

Bullet-Point Update: Electronic and Federal Court Discovery Issues for the Week of July 24, 2017

CYBERSECURITY AND PRIVACY | LITIGATION AND TRIALS | TECHNOLOGY | JULY 31, 2017



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Proportionality

- Use this to quash a fishing-expedition non-party subpoena. *McCall v. State Farm Mut. Auto. Ins. Co.*, 2017 WL 3174914 (D. Nev. July 26, 2017) (Granting motion to quash non-party subpoena and noting, "If the requirement for proportionality in discovery means anything, however, it must mean that burdensome, tangential discovery should not be permitted based on the mere possibility that something may turn up to support what is otherwise only speculation.").
- Use this to show why you need specifics and evidence to support a proportionality objection. *Schueneman v. Aren Pharm., Inc.*, 2017 WL 3118738 (S.D. Cal. July 21, 2017) (Denying motion to compel on proportionality grounds where defendant ran preliminary searches identifying 43,000 potentially relevant emails and gave evidence that review would take weeks and cost \$80,000).
- Use this to show that proportionality is nothing new. *Gilmore v. L.D. Drilling, Inc.*, 2017 WL 3116576 (D. Kan. July 21, 2017) (Noting proportionality has been in the Rules since 1983, party moving to compel has burden to demonstrate discoverability, defendant had not addressed plaintiff's proportionality objection, denying motion to compel, and awarding fees as a sanction).
- Use this to show that proportionality is more important than ever — even though it's nothing new. *Milwaukee Elec. Tool Corp. v. Snap-On Inc.*, 2017 WL 3130414 (E.D. Wisc. July 24, 2017) (Noting that, while proportionality has long been part of the rules, it now enjoys "pride of place").

Boilerplate Objections

- Use this for a snappy quote protesting the other side's boilerplate objections. *Caballero v. Bodega Latina Corp.*, 2017 WL 3174931 (D. Nev. July 24, 2017) (Overruling boilerplate objections and asking: "Why is it private? How is it overly broad? Why is it burdensome? This language tells the Court nothing.").
- Use this when you're tired of the other side's boilerplate objections. *Daisy Trust v. JP Morgan Chase Bank, NA*, 2017 WL 3037427 (D. Nev. July 18, 2017) (Awarding sanctions where boilerplate objections did not "show" "specifically" how requests were improper).
- Use this when the other side's general objections are nonsense. *Hilton v. IC Systems, Inc.*, 2017 WL 3118531 (M.D. Fla. July 21, 2017) (Overruling boilerplate preliminary "statement" and "general objections" in response in their entirety).
- Use this when the other side moves to compel and you're worried your own objections may be boilerplate. *Adkins v. TFI Family Svcs., Inc.*, 2017 WL 3130587 (D. Kan. July 24, 2017) (Holding that party moving to compel bears initial burden to show discoverability, despite boilerplate nature of objections).

Spoliation

- Use this to illustrate (by negative example) some best practice requirements for preserving cell phone data. *Jackson v. Haynes & Haynes, P.C.*, 2017 WL 3173302 (N.D. Ala. July 26, 2017) (Denying spoliation sanctions where employee plaintiff failed to preserve cell phone with app that tracked her hours, and criticizing her for failing to upgrade to paid version of app that would have allowed data to be exported).

ESI Costs

- Use these to obtain more of your ESI costs when you win. *SG, by and through SMG v. Walt Disney Parks and Resorts US, Inc.*, 2017 WL 3065212 (M.D. Fla. July 18, 2017) (Allowing software coding costs as a recoverable over party's objection with minimal discussion); *Ariel Investments, LLC v. Ariel Capital Advisors, LLC*, 2017 WL 3023746 (N.D. Ill. July 17, 2017) (Taxing as costs the expense of rendering native format files into a universally-readable format).

Text Messages

- Use this to obtain text messages from a non-party. *McBeath v. Tuscon Tamale Co.*, 2017 WL 3118779 (D. Az. July 21, 2017) (Denying motion to quash non-party subpoena that requested text messages related to a disputed job offer).
- Use this to protect privilege and work product in text messages. *Bard v. Brown County*, 2017 WL 3129802 (S.D. Oh. July 21, 2017) (After in camera review, protecting on privilege and work product grounds text messages between a non-party and their counsel).
- Use this to explain anomalies in text message productions. *United States v. Totoro*, 2017 WL 3189216 (E.D. Pa. July 27, 2017) (Finding that FBI had not manipulated text messages produced in criminal discovery, but that variations between two productions of the same texts were caused by differences in the technologies used to extract them).

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