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What's in Your Pocket?

Smartphones: A New "Safe Harbor" for E-Discovery

By Larry G. Johnson

Think for a minute: What computer do you use that has the most information about you on it? Your desktop at work? Your home PC? Your laptop? The firm's server with all your emails?

The right answer probably is: "None of the above." Or to be precise: The answer is in your pocket or purse. It's your smartphone. And the reason may not be immediately obvious. Not only does your smartphone sync up with all your emails (regardless of where you wrote or received them), but it also produces and retains two very important data types found on smartphones: voice mail and text messages. And with proper forensic tools, your phone also retains deleted files of these data types that can be resurrected.

In other words, in your pocket are the most meaningful communications and information you exchange with others in your life. It's where you live.

That's why wise lawyers consider their client's smartphone first when preparing for e-discovery. This is especially true in family law cases where there are often valuable conversations between the parties via text messages and voicemails.

Let's pause a moment. Think how powerful voicemail alone can be to a litigator. Unlike emails or text messages, you can hear the actual voice, mood and intonation of the sender. The tone could be more important than the content.

Voicemail is electronically stored information ("ESI") that lawyers too often forget to ask for, or even know how to ask for. Yet for many phone users, that is where *all* their voicemail is. If you did not ask for and receive voicemail in your last case, you didn't do a complete job.

According to the Pew Research Center, "nearly two-thirds of Americans own a smartphone, and 19% of Americans rely to some degree on a smartphone for accessing online services and information and for staying connected to the world around them — either because they lack broadband at home, or because they have few options for online access other than their cell phone."[1] Given the convenience and portability of smartphones, the trend toward greater reliance on this kind of computer for all our personal and business data can only continue upward.

Accelerating this trend, even corporate America is relying more on their own employees' communication devices and data. Many companies, such as Microsoft, are following a "BYOD" strategy: "Bring Your Own Device." Employees agree to be bound by company email and Internet usage policies, but otherwise they use their own smartphones for both business and pleasure.[2]

So, with just one small device lawyers can easily access a ready repository of all the kinds of data used daily by people on a computer (and phone) that goes with them everywhere. On top of the three main communication data types previously mentioned — text message content, voicemails and emails (plus attached documents) — there are added bonuses on smartphones. These include:

- the photos and videos people take that are stamped with times and dates;
- GPS data from trips taken;
- calendars with appointments and dates preserved;
- Internet sites visited and search terms used;
- Wi-Fi location information; and
- shopping and social network information.

It is from such a cornucopia of information that Seattle/Portland lawyer and technologist Tom Howe has come up with a unique combination of technology and methodology for extracting all the data on smartphones. His simple, innovative process promises to usher in a true e-discovery safe harbor worthy of codification in court rules, model orders or agreed protocols among litigants.

Consistent with federal Civil Rule 1's admonition that the rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding," for a flat fee Howe does all the e-discovery needed on a smartphone, from data collection to final evidence reports.

The first step entails sending his law firm/corporate clients a remote collection unit. All the client needs to do is plug in the smartphone, and the device extracts the information from the phone onto its encrypted storage device. None of the smartphone information passes over the Internet or ever gets stored there.

When the device is shipped back to Howe, the data are processed and reduced to extensive PDF reports with hyperlinks in a table of contents, along with sections devoted to search terms for the matter. Since the reports are easily navigated PDF files, no special software is needed for lawyers to find the evidence they need.

Howe is a trailblazer in what will certainly become a paradigm shift from preserving tons of mostly irrelevant data on servers and desktops for litigation holds, and settling on key witnesses' smartphones instead. More information about Howe's approach is at *www.howelawfirm.com*. Other companies in the e-discovery space are making tentative moves in the same direction and the beneficiaries will be law firm clients who will spend less on protracted and wasteful e-discovery.

Of course, just as bad facts can make bad law, complex cases often require complex e-discovery. But to one who has litigated cases for 40 years, I think preserving and producing ESI from smartphones as the default "safe harbor" in a case, whereby anything beyond that has to be justified (and possibly paid for) by the requesting party per federal Civil Rule 26(b) proportionality standards, would do much to prevent many of the abuses electronic discovery is known to be prone to.

Ever since the Federal Rules of Civil Procedure were amended in 2006 to take into account the unique nature of ESI, discovery battles over what should or should not be legitimate stores of information to be preserved and produced have been waged across the land. Attempts have been made to standardize a process that lawyers can understand and follow, such as the Electronic Discovery Reference Model (EDRM) promoted at *www.edrm.net*. But like many things in our adversarial system, e-discovery continues to be a war of attrition in too many cases, especially if the judge refuses to intervene to establish a protocol to prevent costly and unnecessary e-discovery.

How refreshing and simple it would be to state simply that smartphones should be considered first as the sole ESI source used in the case for e-discovery, and perhaps leave it at that. In certain types of cases, such as family law and employment law, that would seem to be a no-brainer.

Adopting federal and state procedural rule changes entails a long and difficult process, but the solution for many courts is to adopt local rules and/or model orders to impose a rule of reason over e-discovery. The K&L Gates law firm has collected a long list of those jurisdictions that have followed this path to keep e-discovery manageable and cost-effective. The list is available at *www.ediscoverylaw.com/local-rules-forms-and-guidelines-of-united-states-district-courts-addressing-e-discovery-issues*.

Of course, there is nothing to stop the parties in any given case from adopting their own guidelines as well under FRCP 29 and state equivalents. A good place in every case would be to start with the available smartphones and see what results that produces. At a minimum, staged e-discovery almost always makes sense, often since the information obtained from the first round of production informs what you ask for in any subsequent rounds.

A final point: What if a party "does a Brady" and destroys his smartphone, what then? In most instances, the information on any smartphone is automatically synced or backed up on the user's PC, Mac or in the cloud.

Data these days are more "sticky" than ever. And smartphone users have yet to fully catch on to the fact that their good friend in their pocket could well turn out to be their worst enemy. ■

Larry G. Johnson is a lawyer in Newcastle, and has been a member of the Washington bar since 1974. He recently served on the E-Discovery Subcommittee of the WSBA Escalating Cost of Civil Litigation (ECCL) Task Force. Besides being a litigator, for the past 20 years he has served as a consultant and expert witness in e-discovery matters. He does business as Electronic Data Evidence (www.e-dataevidence.com).

[1] "U.S. Smartphone Use in 2015," *www.pewinternet.org/2015/04/01/us-smartphone-use-in-2015*.

[2] For more on this trend, see "Bring Your Own Device (BYOD) Survival Guide for Microsoft Technologies," *http://social.technet.microsoft.com/wiki/contents/articles/20554.bring-your-own-device-byod-survival-guide-for-microsoft-technologies.aspx*.