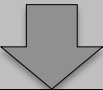


**OPTIONS (IN MA) FOR PRESERVING RECORDS HELD BY ISPs**

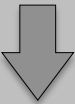
| Type of Records At Issue<br> | Can the MA Court get the ISP to preserve the named records?   | Can the Commonwealth get the ISP to preserve the named records?  | Can the Defense Attorney get the ISP to preserve the named records?              |
|---|---|--|--|
| All Info/ Records   | <p>Maybe.<br/>                     If court wishes to do so (upon a party's request), I suggest using one of these two methods:</p> <ol style="list-style-type: none"> <li>1. Court issues a <i>Request</i> for Preservation, Pursuant to 18 USC 2703(f), to the ISP. Format: Request for Preservation is served by Court Clerk on ISP.</li> <li>2. Court issues an <i>Order</i> for Preservation, Pursuant to 18 USC 2703(f), to the ISP.</li> </ol> <p>To weed out "fishing expeditions" by D/C: require D/C to make a sufficient proffer (by preponderance) that (i) relevant evidence exists on the ISPs server in a particular account, (ii) there is no other means of obtaining the relevant part of that account, and (iii) lack of preservation could result in loss of that evidence.</p> <p>If yes:<br/>                     Format: Order for Preservation is served by Court Clerk on ISP.</p> | <p>Yes. Can <i>compel</i> the ISP to preserve records. (A <i>request</i> will be treated as an attempt to compel, so it doesn't matter which word the Commonwealth uses in its letter.) Format: Letter to ISP.</p> | <p>Yes. Can <i>request</i>, but cannot <i>compel</i>. Format: Letter to ISP.</p> |

\* Disclaimer: The answers given here are based on the controlling federal and state statutes, and the paucity of "on point" case law. Where the answer is "Maybe," I have suggested methods for preservation/seizure that *might* help accomplish the objective. Unfortunately, those methods carry the risk of both appeal and ECPA-based personal liability. Thus, proceed with caution.

**MAY 3, 2013 CAVEAT FROM THE AJA ABOUT THIS FORM:**

*We do not represent that these rubrics apply to any other state than Massachusetts.*

**OPTIONS (IN MA) FOR SEIZING RECORDS FROM ISPs**

| Type of Records at Issue<br>   | Can the MA Court obtain the named records from the ISP?  | Can the Commonwealth obtain the named records from the ISP?   | Can the Defense Attorney obtain the named records from the ISP?   |
|---|--|---|---|
| Basic Subscriber Info.:<br>-Name<br>-Address<br>-IP address & connection logs<br>-Length of service<br>-Types of service<br>-Telephone #s<br>-Billing/payment info. | Maybe.<br>If yes:<br>Format: Rule 17 Order.<br>Will the ISP treat the Rule 17 Order as an "administrative subpoena" contemplated by ECPA? Consider: Remedy for violating ECPA is not suppression; it's personal liability. If Court's Order pertains to the victim's or a witness' account, will the Court be sued for violating ECPA? | Yes. Can <i>compel</i> the ISP to provide Basic Subscriber Info., but cannot simply request (2702).<br>Formats: Admin Subp, grand jury subpoena, trial subpoena, D Order, SW, or the subscriber's consent.<br>Note: A D Order is sought in much the same way as a SW is sought, but can only be sought (per ECPA) in the MA Sup. Ct. (our ct that can issue wire taps). | Yes. Can <i>request</i> , but cannot <i>compel</i> .<br>Format: Letter to ISP.<br>Suggestion: Might be more successful method if D/C attaches Affidavit from subscriber consenting to release of info.              |
| Transactional Subscriber Info<br>-Cell site info<br>-Clickstream data (URLs or IP addresses of websites visited)  | Yes. Upon the CW's Application (but not upon the D/C's application), the court can <i>compel</i> this info, but cannot simply <i>request</i> it.<br>Format for District Court: SW.<br>Format for Superior Court: D Order or SW.  | Yes. Can <i>compel</i> this info, but cannot simply <i>request</i> it (2702).<br>Format: D Order and/or SW. NB: In MA, per MGL 271/17B, an administrative subpoena cannot be used (even w/notice to the subscriber) to obtain transactional info that is clickstream data.  | Yes. Can <i>request</i> , but cannot <i>compel</i> .<br>Format: Letter to ISP.<br>Suggestion: Might be more successful method if D/C attaches Affidavit from subscriber consenting to release of info.              |
| Content   | Yes. Upon CW's Application (but not upon D/C's application), Court can <i>compel</i> this info, but cannot simply <i>request</i> it.<br>Format: SW.  | Yes. Can <i>compel</i> this info, but cannot simply <i>request</i> it.<br>Format: SW.   | No, D/C cannot <i>compel</i> or <i>request</i> this info. However, the actual subscriber can request this info via consent.<br>Format: Consent letter/Aff from the subscriber, completed to the ISP's satisfaction. |