

ELECTRONIC EVIDENCE **THE TEXT MESSAGE**

In terms of divorce practice, this time period could easily be called the electronic age. We have an increasing number of clients who are extremely well versed (many times much more than their lawyer) in using the amazing technology available to us. It is no longer uncommon to communicate only with email, to use our PDA's while waiting for a hearing or to take a laptop and flash drive with us to a settlement meeting. This technology age has moved faster than the Rules of Civil Procedure, the Rules of Evidence or than most lawyers can handle.

On the following pages I have compiled a very brief primer on what electronic evidence is, where to find it, how to get it and how to introduce it in Court. I suggest using this outline as a checklist in your cases that may involve electronic evidence. I would also suggest to you, that electronic evidence will soon become the norm in cases and not the exception.

I will address one very specific form of electronic evidence: the text message. Once reserved only for "Generation Me," divorcing spouses have found a new way with which to communicate their venom to each other. Text messages are especially great for this because they are cheap, they are instant and they are quickly lost from the evidentiary world if not preserved.

There appear to be two ways to preserve text messages:

1. As soon as the client receives the text messages they should go directly to a Certified Court Reporter to have them transcribed. This will give you a witness. The Court Reporter carries a lot more weight than an angry divorce litigant. The Court Reporter can testify that he/she held the phone, scrolled through all of the texts and transcribed them exactly as found on the phone.

Roberta S. Batley
Little & Gilman-Tepper, PA
500 Marquette Ave. NW, Suite 770
Albuquerque, NM 87102
(505) 246-0500

2. Get a letter and a subpoena out to the cellular phone company pronto! There are two surprises in this area. First, a person cannot obtain the text messages off from his or her own phone without a subpoena. Secondly, on average, text messages are only kept in the system for 72 hours. That is it – then they are gone. Thus, they are very different than phone records that go back for months on end and that clients can obtain generally through a phone call. I have attached a copy of a sample letter and subpoena used by our office to obtain these messages. Make sure your letter says to hold these messages in the system until the subpoena has been answered or they will be gone. Also attached is a sample page of a transcript of a text message exchange obtained using a subpoena.

Finally, educate your client about the danger of using text messaging during his or her case. Most of us have now modified our instructions to our clients to include the do's and don'ts of email and voicemail, but in my opinion if you do not address texting with your client you will be sadly surprised by what they will type.

Roberta S. Batley
Little & Gilman-Tepper, PA
500 Marquette Ave. NW, Suite 770
Albuquerque, NM 87102
(505) 246-0500

ELECTRONIC EVIDENCE

WHAT IS IT, WHERE IS IT, HOW DO YOU GET IT AND HOW DO YOU GET IT IN

- I. Electronic evidence is data and information that is stored somewhere electronically. Where it is stored will direct how you get it.

- II. Electronic evidence can be found in the following places:
 - A. Individual desktop
 - B. Individual laptops
 - C. Network hard disk
 - D. Removable media
 - 1. Floppy disk
 - 2. Tapes
 - 3. CD's
 - E. Optical disks
 - F. Hard Drives
 - G. Network Storage
 - H. Remote Internet storage
 - I. Backup devices
 - J. Archives
 - K. Zip drives
 - L. Personal digital assistants
 - M. Cellular phones
 - N. Camera phones
 - O. Ipods
 - P. Internet service providers
 - Q. Computer systems of others

- III. Information can be requested from:
 - A. Spouses
 - B. Closely held business
 - C. Employer
 - D. Friend

Roberta S. Batley
Little & Gilman-Tepper, PA
500 Marquette Ave. NW, Suite 770
Albuquerque, NM 87102
(505) 246-0500

- E. Relations
- F. Investment Firms
- G. Others

IV. What do you want to ask for?

- A. W/P Files (Word Processing)
- B. Spreadsheet files
- C. Budgets
- D. Financial plans
- E. Historical expenditures
- F. Expert's Financial models
- G. Financial Management programs
 - 1. Check
 - 2. Credit card
 - 3. Investments
- H. Database files
- I. Contact Lists
- J. Assets
- K. Email
- L. Calendars
- M. Log Files
- N. Browser History
- O. Network logs
- P. Audit trails

V. How do you get it

- A. Computer Forensics – Electronic Evidence
- B. Collections
- C. Preservation
- D. Analysis
- E. Presentment

VI. How to Request it

- A. Notice to Preserve and Retain Data
- B. Rule 26(a)(1)(c) obligated parties to provide descriptions of documents and data complications
- C. Rule 34 permits request to produce data complications
- D. Deposition of custodian of records

Roberta S. Batley
Little & Gilman-Tepper, PA
500 Marquette Ave. NW, Suite 770
Albuquerque, NM 87102
(505) 246-0500

- E. Protective Order
- F. Order to turn over hard drive

VII. How do you get it in to Court

A. Purposes

- 1. Only evidence on issue
- 2. Inconsistencies with hard copy
- 3. Ease of searching information

B. Authority to Use

- 1. Federal Rules of Civil Procedure Rule 34 – Electronically stored information is subject to subpoena and discovery permits a party to request “data compilations” for production.
- 2. Rule 26 – Each company has the duty to preserve documents in a particular case
- 3. Federal Rule of Evidence 1001 (11) – Defines writing and recording as letters, words, or numbers of their equivalent, set down by handwriting, typewriting, printing, photo-stating, photographing, magnetic impulse, mechanical or electronic recording, or other forms of data compilation.

DATE

Cellco Partnership d/b/a Verizon Wireless
Attn: Custodial of Records
51 Inclone Drive
Branchburg, NJ 08876

Re:

Dear Sir/Madam:

You have been served with a subpoena in the above referenced matter. Please compile any responsive documents requested in the subpoena. After speaking with the legal department we are concerned that the information being requested will be purged from your system within three days. Please do not purge the text messages that were requested from your system. If the documents are received timely, there is no need to appear in court.

If you have any questions, please call me.

Very truly,

Roberta S. Batley
FOR THE FIRM

/ta
cc:

Roberta S. Batley
Little & Gilman-Tepper, PA
500 Marquette Ave. NW, Suite 770
Albuquerque, NM 87102
(505) 246-0500

SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

,

Petitioner,

vs.

No. DM

,

Respondent.

SUBPOENA FOR PRODUCTION OR INSPECTION¹

SUBPOENA FOR

- DOCUMENTS OR OBJECTS²**
 INSPECTION OF PREMISES²
 TESTIFY

TO: Cellco Partnership d/b/a Verizon Wireless
Attn: Custodial of Records
51 Inclone Drive
Branchburg, NJ 088763

YOU ARE HEREBY COMMANDED ON:

DATE: Date at Time

TO:

- permit inspection of the following described books,
papers, documents or tangible things:

1. Text Message sent and received from (xxx)xxx-xxxx
on Date to Date
The Law Offices of:
Little & Gilman-Tepper
500 Marquette NW
Suite 770
Albuquerque, NM 87102

-
- permit the inspection of the premises located at:
-

Roberta S. Batley
Little & Gilman-Tepper, PA
500 Marquette Ave. NW, Suite 770
Albuquerque, NM 87102
(505) 246-0500

ABSENT A COURT ORDER, THE ABOVE DATE SHALL NOT BE LESS THAN FIFTEEN (15) DAYS FROM THE DATE YOU RECEIVED THIS SUBPOENA. UNLESS ORDERED BY THE COURT, DO NOT RESPOND TO THIS SUBPOENA BEFORE THAT DATE.

DO NOT RESPOND TO THIS SUBPOENA FOR PRODUCTION OR INSPECTION IF YOU ARE SERVED WITH WRITTEN OBJECTIONS OR A MOTION TO QUASH UNTIL YOU RECEIVE A COURT ORDER REQUIRING A RESPONSE.

You may comply with this subpoena for production or inspection by providing legible copies of the items requested to be produced by mail or delivery to the attorney whose name appears on this subpoena. You may condition the preparation of the copies upon the payment in advance of the reasonable cost of inspection and copying. You have the right to object to the production pursuant to this subpoena as provided below.

READ THE SECTION "DUTIES IN RESPONDING TO SUBPOENA."

IF YOU DO NOT COMPLY WITH THIS SUBPOENA you may be held in contempt of court and punished by fine or imprisonment.

Judge, clerk or attorney

RETURN FOR COMPLETION BY SHERIFF OR DEPUTY

I certify that on the _____ day of _____, 2005 in _____ County, I served this subpoena on _____ by delivering to the person named a copy of the subpoena and a fee of \$ _____.

Deputy sheriff

**RETURN FOR COMPLETION BY OTHER PERSON
MAKING SERVICE**

I, being duly sworn, on oath say that I am over the age of eighteen (18) years and not a party to this lawsuit, and that on the _____ day of _____, 2005 in _____ County, I served this subpoena on _____ by delivering to the person named a copy of the subpoena³.

Person making service

SUBSCRIBED AND SWORN to before me this _____ day of _____, 2005

Roberta S. Batley
Little & Gilman-Tepper, PA
500 Marquette Ave. NW, Suite 770
Albuquerque, NM 87102
(505) 246-0500

Judge, notary or other officer
authorized to administer oaths

THIS SUBPOENA issued by or at request of:

TIFFANY A. OLIVER
LITTLE & GILMAN-TEPPER, P.A.
P.O. Box 26717
Albuquerque, NM 87125
(505) 246-0500

Dated: _____

TO BE PRINTED ON EACH SUBPOENA

1. *This subpoena must be served on each party in the manner provided by Rule 1-005 NMRA. If service is by a party, an affidavit of service must be used instead of a certificate of service.*
2. *A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.*
3. *If a person's attendance is commanded one full day's per diem must be tendered with the subpoena, unless the subpoena is issued on behalf of the state or an officer or agency thereof. Mileage must also be tendered at the time of service of the subpoena as provided by the Per Diem and Mileage Act. See Section 38-6-4 NMSA 1978 for per diem and mileage for witnesses. See Paragraph A of Section 10-8-4 NMSA 1978 for per diem and mileage rates for nonsalaried public officers. Payment of per diem and mileage for subpoenas issued by the state is made pursuant to regulations of the Administrative Office of the Courts. See Section 34-9-11 NMSA 1978 for payments from the jury and witness fee fund.*

PROTECTION OF PERSONS SUBJECT TO SUBPOENAS

A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person

Roberta S. Batley
Little & Gilman-Tepper, PA
500 Marquette Ave. NW, Suite 770
Albuquerque, NM 87102
(505) 246-0500

subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

Subject to Subparagraph (2) of Paragraph D below, a person commanded to produce and permit inspection and copying may, within fourteen (14) days after service of the subpoena or before the time specified for compliance if such time is less than fourteen (14) days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises or within fourteen (14) days after service of the subpoena may file a motion to quash the subpoena and serve the motion on all parties to the action. If an objection is served or a motion to quash is filed and served on the parties, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it:

- (1) fails to allow reasonable time for compliance,
- (2) requires a person who is not a party or an officer of a party to travel to a place more than one hundred miles from the place where that person resides, is employed or regularly transacts business in person, except as provided below, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

Roberta S. Batley
Little & Gilman-Tepper, PA
500 Marquette Ave. NW, Suite 770
Albuquerque, NM 87102
(505) 246-0500

(3) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(4) subjects a person to undue burden.

If a subpoena:

(1) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(2) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(3) requires a person who is not a party or an officer of a party to incur substantial expense to travel,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

DUTIES IN RESPONDING TO SUBPOENA

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(3) A person commanded to produce documents or material or to permit the inspection of premises shall not produce the documents or materials or permit the inspection of the premises if a written objection is served or a motion to quash has been filed with the

Roberta S. Batley
Little & Gilman-Tepper, PA
500 Marquette Ave. NW, Suite 770
Albuquerque, NM 87102
(505) 246-0500

court until a court order requires their production or inspection.

Roberta S. Batley
Little & Gilman-Tepper, PA
500 Marquette Ave. NW, Suite 770
Albuquerque, NM 87102
(505) 246-0500