

Cell phones, the Forgotten Source of eDiscovery Evidence

By John R. Clingerman, CFCE

Alas, the amazing cell phone, the indispensable device so very prevalent in today's society. It's something we just can't do without! Not long ago the concept of cell phones was similar to the "communicators" seen on Star Trek. They were extremely limited in their technological capabilities, used solely for voice communication and a luxury to possess. However, no longer are they simple storage areas for a phone book and voice capable communication, but rather they have become very powerful and very smart! So smart, we call them Smartphones.

Recently, the 8th Circuit Court of Appeals has recognized today's cell phone as a computer! We are hard pressed to find someone without one and many people possess two. The latest statistics show there are at least 5.3 billion cell phone service subscriptions worldwide with about 800 million in the United States.

In the corporate environment they've become a necessity just like the company-issued laptop. We have the ability to spend the entire day out of the office and conduct business completely on the device. It's a breeze to access company emails including their attachments, generate documents from scratch or edit others. And let's not forget to mention the ability to jump on the Web and perform any function as though you are sitting behind your laptop in the office.

Our cell phones are always less than an arm's reach away when not being used. Yet, it's often forgotten about or completely overlooked during eDiscovery litigations and computer forensic investigations.

Why? How can we forget it? It's most likely unnoticed because we assume that digital evidence relevant to litigation will only be residing on a company network or an employee's assigned computer. However, if employees are assigned a cell phone or Smartphone those devices should always be noted within a litigation hold notice and discussed at a meet and confer.

We have seen, on a number of occasions, when a cell phone has proven to possess the smoking gun.

For example, the device may contain text messages or pictures that are relevant to a sexual harassment lawsuit and are not present anywhere else. Or, it may contain artifacts of instant messages sent while accessing social networking sites. Additionally, the device may contain documents which are not authorized to be possessed outside of the corporate office such as, customer lists, personally identifiable information, copyrighted material, etc. What if those documents were sent out of the corporate environment via a web based email account and retrieved by the recipient's cell phone or Smartphone? If any of these situations arise, the cell phone may be the ONLY place you will find your evidence. But you'll never know unless the device is listed as part of a custodian's items that need to be collected, searched and analyzed.

The moral of the story, DO NOT rely solely on a company's network shares or a custodian's computer(s) as the only possible sources of data relevant to your case. **Always, always, always get access to the cell phones and Smartphones.** Forensic acquisition of those devices and the subsequent expert report may be just what is needed to win your case!

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