

## BlackBerry Boo-Boos: How to Get the Judge to Text You Adverse Inference Instructions

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*Southeastern Mechanical Services, Inc., v Brody, et al.*, is the story of how wiping the data off your BlackBerry can result with the Court having you drawn and quartered. Not with horses, but with adverse inference instructions.

In a trade secret case where Individual Defendants left the Plaintiff's company and went to the Defendant's company, issues with BlackBerry data spoliation exploded like a fireball in the night. *Southwestern Mechanical Services, Inc., v Brody, et al.*, 2009 U.S. Dist. Lexis 85430 (August 2009). There is an "app" for that sort of spoliation called adverse inference instructions.



The key facts of the case took place in a matter of days. The three Individual Defendants purchased their BlackBerries between May 28 to May 30, 2008. The devices were used for email, phone and text messaging.

The Individual Defendants' BlackBerries were synced with the Defendant's email server between June 3 to June 4, 2008. *SMS*, at \*5-6.

A demand letter was sent from the Plaintiff on June 6, 2008 and email messages were preserved on June 10. *SMS*, at \*7. A temporary restraining order (TRO) was issued on June 13 and the Individual Defendants were instructed to return their laptops and BlackBerries on June 17, 2008. *SMS*, at \*7-8.

The Defendants represented that no email messages were lost from the Individual Defendants' BlackBerries or laptops because they were synced to the Defendant's BlackBerry Enterprise Server. *SMS*, at \*4. As such, the email messages were not on any hard drives, but an email server. *SMS*, at \*6.

### Forensic Examination of the BlackBerries



After the execution of a litigation hold and the physical sequestering of the Individual Defendants' BlackBerries and computers, the Plaintiff's expert performed a forensic examination using Paraben Device Seizure software on the BlackBerries. *SMS*, at \*9-12.

The Plaintiff's expert quickly determined the BlackBerries had been wiped clean: No phone records, no text messages, no email messages or applications existed on the devices. *SMS*, at \*10. Moreover, the data on the devices was different from what would be on a brand new BlackBerry and different from one only used as a phone. *SMS*, at \*11, fn 8.

This sort of thing does not happen by accident. The only ways this would happen (according to the expert) would be by a “hard reset” or someone entered the incorrect password ten times. *SMS*, at \*11.

The Defendant’s forensic expert also determined that the BlackBerry SIM cards contained some contacts and text messages, but not emails messages. *SMS*, at \*12.

### **Dial S for Spoliation**

For those who are not familiar with spoliation, it is the intentional destruction of evidence. *SMS*, at \*13. To prove sanctions for spoliation under Florida law, a party must show the following:

- 1) The evidence existed at one point in time;
- 2) There was a duty to preserve the evidence on the part of the spoliator; and
- 3) The evidence was crucial to the movant’s prima facie case.

*SMS*, at \*14.

The Court rocketed through these three factors answering all in the affirmative. *SMS*, at \*15.

The Court found that there were circumstances showing the destruction of the email, text messages and phone data was in bad faith. *SMS*, at \*16-17. The Court found the Individual Defendants to not be credible in explaining the data loss, because the expert testimony showed that 3 of the 4 ways the data could have been lost were by intentional acts. *SMS*, at \*17. Further, the Individual Defendants had both the motive and opportunity to erase the data on their BlackBerries. *SMS*, at \*16-17.

Furthering the Individual Defendants’ credibility gap, there was evidence of other deleted data. One Individual Defendant’s prior computer he used while employed by the Plaintiff had all of its email and contacts deleted. The other Individual Defendant used a software program to delete all of the data on it before returning it to the Plaintiff. *SMS*, at \*19-20.

The Court found that the appropriate sanction for the loss of data was an adverse inference instruction regarding the Individual Defendants failure to preserve data on BlackBerries that would be advantages to Plaintiffs and disadvantageous to the Individual Defendants. *SMS*, at \*23. While default judgment was avoided, the Court’s irritation is visible throughout the opinion.

### **Bow Tie Thoughts**

The Court’s analysis of the BlackBerry preservation and data deletion was very well done. This case highlights how data on a BlackBerry (or any Smartphone) can be deleted and the importance of having procedures to enact a litigation hold on these devices.