



Federal Bar
Association

2021 HYBRID ANNUAL MEETING

SEPTEMBER | 23-25 | MIAMI | FLORIDA

**What Happens After You Give
Your Client's iPhone to a
Forensic Investigator?**
*Legal Frontiers in the Discovery
of Personal Devices*

#FBA

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Our panel members

- Hon. Lauren F. Louis, United States Magistrate Judge, Southern District of Florida
- Robert A. Stines, Partner, Freeborn & Peters LLP, Tampa
- Benjamin G. Greenberg, Partner, Greenberg Traurig, Miami
- Moderator: Larry Dougherty





Roadmap of today's discussion

1. Factoring devices into discovery plans
2. Gaining familiarity with new techniques
3. Managing proportionality and expense
4. Finding the right partners to do your job
5. Staying ethical





Audience poll

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Voice of the Federal Bar and Bench



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1. Factoring devices into discovery plans

Conversations you need to have early with the client

- How did your client communicate in this case?
- How did the other parties communicate?
- Are there company policies on devices?
- Does ownership of the device make any difference?
- How might electronic communications be relevant?
- How must electronic communications be preserved?
- Your litigation hold letter





1. Factoring devices into discovery plans

- Is the data on the phone or in the cloud?
 - Texts
 - SMS
 - WhatsApp
 - Workplace chat programs
 - Slack
 - Microsoft Teams
 - Jira
 - Trello





1. Factoring devices into discovery plans

- Should you image your client's devices? If yes, when?
- Discrete discovery versus discovery of an image





1. Factoring devices into discovery plans

- **Understanding your client's data ecology**

- Which devices and apps does she use?
- Does social media factor into her work?
- Does your client share devices?
- Does your client use devices at home?
 - Are there family members with privacy concerns?





1. Factoring devices into discovery plans

- **Understanding your client's data ecology (cont'd)**
 - Does your client back up devices? If yes, how?
 - What does she do with old devices?





1. Factoring devices into discovery plans

- **The cloud remembers (sometimes)**
 - iCloud, Microsoft OneDrive, Google Drive, Dropbox
 - Restoring devices from the cloud





1. Factoring devices into discovery plans

- **Is an iPhone an exhaustive repository of every server with which it has interacted?**
 - Can the cloud ever contain more than the devices it supports?





1. Factoring devices into discovery plans

- **Understanding your client's data ecology (cont'd)**

- Is she regularly in the habit of deleting or overwriting data?





1. Factoring devices into discovery plans

- **What's the current law on routine deletion?**
 - **No problem.** *Brittney Gobble Photography, LLC v. Sinclair Broad. Grp., Inc.*, No. SAG-18-3403, 2020 WL 1809191, at *10 (D. Md. Apr. 9, 2020) (routine deletion of e-mails more than a month after receipt of subpoena did not support inference of intent to deprive).
 - **Problem.** *Braham v. Lantz*, No. 3:08cv1564(DEW), 2014 WL 1270096, at *7 (D. Conn. March 27, 2014) (noting that a party reasonably anticipating litigation must suspend its routine deletion policy) (quoting 11 Sedona Conf. J. 265, 269 (Fall 2010) and *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003) (“*Zubulake IV*”)).
- **Pro tip** – make sure your litigation hold letter requests a suspension of routine deletion





1. Factoring devices into discovery plans

- **Don't do this**

DR Distributors, LLC v. 21 Century Smoking, Inc., No. 12 CV 50324, 2021 WL 185082, at *11 (N.D. Ill. Jan. 19, 2021) (faulting lead counsel's lack of familiarity with ESI, and his use of verbal litigation holds, in a case in which crucial Yahoo! chats were not preserved and thus deemed spoliated)





2. Gaining familiarity with new techniques

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- Audience poll: Raise your hand if you recognize the following terms

- Why do these matter?





2. Gaining familiarity with new techniques

- Case law tends to lag behind specific apps and technologies, and only slowly recognizes new ones, *e.g.*:
 - *DR Distributors, LLC* (concerns Yahoo! Chat, which was discontinued in 2012)
 - *Dodd v. Aeterna Zentaris Inc.*, No. 9:17-CV-2382-PMD, 2018 WL 4300536, at *2 (D.S.C. July 10, 2018) (ordering forensic collection of plists regardless of whether they contain search terms) (plists have been around in various forms for a long time).





2. Gaining familiarity with new techniques

- Current criminal practice – which phone records do law enforcers seek in search warrants?
 - It's not uncommon for new criminal investigative techniques to migrate to civil litigation within a year or two





2. Gaining familiarity with new techniques

- Current criminal practice – examples from search warrants:

any and all diaries, address books, names, text messages, and lists of names and addresses of individuals who were contacted for the purpose of possession or distribution of controlled substance;





2. Gaining familiarity with new techniques

- Current criminal practice – examples from search warrants (cont'd):

3. Records of Internet activity related to the possession or distribution of narcotics, including firewall logs, caches, browser history and cookies, “bookmarked” or “favorite” web pages, search terms that the user entered into any Internet search engine, and records of user-typed web addresses.





2. Gaining familiarity with new techniques

- Current criminal practice – examples from search warrants (cont'd):

Any and all location information identifying the location of the user or users of the **TARGET DEVICES** or any co-conspirators.





2. Gaining familiarity with new techniques

- Internet searches – **Irrelevant and private?**
 - Cell phone internet searches and browsing history “could reveal an individual's private interests or concerns — perhaps a search for certain symptoms of disease, coupled with frequent visits to WebMD.” *Riley v. California*, 573 U.S. 373, 395–96 (2014).





2. Gaining familiarity with new techniques

• Internet searches (cont'd) – **Relevant!**

- Searches of Safari browser data located the phrase “**what is employee solicit consequence penalty,**” which was probative to claims of employee solicitation and trade secret misappropriation. *WeRide Corp. v. Huang*, Case No. 5:18-cv-07233-EJD, 2020 WL 1967209, at *2, 16 (N.D. Cal. April 24, 2020) (imposing sanctions and entering defaults against defendants who spoliated evidence by wiping one MacBook and returning another MacBook to the Apple store on the same day a cease-and-desist letter was received).
- **See also** *NITV Fed. Servs., LLC v. Dektor Corp.*, No. 18-80994-CIV, 2019 WL 7899730, at *4 (S.D. Fla. Sept. 20, 2019) (finding spoliation and noting the defendants’ Google searches for “**file shredder**” programs).





3. Managing proportionality and expense

- Discovery – how much is enough?





3. Managing proportionality and expense

- **Keeping the focus on relevance – what is the discovery for?**
 - Facebook and Instagram posts relevant to “contemporaneous mental and emotional states and therefore relates to the injuries she claims.” *Crossman v. Carrington Mort. Svcs., LLC*, No. 3:19-cv-1081-J-39PDB, 2020 WL 2114639, at *4 (M.D. Fla. May 4, 2020) (citing *Hinostroza v. Denny's Inc.*, No. 2:17-cv-02561-RFBNJK, 2018 WL 3212014, at *6 (D. Nev. June 29, 2018) (citing cases)).
 - Texts and e-mails regarding work for new employer relevant to claims of unfair competition and theft of trade secrets. *Inventiv Health Consulting, Inc. v. French*, No. 5:18-CV-295-D, 2020 WL 728148, at *6 (E.D.N.C. Feb. 12, 2020) (granting motion to compel).





3. Managing proportionality and expense

- **Proportionality is your guardrail**

- *Walker v. Newman University, Inc.*, Case No. 2:19-cv-2005-DDC-TJJ, Doc. 159, at *5–6, 9 (D. Kan. Aug. 13, 2020) (granting motion for protective order blocking disproportional requests for e-mail and texts in gender discrimination action).





3. Managing proportionality and expense

- What is “discovery about discovery” in the context of devices?





3. Managing proportionality and expense

- **Examples of iPhone files that lead nowhere**
 - manifest.mbdb reports
 - plist files for all applications on an iPhone
 - data from Health App
 - data from games or entertainment Apps





3. Managing proportionality and expense

- Declining to go “**down the rabbit hole of discovery on discovery**” in search of supposedly missing texts. *Gross v. Chapman*, No. 19 C 2743, 2020 WL 4336062, at *2 (N.D. Ill. July 28, 2020).





3. Managing proportionality and expense

- **The only times when “discovery about discovery” is appropriate:**
 - “when one party’s discovery compliance has reasonably been drawn into question,” or
 - “there is ‘an adequate factual basis’ for an inquiry.”
- **“speculation [about missing discovery] is never sufficient”**

Gross v. Chapman, 2020 WL 4336062, at *2–3 (collecting cases, and discussing Sedona Conference standard that requires “tangible, evidence-based indicia (versus general allegations of deficiencies or mere ‘speculation’) of a material failure by the responding party to meet its obligations”).





“Nearly 5,000 texts is enough.”

- “It should be obvious that given what this case is about, and that a large volume of ESI has already been produced at significant expense to the defendants, discovery on discovery with no basis other than plaintiffs' hopeful guess that there must be more texts about an engagement breakup is substantially out of proportion to the needs of the case. **The discovery rules are not a ticket . . . to an unlimited, never-ending exploration of every conceivable matter that captures an attorney's interest. . . . Nearly 5,000 texts is enough.** The parties' ‘ancient grudge’ shall not be allowed to ‘break to new mutiny.’”

Gross v. Chapman, 2020 WL 4336062, at *4 (emphasis added).





3. Managing proportionality and expense

- Again, speculation about lost ESI is not enough

Pugh-Ozua v. Springhill Suites, No. 18-CV-1755 (RA), 2020 WL 6562376, at *4 (S.D.N.Y. Nov. 9, 2020) (“supposition” that allegedly deleted text messages and e-mail would support the plaintiff’s claims was inadequate to establish prejudice authorizing the imposition of sanctions).





4. Picking the right partners

- What to look for in an ESI expert
- What an ESI expert is for
 - Device imaging
 - Consulting
 - Testifying
- When to seek ESI co-counsel





4. Picking the right partners

- Court-appointed forensic neutrals
 - They can image a phone and collect discovery if the movant makes a showing the discovery would be relevant and proportional

See, e.g., Measured Wealth Private Client Group, LLC v. Foster, No. 20-cv-80148-SINGHAL/MATTHEWMAN, 2021 WL 1215218, at *3 (S.D. Fla. March 31, 2021) (collecting cases) (ordering selection of forensic neutral to image and collect data from defendant's iPhone in light of showing by the plaintiff that the discovery was necessary; and setting out the protocol for the neutral's data collection).





4. Picking the right partners

- What to budget for ESI experts?
- How to budget?
 - Driven by the nature of the case or type of data?
 - Or by client's preferences or limits?
- Is more not better?





5. Staying Ethical

Rules that apply here

- MRPC Rule 1.1 – Competence
- MRPC Rule 1.4 – Communications with the Client
- MRPC Rule 3.3 – Candor Toward the Tribunal
- MRPC Rule 3.4 – Fairness to Opposing Party & Counsel
- MRPC Rule 5.3 – Responsibilities Regarding Nonlawyer Assistance





5. Staying Ethical

- MRPC Rule 1.1 – Competence
 - Comment 8: “a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology”





5. Staying Ethical

- MRPC Rule 1.4 – Communications with the Client
 - *Lawson v. Sun Microsystems, Inc.*, No. 107CV196RLYTAB, 2010 WL 503054, at *4 (S.D. Ind. Feb. 8, 2010) (overruling magistrate judge’s imposition of \$13,625 sanction against plaintiff’s counsel in connection with alleged failure to communicate with client regarding ESI review and thereby violating Indiana’s Rule 1.4).





5. Staying Ethical

- MRPC Rule 3.3 – Candor Toward the Tribunal
 - *Doe v. Purdue Univ.*, No. 2:17-CV-33-JPK, 2021 WL 2767405, at *14 (N.D. Ind. July 2, 2021) (imposing sanctions on plaintiff for intentional deletion of 11 videos and images from the Memories folder of the Snapchat app on his phone, and noting that “Plaintiff's representations to this Court regarding his Snapchat data have been opaque and misleading at best, intentionally false at worst. Plaintiff's conduct was, in no uncertain terms, an intentional or reckless disregard of his obligations to comply with both his obligations as a litigant and this Court's orders. As such, it was done in bad faith for purposes of Rule 37.”)





5. Staying Ethical

- MRPC Rule 3.4 – Fairness to Opposing Party & Counsel
 - A lawyer shall not:
 - (a) unlawfully obstruct another party' s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
 - Comment 1: The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.



Questions?



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