

A Judicial Perspective: An Effective Motion to Compel

By: United States Magistrate Judge Helen C. Adams

- Have you had a “real” meet and confer where you actually talked with opposing counsel about the specific discovery issues in dispute? An exchange of written communication alone does not satisfy this requirement, especially if the written communication is snarky and overly argumentative. If you feel the need to have written communication about the topic, it should
 - Be focused on the dispute at issue, not rehash the last 18 months of litigation and why the other side is a bad actor. When you start off in attack mode, is the other side really able to listen and hear the message regarding the disputed issue or are they side-tracked by the attack.
 - Be measured: discuss the issues in a factual manner without name calling or over-exaggeration. Be written with the goal of resolving or narrowing the disputed issues not to simply create a record or to increase attorneys’ fees and costs.
 - Be supported by any relevant legal citations that are on point.
 - Either precede or follow an actual conversation with opposing counsel about the disputed issues.
 - Be proofread by a second set of eyes who can critically evaluate the tone and clarity and help you craft a more effective communication.
- Carefully walk the “timing” tightrope. While you do have an obligation to meet and confer and try to resolve or narrow issues without need for court intervention, do not wait too long to file the motion to compel. Communicate realistic deadlines for opposing counsel to advise whether they will be withdrawing any objections or providing supplementation. Always keep a long-term perspective in mind. Know what your pretrial deadlines are including discovery and dispositive motion deadlines and factor your need to meet those deadlines into the timing of when you file your motion to compel.
- Have current and relevant authority for what you are requesting in your motion to compel or resistance to the motion. Current Federal Rule of Civil procedure 26(b)(1) permits a party to discover “any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs

of the case.” Use caselaw that interprets this current standard. An objection that the discovery will not lead to admissible evidence is really no longer a valid objection in federal court. Stop cutting and pasting from briefs created before this new standard was inserted into the Rules. If you are arguing proportionality, actually discuss each of the proportionality factors and buttress with an affidavit if appropriate, rather than summarily concluding that the discovery is not proportional.

- Be an effective advocate in your written motion and any oral presentation that you make to the Court.
 - Write a factual and legally supported description of the issues in dispute.
 - Do not attack the opposing party or counsel. It does not make you more effective, it bogs your argument down in unnecessary and distracting issues. I do not care whether you discussed the dispute with opposing counsel 8 times or 10 times! How does arguing about that advance your position. I do not care that you are offended that opposing counsel said your argument was disingenuous. You are a litigator-develop a tougher skin and move on.
 - You do not need to tell me about the other motions to compel that were filed in the case. I lived through those motions as well and they are in the docket. I remember.
- Really think about the relief that you are requesting:
 - Is this the hill you want to die on?
 - How important is this issue to the actual resolution of the case?
 - Do you, and more importantly, your client want to spend fees on this issue?
 - Make your requests narrowly-tailored and specific to what you really need.
 - Think about how a judge will react to you if you make an overbroad and unreasonable request? How does that influence how a judge may look at all of your future requests?
 - If you and opposing counsel resolved a portion of the dispute during briefing, advise the Court of that resolution in your reply brief or through a stipulation so that the Court is not using resources on a resolved issue.
 - Can you group and categorize the disputed requests, such as follows?

- The Court must resolve two issues. First is whether plaintiff is entitled to defendant's financial information. This issue affects document requests 2, 6, 8 and 12. The second issue is whether plaintiff is entitled to relevant communications that defendant had with its customers. This issue affects document requests 7, 9, 22-25. [Then argue why you should win on these issues].