
24 - - what I don't quite get is after they say what's
25 wrong with the discovery, and you know, and it

1 doesn't have to be in a great level of detail, why
2 wouldn't, just in the normal course, it shift that
3 you have to say, well, why it's okay. Isn't that - -
4 -

5 MR. KABA: Well, Your Honor, but that's - -
6 - that is what happened in this case. The burden - -
7 -

8 CHIEF JUDGE LIPPMAN: So - - -

9 MR. KABA: - - - is on the party - - -

10 CHIEF JUDGE LIPPMAN: So is it your burden?

11 MR. KABA: - - - moving to quash.

12 CHIEF JUDGE LIPPMAN: So is it your burden?
13 What's their burden and what's your burden?

14 MR. KABA: I - - -

15 CHIEF JUDGE LIPPMAN: What do they have to
16 say when they move to quash, and what's your
17 responsibility coming back?

18 MR. KABA: When they move to quash a
19 subpoena, they have to say the material is utterly
20 irrelevant.

21 JUDGE PIGOTT: Let me - - - all right. Let
22 me stop you there.

23 MR. KABA: The material sought is utterly
24 irrelevant.

25 JUDGE PIGOTT: Let me stop you there. Your

1 - - - I'm looking at your subpoena, and it says
2 you've got to appear at this place on February 15th,
3 2012, and any adjourned date thereof, to testify and
4 give evidence before trial in this action. Period.

5 MR. KABA: Well, Your Honor, the subpoena
6 also attached the complaint - - -

7 JUDGE PIGOTT: That's separate.

8 MR. KABA: - - - in the California action.

9 JUDGE PIGOTT: That's - - - I agree with
10 you. That's separate, and there's all kinds of
11 discovery there. But the deposition notice is
12 exactly that. And, by the way, that's pretty common.
13 I mean, that's - - - that's what mine looked like.
14 You know, you've got to come in and give - - - and
15 give testimony. Now, if somebody got a complaint
16 saying I'm going to be on vacation or I - - - you
17 know, you've got the wrong Bill Smith, or something
18 like that, that's fine. But other than that, most
19 people don't know - - - nonparties don't know what
20 they're going to be asked.

21 MR. KABA: Well, but Your Honor, in this -
22 - - that is not true in this case, and that - - - in
23 fact, there are many cases in this state that require
24 the party who is seeking to quash or the nonparty
25 seeking to quash to show utter irrelevance.

1 CHIEF JUDGE LIPPMAN: What - - -

2 MR. KABA: It goes back to the Anheuser-
3 Busch matter - - -

4 CHIEF JUDGE LIPPMAN: What - - -

5 MR. KABA: - - - from this court.

6 CHIEF JUDGE LIPPMAN: What did they say - -
7 - what should they have said, as opposed to what they
8 said in the motion to quash?

9 MR. KABA: Well, Your Honor, respon - - -
10 the petitioner here said - - -

11 CHIEF JUDGE LIPPMAN: You're saying they
12 have to say it's totally irrelevant?

13 MR. KABA: They have to - - - they have to
14 offer some proof of utter irrelevance. There needs
15 to be - - -

16 JUDGE GRAFFEO: Why can't they say - - -

17 MR. KABA: - - - some way to get - - -

18 JUDGE GRAFFEO: Why can't they say it's
19 overbroad?

20 MR. KABA: Well, Your Honor, if all they
21 have - - - if all a party - - - a nonparty - - -

22 JUDGE GRAFFEO: Especially in light of the
23 fact that there's no specifics in the notice.

24 MR. KABA: Well, if all a nonparty has to
25 say is a deposition some questions may be overbroad,

1 then the legislature's intent, which in 1984, in the
2 Senate offering statement, the legislature says we do
3 not want to place obstacles in the path of the
4 discovery process and this amendment would, quote,
5 "eliminate the burden, allow for the discovery of any
6 person" - - -

7 CHIEF JUDGE LIPPMAN: Yeah, but aren't - -
8 -

9 MR. KABA: - - - "who possesses" - - -

10 CHIEF JUDGE LIPPMAN: - - - aren't you the
11 one who knows - - -

12 MR. KABA: - - - "material and necessary
13 information".

14 CHIEF JUDGE LIPPMAN: Aren't you the one
15 who knows in more detail what information you want?

16 MR. KABA: Well, Your Honor, in the context
17 of the deposition subpoena - - -

18 CHIEF JUDGE LIPPMAN: In other words, you
19 know what I mean, there's only so much they can say
20 before you come back and really get in there and say
21 some level of detail about what - - - what your needs
22 are.

23 MR. KABA: But Your Honor, in the context
24 of a deposition subpoena, petitioners move to quash.
25 That is, they are asking to get rid of the subpoena

1 altogether, and they have to make a showing that the
2 information - - -

3 JUDGE PIGOTT: Well, wait a minute. Wait a
4 minute.

5 MR. KABA: - - - sought is not material or
6 necessary.

7 JUDGE PIGOTT: Wait a minute. When you - -
8 -

9 JUDGE RIVERA: Can I just - - -

10 JUDGE PIGOTT: When you say move to quash,
11 it doesn't necessarily mean you're - - - you're
12 trying to avoid the whole thing. You're right. I
13 mean, you'll both end up in court and there'll be a
14 determination. If you look at - - - let's assume,
15 for example, you've got a matrimonial, and somebody
16 decides they're going to subpoena every bank in the
17 city and ask for all of the records having to do with
18 whoever - - - you know, both people. Do - - - do all
19 the banks - - - I mean, do they have to come forward
20 and say we don't think this is relevant? They don't
21 know whether it's relevant or not.

22 MR. KABA: Well, Your Honor, that question
23 is - - -

24 JUDGE PIGOTT: But they have - - -

25 MR. KABA: - - - averted - - -

1 JUDGE PIGOTT: I'm almost done. They have
2 to say that it's over burdensome? They don't know if
3 it's over burdensome. I think they can move to quash
4 saying we don't understand this, and then you can
5 come in and say we need these records for - - - you
6 know, for equitable distribution. And - - - and that
7 would make some sense. But how do you put the burden
8 on the bank to say what - - - what we have is not
9 relevant or - - - or is irrelevant to a matrimonial.

10 MR. KABA: But Your Honor, in - - - in this
11 state, courts - - - and in other states and in the
12 federal system, courts put the burden on the moving
13 party to avoid - - -

14 JUDGE PIGOTT: I understand - - -

15 MR. KABA: - - - providing the testimony.

16 JUDGE PIGOTT: I don't understand forty-
17 nine of the states, and I - - - and I don't - - -
18 didn't practice a lot of federal law, but 3101(d) is
19 pretty familiar territory for a lot of people, and -
20 - - and you're right. I mean, it - - - it calls for
21 broad discovery. But that having been said, you
22 know, if you just spread subpoenas out, you know, to
23 - - - to every bank in - - - in the city of Albany,
24 because you're kind of curious whether your spouse
25 has a - - - has a bank account there, I think the

1 bank has a right to come in and say we don't want - -
2 - don't want to do this search; we have no idea what
3 they're up to, but we don't want to do it. And it
4 seems to me that's going forward. And then you would
5 then have to establish why you think this particular
6 bank ought to be deposed.

7 CHIEF JUDGE LIPPMAN: Counsel, is that the
8 thrust of your argument, what you're just talking
9 about with Judge Pigott, that broad liberal
10 discovery, end of story, essentially, as far as
11 you're concerned?

12 MR. KABA: Your Honor - - -

13 CHIEF JUDGE LIPPMAN: Is that the - - -

14 MR. KABA: - - - that's not entirely the
15 end of the story. But the - - - the legislature was
16 quite clear when it shifted the rule in 1984 to get
17 rid of - - -

18 CHIEF JUDGE LIPPMAN: But you would - - -

19 MR. KABA: - - - judicial involvement.

20 CHIEF JUDGE LIPPMAN: But you would agree
21 that the legisla - - - or would you, that the
22 legislature, in some way, wanted to make a
23 distinction, you know - - -

24 MR. KABA: Your Honor, I think the
25 distinction exists, but I think it is a 3103

1 designed and the legislative intent is that they
2 should be treated exactly the same? Is that borne -
3 - - borne out by the legislative history?

4 MR. KABA: Your Honor, I will - - - I will
5 read to you the - - -

6 CHIEF JUDGE LIPPMAN: Please do. Go ahead.

7 MR. KABA: I will read to you the
8 memorandum in support of legislation - - -

9 CHIEF JUDGE LIPPMAN: Go ahead, sure.

10 MR. KABA: - - - from the Senate. It says,
11 "Recent interpretations of CPLR 3104(a)(4) have held
12 that it is procedurally incorrect to seek discovery
13 from a nonparty witness without first securing a
14 court order. This strict interpretation" - - - con -
15 - - "is contrary to the purpose of the disclosure
16 statute and places an obstacle in the path of the
17 discovery process." And here's the key language.
18 "The proposed amendment would eliminate this burden
19 and allow for the discovery of any person who
20 possesses material and necessary evidence. All of
21 the necessary protections to avoid abuse of nonparty
22 witnesses presently exist under 3103 and 3104."

23 JUDGE RIVERA: Okay. So before - - -
24 before I end up interrupting your answer, three
25 sentences: What's your burden? What's their burden

1 on the quash? What's your burden in response?

2 MR. KABA: Your Honor, their burden, when
3 they move to qua - - -

4 JUDGE RIVERA: No, no, your burden; we
5 started with your burden.

6 MR. KABA: Our burden is to serve a
7 subpoena on a nonparty that seeks material and
8 necessary information.

9 JUDGE RIVERA: Okay.

10 MR. KABA: Their burden is to move to - - -
11 when they move to quash, or as was done in this case,
12 they move for a protective order - - -

13 JUDGE RIVERA: Right.

14 MR. KABA: - - - their burden is to satisfy
15 the standards in the law for that: utter
16 irrelevance, if they're moving to quash, or
17 justification, good cause of some sort, if they're
18 moving for a protective order. In response, we must
19 - - - we must respond to that and show your - - -
20 that their arguments for irrelevance do not hold
21 water. The idea that we must also show some other
22 need, as - - - as appellant here described - - - I
23 wrote this down. The - - - the appellants say that
24 the issuing party, quote, "must show a demonstrable
25 need for evidence to prepare for trial". That's

1 nowhere in the statute, and that's - - - how is that
2 anything other than special circumstances, which the
3 legislature quite deliberately struck from the
4 statute?

5 JUDGE GRAFFEO: To follow up to Judge
6 Rivera's question, is there any point in that burden
7 shifting that you ever tell them what you're looking
8 for?

9 MR. KABA: Absolutely, Your Honor, when we
10 respond to their motion to quash. And in fact, we
11 did precisely that in this case. And in fact, Your
12 Honor, appellant has never argued that they do not
13 have relevant information, material and necessary
14 information in this case. Acker, Merrall & Condit,
15 and Mr. Kapon, in particular, are the conduits
16 through which this counterfeit wine was sold. They
17 formed the basis for the transactions in the
18 California action, the fraud transaction in the
19 California action. Surely they have relevant
20 information.

21 Then the question becomes - - - what I
22 believe the - - - the proper interpretation of what
23 they are seeking is they want to limit the scope of
24 the deposition before a single question has been
25 asked. And courts in this state say when you move

1 for a protective order, you bear the burden to show
2 the good cau - - - that good cause exists for that
3 protective order.

4 JUDGE PIGOTT: Do you see a difference
5 between moving for a protective order under 3103 or -
6 - - and moving to quash a subpoena under 3101?

7 MR. KABA: I do, Your Honor. I - - - I
8 believe under 3101, moving to quash has to be
9 understood and interpreted in light of the
10 legislative amendments, and in light of the
11 legislature's intent which is - - -

12 JUDGE PIGOTT: Well, the amendment - - -
13 the amendment - - -

14 MR. KABA: - - - full and full disclosure.

15 JUDGE PIGOTT: Excuse me. Excuse me. The
16 amendment, as you read it, it's - - - it's exactly
17 right. It used to be you had to go get a court
18 order, which was a pain in the neck and took a lot of
19 time and money. So now you can just issue it just
20 like the person is - - - is in the state or - - - or
21 whatever. But that did not change, I don't think - -
22 - you know, the fact that the nonparty person, who
23 may be a bartender, you know, who happened to serve
24 drinks to somebody and there was an accident down the
25 road and now three years later there's a lawsuit, for

1 I think you're misunderstanding 3119, only in the
2 sense that I don't think you lived through the days
3 before it when it was really a pain in the neck. And
4 back - - - I'm too old - - -

5 MR. KABA: Some states still require - - -
6 require us - - -

7 JUDGE PIGOTT: Letters Rogatory used to be
8 what - - -

9 MR. KABA: Yeah, no, but some states still
10 require it, Your Honor.

11 JUDGE PIGOTT: That - - -

12 MR. KABA: I guess my point - - -

13 JUDGE PIGOTT: That was what we're getting
14 rid of. I mean, this is easy now. You can - - - you
15 can get nonparty witnesses and your goal - - -

16 MR. KABA: But Your Honor, if the system is
17 really just the nonparty gets to come into court and
18 says I think this is overbroad, you really haven't -
19 - -

20 JUDGE PIGOTT: Not overbroad.

21 MR. KABA: - - - gotten rid of that system.

22 JUDGE PIGOTT: Not overbroad. I got
23 subpoenaed in a case I have no idea, and - - - and
24 I'm going on vacation, and they tell me that I got to
25 be down here. And I don't want to do it. And I've

1 got three kid - - - anything that says - - -

2 MR. KABA: Your Honor, every - - -

3 JUDGE PIGOTT: - - - your - - - I'm almost
4 done.

5 MR. KABA: Yes.

6 JUDGE PIGOTT: Anything that they want to
7 bring. And then you had to say, Judge, we've got the
8 wrong person, wrong Bill Smith; we're sorry. Or we
9 really need him; we can give him a new date.

10 MR. KABA: But Your Honor, in every case,
11 their - - - the incentive would then be on the
12 subpoenaed party to go to court and request judicial
13 - - -

14 JUDGE PIGOTT: No, no, no - - -

15 MR. KABA: - - - involvement in - - -

16 JUDGE PIGOTT: - - - it's expensive, it's
17 time-consuming - - -

18 MR. KABA: - - - interaction.

19 JUDGE PIGOTT: It's - - -

20 MR. KABA: In your example, Your Honor, the
21 - - - the bartender just gets to go to court and say
22 I don't understand why I'm being subpoenaed. But as
23 I've said, just - - -

24 JUDGE PIGOTT: Right. Doesn't even need a
25 lawyer to do that. And that's - - - that's my point.

1 And - - - and you - - - you want to say that because
2 you served him with a piece of paper, he's got to go
3 get a lawyer, figure out what 3101(a)(4) means to
4 him, and file a petition and a motion to quash. And
5 I don't think that's required. It seems to me you
6 can just - - -

7 MR. KABA: Well, Your Honor, if I - - - if
8 I may just - - -

9 CHIEF JUDGE LIPPMAN: Last - - - last
10 point, counsel.

11 MR. KABA: - - - my last thought is
12 whatever the burden, whatever the proof, in this case
13 it has been met, because the issue of relevance is
14 not fairly in dispute, and the Supreme Court's
15 decision, and the Appellate Department's decision - -
16 -

17 CHIEF JUDGE LIPPMAN: Can - - -

18 MR. KABA: - - - I think make that clear.

19 CHIEF JUDGE LIPPMAN: I guess the point is
20 - - - and you don't have to answer this, but just
21 from - - - from what we're hearing is, is there a
22 clear rule, or does it depend upon what you say, what
23 they say, and then what you say? You know what I'm
24 saying? Is there - - - is there a sharply defined
25 rule, or is it very much dependent on - - - on, you

1 know, the exact colloquy between you?

2 MR. KABA: If I may, Your Honor, with
3 respect? I - - -

4 CHIEF JUDGE LIPPMAN: Go ahead, quickly.

5 MR. KABA: I think the rule is motivated by
6 looking at the history of what the legislature wanted
7 - - -

8 CHIEF JUDGE LIPPMAN: Okay.

9 MR. KABA: - - - to do, which is - - -

10 CHIEF JUDGE LIPPMAN: You think there is -
11 - -

12 MR. KABA: - - - minimize judicial
13 involvement - - -

14 CHIEF JUDGE LIPPMAN: You think there is a
15 rule - - -

16 MR. KABA: - - - and promote full
17 disclosure.

18 CHIEF JUDGE LIPPMAN: - - - that basically
19 puts the burden on them - - -

20 MR. KABA: I think the rule - - -

21 CHIEF JUDGE LIPPMAN: - - - to show it's
22 not relevant.

23 MR. KABA: I think the rule from Anheuser-
24 Busch and other - - -

25 CHIEF JUDGE LIPPMAN: Okay.

1 MR. KABA: - - - cases and the legislature
2 puts the burden - - -

3 CHIEF JUDGE LIPPMAN: Okay.

4 MR. KABA: But it has a role for us - - -

5 CHIEF JUDGE LIPPMAN: Okay, counselor.

6 MR. KABA: - - - which is to then come back
7 and say, yes, indeed, it is material and necessary -
8 - -

9 CHIEF JUDGE LIPPMAN: Okay. Let's hear - -
10 -

11 MR. KABA: - - - and relevant.

12 CHIEF JUDGE LIPPMAN: - - - rebuttal from
13 your adversary.

14 MR. KABA: Thank you.

15 CHIEF JUDGE LIPPMAN: Thank you.

16 Counselor, is there a black and white rule,
17 or is it very dependent in each case? Your
18 adversary's saying the burden's on you, period. Is
19 it that easily - - - is it just the answer the burden
20 is on him, or is it a more nuanced - - -

21 MR. SHECHTMAN: No, I - - - no - - -

22 JUDGE RIVERA: And consider the three
23 sentences: his burden initially, yours on the quash,
24 his in response.

25 MR. SHECHTMAN: Let me try to do both.

1 CHIEF JUDGE LIPPMAN: Yes, sure.

2 JUDGE RIVERA: Go ahead.

3 MR. SHECHTMAN: And let me step back for
4 one - - - one second. It's hard to think that this
5 is the federal system. You have a statute that on
6 its face distinguishes between parties and
7 nonparties.

8 JUDGE ABDUS-SALAAM: So you're saying it's
9 not like Federal Rule 26?

10 MR. SHECHTMAN: It - - - the Federal Rule
11 26, you can't find the word "nonparty" in it. Right?
12 The standard is the same.

13 JUDGE ABDUS-SALAAM: So even if the
14 legislature said this is going to track Federal Rule
15 26, you say, but you left in non - - - a distinction
16 between parties and nonparties - - -

17 MR. SHECHTMAN: Well - - -

18 JUDGE ABDUS-SALAAM: - - - so that's - - -

19 MR. SHECHTMAN: - - - I think if the
20 legislature - - - legislative history said that, Your
21 Honor, you'd say the sta - - - the language isn't
22 very good, but I suppose we know what they meant,
23 right? But here we know the following. The advisory
24 committee on civil practice said to them, turn this
25 into federal law; put brackets around all those

1 sections and make parties and nonparties the same.
2 They chose not to do it. They chose to keep a
3 distinction - - -

4 CHIEF JUDGE LIPPMAN: Counselor, so how
5 does it translate into the answer to those questions?

6 MR. SHECHTMAN: And one - - - one final
7 thing.

8 CHIEF JUDGE LIPPMAN: Sure.

9 MR. SHECHTMAN: In 1985, when it went back
10 to the advisory committee, they lamented, right?
11 They said we didn't get what we wanted. We hoped to
12 get rid of any - - -

13 JUDGE RIVERA: Okay.

14 MR. SHECHTMAN: - - - special circumstances
15 - - -

16 JUDGE RIVERA: So what did they think they
17 got?

18 MR. SHECHTMAN: So what they think they got
19 is the following.

20 JUDGE RIVERA: His burden, your burden, and
21 then his burden again.

22 MR. SHECHTMAN: I think Judge Pigott is
23 right.

24 JUDGE RIVERA: Okay.

25 MR. SHECHTMAN: I think the answer is my

1 burden is minimal. My burden is to come in and say I
2 don't want to comply with this subpoena. Right? Or
3 I think this subpoena is - - -

4 CHIEF JUDGE LIPPMAN: You have to say
5 something, but not that much?

6 MR. SHECHTMAN: Not much more than - - -

7 CHIEF JUDGE LIPPMAN: Go ahead.

8 MR. SHECHTMAN: Not much more than - - -

9 CHIEF JUDGE LIPPMAN: Continue.

10 MR. SHECHTMAN: - - - good morning; I just
11 think I have to show up and say - - -

12 CHIEF JUDGE LIPPMAN: Okay. And then?

13 MR. SHECHTMAN: - - - I'm starting this
14 process.

15 CHIEF JUDGE LIPPMAN: And then?

16 MR. SHECHTMAN: And then the burden shifts
17 here. And the burden shifts to say - - -

18 CHIEF JUDGE LIPPMAN: More than minimal?

19 MR. SHECHTMAN: The burden is that there is
20 a need, a demonstrable need to obtain evidence in
21 preparation of trial, so that the judge should be
22 saying - - -

23 JUDGE RIVERA: And what's the source of
24 that burden? Where's the language for that?

25 MR. SHECHTMAN: The language of that is in

1 the phrase, "Upon notice stating the circumstances or
2 reasons such that disclosure is sought or required".

3 CHIEF JUDGE LIPPMAN: At what level of
4 detail does he have to do that?

5 MR. SHECHTMAN: Enough that he can say to
6 the judge, Judge, this is required, this is required,
7 so that when we say, well, why is anything more
8 required than the 149 bottles? We're prepared to
9 testify about that. The answer is well, we need your
10 historical and internal practices for the following
11 reason. We - - -

12 JUDGE RIVERA: Okay. I'm - - - but I'm not
13 clear what you have articulated as your burden. What
14 - - -

15 MR. SHECHTMAN: I don't think I have - - -

16 JUDGE RIVERA: What - - -

17 MR. SHECHTMAN: I don't think I have a
18 burden.

19 JUDGE RIVERA: You just come in and say I
20 don't want to comply.

21 MR. SHECHTMAN: I think I come in and say -
22 - -

23 JUDGE RIVERA: Is that what you're saying?

24 MR. SHECHTMAN: - - - they've subpoenaed
25 me, I'm a nonparty - - -

1 JUDGE RIVERA: And I don't want to comply.

2 MR. SHECHTMAN: - - - and I don't want to -

3 - -

4 JUDGE RIVERA: That's all you have to do.

5 MR. SHECHTMAN: - - - I don't want to
6 comply, or I think this is burdensome, or I think
7 this is overbroad, or I have to go on vacation.
8 Right?

9 CHIEF JUDGE LIPPMAN: Okay.

10 MR. SHECHTMAN: To which - - - at that
11 point - - -

12 CHIEF JUDGE LIPPMAN: Finish - - - finish
13 up.

14 MR. SHECHTMAN: At that point - - -

15 CHIEF JUDGE LIPPMAN: Go ahead.

16 MR. SHECHTMAN: - - - the issuing party in
17 New York, unlike in the federal courts, has to say to
18 the judge, we need this for purposes of litigating,
19 not that we have to have special circumstances, not
20 that we can't get it from anybody else - - -

21 CHIEF JUDGE LIPPMAN: Okay.

22 MR. SHECHTMAN: - - - but here's the reason
23 we need it. And the question is why do you need
24 information about our historical internal practices
25 or procedures? The judge below said because it's not

1 MR. SHECHTMAN: So that, I think, is the
2 answer to the three questions.

3 CHIEF JUDGE LIPPMAN: Okay.

4 JUDGE RIVERA: Thank you.

5 MR. SHECHTMAN: I thank the court.

6 CHIEF JUDGE LIPPMAN: Thank you both.

7 Appreciate it.

8 (Court is adjourned)

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

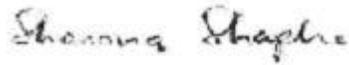
24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of John Kapon, et al. v. William I. Koch, No. 63 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

AAERT Certified Electronic Transcriber (CET**D-492)

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

Date: February 27, 2014