E-Discovery and Cellphones – A Practical Guide to Making the Most of Request for Smartphone Data

Zach B. Pyers, Esq. and **Kenton H. Steele, Esq.**
Reminger Co., L.P.A.

Zach B. Pyers, Esq.

Kenton H. Steele, Esq.

I. Introduction

Cellphones are not only changing the way Americans live their lives, but also the way discovery is conducted. "[I]t is no exaggeration to say that many of the more than 90% of American adults who own a cellphone keep on their person a digital record of nearly every aspect of their lives—from the mundane to the intimate." *Riley v. California*, 134 S. Ct. 2473, 2490 (2014). Today, the extensive amount of information created and stored on cellphones is sought after by litigants hoping to uncover useful information to help them prevail at trial or on a dispositive motion. Litigators must incorporate procedures tailored towards discovery and preservation of cellphone and application data into their practice. That being said, courts will ultimately make the decisions on the appropriate balance of privacy concerns and the free flow of relevant information. Litigators able to strike a balance between these concerns and speak authoritatively on the mechanics of discovery of cellphone data will likely be at a significant advantage.

II. What is E-Discovery?

Electronic discovery or "e-discovery" is any process where electronically stored information ("ESI") is sought, located, collected, searched, processed, produced, reviewed, or analyzed in a civil or criminal case. This electronic information is created every day by businesses and people at incredible rates. The amount of available information raises privacy concerns and can greatly increase the cost of discovery in all litigation. Cellphones are creating, storing, sending, and receiving ESI in numerous ways. This is especially true when that phone is a smartphone. A smartphone is "[a] mobile phone that performs many of the functions of a computer, typically having a touchscreen interface, Internet access, and an operating system capable of running downloaded apps." *Smartphone, Oxford Living Dictionary* (2019). For example, if GPS is enabled on a smartphone, location information is created simply by the device being carried around in someone's pocket. Many people are totally unaware of the information created by their use of a cellphone. Similarly, most people fail to understand how the information on their phone may be unintentionally destroyed through the regular operation of their phone's operating system or the apps they use. Destruction or spoliation may occur through the overwriting of data by the cellphone carrier settings, making preservation in high-stakes litigation that much more important.

III. What Is The Appropriate Scope of E-Discovery Involving Cellphone Data?

Both the Ohio and Federal Rules of Civil Procedure permit the discovery of ESI. Fed. R. Civ. P. 26(b); Ohio R. Civ. P. 26(B)(5). However, these rules also place limitations on the scope of ESI discovery – "A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of *undue burden or cost*." Fed. R. Civ. P. 26(b)(2)(B) (emphasis added). Electronic information can be costly to retrieve, review, and produce. The limitations in the Civil Rules are particularly important when the ESI may be only

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potentially or *possibly* relevant to a given case. Although the Civil Rules set out specific limitations on discovery of ESI, litigators should also remain cognizant of the general principles that govern the discovery process as these may be crucial to a court's determination between granting a motion to compel or a request for a protective order.

While cellphones record and store an enormous amount of information, it is unlikely that the entirety of the information on a device will be relevant to a given case. Because not all information on a cellphone will be important, requests should be tailored to obtain the specific information most likely to be relevant. A broad request for all information on a cellphone is almost certain to be a categorically unreasonable request. Making a broad, all-encompassing request for anything and everything will often result in an unwinnable discovery dispute. This is particularly true if the case is in federal court, where the Civil Rules now explicitly prioritize specific and well-articulated requests.

Two cases from Florida demonstrate different approaches to how information is requested and how those varying approaches can lead to significantly different outcomes when it comes to the discovery of cellphone data. First, in *Holland v. Barfield*, a wrongful death case arising from a balcony fall, the plaintiff requested production of "any and all computer hard drives" and "all cellphones" from "24 hours preceding [the date of the incident] to present." 35 So.3d 953, 954 (Fla.App.2010). The plaintiff claimed that the request was necessary to uncover conversations between the co-defendants, including text and Facebook messages. *Id.* Predictably, the defendant requested a protective order in response to the broad request, both in the scope of the timeframe and subject matter, arguing it amounted to a "fishing expedition" and would be an invasion of privacy. *Id.* The court agreed and found that there were less intrusive ways to obtain the requested information. *Id.* at 956. This Court was particularly troubled by the fact that the request asked for the hardware rather than "the specific information contained therein." *Id.*

In *Antico v. Sindt Trucking,* a wrongful death arising from an automobile accident, plaintiff requested inspection of defendant's cellphone for the nine-hour period surrounding the accident. 148 So.3d 163 (Fla. App., 2014). Additionally, this request contained strict parameters for how to obtain the information, including allowing defendant's counsel to be present and to video record the inspection. *Id.* at 165. Further, the plaintiff proposed that the summary of findings could be reviewed by defendant's counsel prior to distribution. *Id.* Here, plaintiff requested the information contained in the phone during the time of the alleged accident as result of a specific allegation, supported by testimony of two witnesses, that the petitioner driver was distracted by her phone immediately before the collision. *Id.* at 167. Based on that fact-supported allegation, the time-scope limitations, and the specific plan to protect against privacy invasions, the court allowed the plaintiff's expert to inspect the defendant's phone and review all use of the phone in the time leading up to the collision. *Id.* at 168.

A Pennsylvania case offers additional insight into the appropriate scope of cellphone discovery. In *Dietrich v. Buy-Rite Liquidators, Inc.,* a slip and fall case, defendant (after restructuring his original request) requested all of plaintiff's cellphone records during the one-hour period in which the injury supposedly occurred. 25 Pa.D.&C.5th *1 (C.P.2012). Defendant requested this information upon the premise that plaintiff *may* have been on her phone while in the store, and the distraction of the cellphone use was the actual cause of her fall. *Id.* Here, unlike *Antico*, there were no witnesses or other evidence to support the allegation that plaintiff was distracted by her phone. *Id.* at *9. Ultimately, the court found granting access to, "Plaintiff's cellphone records for the date of the accident, without any factual evidence or other indicia of possible relevance, is an improper intrusion upon Plaintiff's privacy." *Id. at *5.* Thus, even when discovery requests for cellphone data are limited temporally, there must also be factual support for the likely relevance of the requested data.

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These cases demonstrate that while it is easy to see a cellphone as a treasure trove of discoverable information, courts are likely to weigh the party's e-discovery requests based upon the following factors:

- **Time:** When the discovery request is sufficiently limited to the period of time relevant to the event at issue, and not simply between the incident and the time the request is sent, or for all information on the phone at issue, the discovery request is more likely to be a reasonable request.
- **Factual Basis:** Being able to fully articulate why an inspection of an opposing party's smartphone is likely to lead to the discovery of relevant information and provide evidence to support that basis should serve as winning support for a motion to compel.
- **Type of Information Requested:** Courts have shown they are more willing to grant requests that ask for specific information, rather than requests based on sources or locations of information. For instance, a request for all text conversations that mention a specific subject is a better alternative than a broad request for any and all texts exchanged in a given time frame.
- **Manner of Obtaining the Requested Information:** When the discovery request is limited to the electronic records and not the hardware itself, and when the requester offers ways of including opposing counsel in their discovery plan, the cellphone discovery request is more likely to be permissible.

Considering these factors when drafting requests will likely lead to more fruitful responses from opposing parties and/or favorable outcomes in the event a motion to compel becomes necessary. That being said, these factors should also guide objections to requests from opposing parties and the content of briefing submitted when a discovery dispute arises.

IV. Differing Preservation Obligations For Individuals And Companies

While there is a common sense duty to preserve evidence, cellphones can create challenges related to preserving potentially relevant data. This reality is reflected in the Federal Rules of Civil Procedure through the creation of a good-faith operation exception to sanctions for spoliation of evidence. "Absent exceptional circumstances, a court *may not* impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic system." Fed. R. Civ. P. 37(e) (emphasis added).

To determine whether a loss of ESI was the result of routine and good-faith operations, courts have looked at the settings in electronic systems and cellphones, which can include the deletion or overwriting of information. *Federico v. Lincoln Military Hous., LLC*, E.D.Va. No. 2:12-cv-80, 2014 U.S. Dist. LEXIS 178943, at *23 (Dec. 31, 2014). For example, a person may set their cellphone to keep text messages for only thirty-days or up to one-year. Additionally, cellphone carriers have independent retention periods for backing up the content of devices. *Id.* As with all discovery concerns, proportionality and reasonableness should be considered. "For example, substantial measures should not be employed to restore or replace information that is marginally relevant or duplicative." Fed. R. Civ. P. 37(e) (Notes of Advisory Committee on 2015 amendments).

Courts have applied differing standards for the obligation to preserve electronically stored information based upon the type of party being subpoenaed. "Moreover, the fact that Plaintiffs are individuals whose devices are solely for personal use informs what constitutes a 'routine, good-faith operation.'" *Federico v. Lincoln Military Hous., LLC*, E.D.Va. No. 2:12-cv-80, 2014 U.S. Dist. LEXIS 178943, at *28 (Dec. 31, 2014). In short, individual plaintiffs are held to a more forgiving standard than corporate parties. *Id.* This difference in accountability can frustrate attempts to obtain information from an individual plaintiff's cellphone. Courts have overlooked the deletion of relevant information by individuals even when that individual anticipates of litigation. The reason behind this forgiving attitude is that parties are only put on notice to preserve information that the party knows to

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be relevant to the litigation. *Id.*

In an illustrative example, the United States District Court for the District of Nevada found that an individual plaintiff had not been put on notice to preserve all text messages, and that the deletion of likely relevant text messages prior to receiving discovery requests was not spoliation of evidence. *Painter v. Atwood*, D.Nev. No. 2:12-cv-01215-JCM-RJJ, 2014 U.S. Dist. LEXIS 35060, at *18-19 (Mar. 18, 2014). Conversely, United States District Court for the District of South Carolina held a corporate party liable for spoliation through continued use of a work laptop after litigation was anticipated. *Nucor Corp. v. Bell*, 251 F.R.D. 191, 197 (D.S.C., 2008). Corporate parties are expected to have a higher level of sophistication and understanding of the litigation process than individuals, and this presumption impacts how courts view disputes over e-discovery and preservation of data.

V. Conclusion

The amount of electronically stored information people and businesses are creating continues to grow. Correspondingly, the ability to obtain and make use of ESI will continue be a primary concern in nearly all litigation. In order to balance the desire to discover electronically stored information against privacy concerns and the cost of production, parties and courts must take the scope and reasonableness of requests into account. This includes limiting the scope of requests for cellphone data temporally and by subject, the identifying a factual basis supporting the need for the information, the format of information being sought, and the manner and specifics of obtaining information requested. The burden on parties created by electronic information begins with the duty to preserve, continues in discussions of electronic discovery issues at Rule 26(f) or similar provisions, and permeates throughout the written discovery process. Understanding the importance of this category of information, while also considering how courts are likely to perceive the privacy concerns attendant to a given request for digital information, are key to obtaining favorable outcomes and avoiding sanctions for the destruction of relevant information.

Zachary Pyers, Esq., is a Partner in the Columbus, Ohio office of Reminger Co., LPA and practices in the areas of commercial litigation and professional liability. He is also an Adjunct Professor at Capital University Law School where he teaches a number of litigation focused courses, including a course in E-Discovery.

Kenton H. Steele, Esq., is an attorney in the Columbus, Ohio office of Reminger Co., LPA. He frequently encounters issues relating to discovery of cellphone data when litigating personal injury and professional liability cases.