

Naughty or Nice? Instead of Coal, I Got ... ESI?!

By Ryan P. Newell, Esquire

This holiday season many people received new mobile devices, such as phones and tablets — even “phablets,” which combine features of phones and tablets. In addition to being great gifts, they are also potential sources for discovery in litigation. The following article addresses some common questions associated with discovery from mobile devices.

Why would a party want discovery from mobile devices?

With the amount of electronically stored information (“ESI”) from a variety of other sources (e.g., networks, computers, email, etc.), how could a party reasonably request discovery from mobile devices such as cell phones and tablets? Just as paper discovery was the incumbent before the advent of personal computers, mobile devices have become ubiquitous with modern day living.

The facts are staggering:

- 90% of Americans use a cell phone — of which 58% use a smartphone.
- 42% of Americans own a tablet.¹
- This year, mobile devices will account for 40% of business-oriented devices.
- A person will access a mobile device approximately 150 times per day.
- For every personal computer, there are four cell phones.²

In many ways, mobile devices are just smaller personal computers with additional communication capabilities. Among adults, 63% use their cell phones to go

1. Pew Research Center Internet Project, *Mobile Technology Fact Sheet*, <http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet/>.

2. IBM, *Mobile Isn't a Device. It's Data.*, <http://www.ibm.com/smarterplanet/us/en/smarter-enterprise/perspectives/mobile.html>.

online and 34% of cell internet users use their cell phones as the primary means of going online. As for communications, 81% of users send or receive text messages and 52% send emails from cell phones.³ In terms of volume, text messages now far outweigh phone calls.⁴

What type of data is on a mobile device?

It is estimated that there are 5.2 million gigabytes of mobile data generated daily.⁵ Just as with personal computers, mobile ESI can take a variety of forms: emails, voicemails, call logs, contact lists, internet histories, and social media files. Unlike personal computers, there is also a lot of data collected in the applications users download to mobile devices. For example, GPS applications often store the names and addresses of the mobile device user and of people and places visited. Digital voicemail applications will likely contain written transcriptions of the voicemail. And voice-recognition applications, like Apple's Siri, will collect and have access to recordings, transcripts, contact lists, and diagnostic data required for the voice commands.⁶

Is it even discoverable?

While mobile device discovery is still in its nascent stage, practitioners should recognize that such information is discoverable under both federal and state law. It

3. *Mobile Technology Fact Sheet*.

4. Pew Research Center Internet Project, *Americans and Text Messaging*, (Sept. 19, 2011), <http://www.pewinternet.org/2011/09/19/americans-and-text-messaging/>.

5. IBM, *To put that in perspective, a Word document that is 5.2 million gigabytes would contain approximately 312 billion pages*. See Lexbe eDiscovery Calculator, <http://ediscovery.lexbe.com/resources/ediscovery-calculator/>.

6. LexisNexis, “Siri®, How Much Discoverable ESI is on My Smartphone?” (October 2012), <http://www.lexisnexis.com/legalnewsroom/litigation/b/e-brief/archive/2012/10/05/siri-how-much-discoverable-esi-is-on-my-smartphone.aspx>.

is well accepted under common law that the scope of permissible discovery is broad, but several federal and state court rules are beginning to expressly identify ESI as falling within that broad scope. For example, Federal Rules of Civil Procedure 26, 34, and 45 and the corresponding Court of Chancery rules now explicitly recognize that ESI may be discovered.⁷

While not all courts have yet to follow suit by amending their rules, litigants should be wary of ignoring potentially discoverable mobile ESI merely because the rules do not yet expressly mention ESI. Rather, when considering whether discovery from mobile devices is necessary, parties should consider principles of proportionality,⁸ including whether the same discovery can be obtained from more convenient and less expensive sources.

What questions should I consider in discovery from mobile devices?

If faced with discovery requests for mobile device ESI, you should consult an e-discovery professional with experience in mobile data collection. But, there are also a number of other issues to be aware of independent of any expertise you may seek out.

First, data stored on mobile devices may not be “write-protected” — meaning the device's memory may be subject to frequent changes with each passing text message, email, call, etc.⁹

7. See also Default Standard for Discovery (D. Del.); Complex Commercial Litigation Division Sample e-Discovery Plan Guideline (Del. Super.).

8. The Sedona Conference, *Commentary on Proportionality* (January 2013), <https://thesedonaconference.org/publication/The%20Sedona%20Conference%20Commentary%20on%20Proportionality>.

9. The Ediscovery Blog, *Mobile Device Forensics – A Walk on the Wireless Side of Ediscovery* (Dec. 30, 2010), <http://www.theediscoveryblog.com/2010/12/30/mobile-device-forensics-a-walk-on-the-wireless-side-of-ediscovery/>.

Second, you need to consider how you will collect the data. Through a “logical acquisition” you can make copies of certain files without preserving all the attributes of the mobile device. On the other hand, a “physical acquisition” results in a forensic copy of the device and may be required for collecting email and certain applications.

Third, given the small hard drives of mobile devices, there may be additional data stored on a cloud, such as Apple’s iCloud.

Fourth, you should determine whether the mobile devices are synched with other devices (such as a phone being synched with the email on your work computer). Synching may change the data on the mobile device.¹⁰

Finally, before you or your client discard the old mobile device, consider what is happening with that data and what needs to be preserved.¹¹

10. Michael Arnold, *Collecting Data From Mobile Devices*, http://apps.americanbar.org/litigation/litigationnews/trial_skills/110113-tips-collecting-data-mobile-device.html.

11. LexisNexis.

As mobile devices increase in popularity, blurring the line between business and pleasure, they will likely continue to be sources of discoverable ESI. But, with the proper amount of forethought, lawyers can advise their clients properly both as to what to preserve and what to request in litigation — in much the same way attorneys first considered e-discovery from personal computers.

• • •

Questions?

Do you have questions regarding the use of technology and the practice of law? Please submit them on the Delaware Supreme Court’s Commission on Law and Technology helpdesk form. (<http://courts.delaware.gov/declt/helpdesk.stm>). 

Ryan P. Newell is a partner at Connolly Gallagher LLP, where he focuses on commercial and intellectual property litigation. He is the chair of the Commission on Law & Technology’s e-discovery working group.

Is there a major milestone in your future, or the future of your law firm?

An anniversary, a memorial or a celebration?

Consider a tax deductible gift to the Delaware Bar Foundation Endowment Fund, a gift that will continue to give to those most in need.



DELAWARE BAR
FOUNDATION

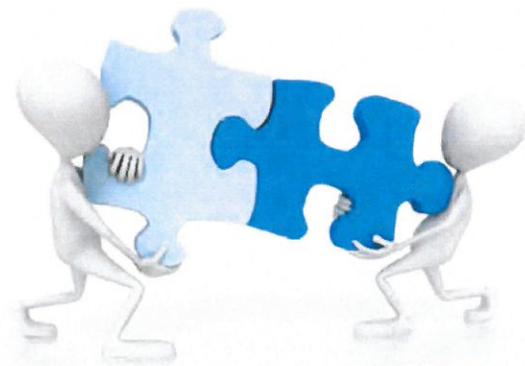
Melissa Flynn
Executive Director
Phone: (302) 658-0773
www.delawarebarfoundation.org

ZIMNY & ASSOCIATES, P.A.

*Complete Tax, Audit & Accounting Services
for Attorneys & Law Firms*



PRE-CERTIFICATION FOR ANNUAL BAR ASSOCIATION COMPLIANCE
FORENSIC ACCOUNTING SERVICES



Putting the pieces together for your financial health with accuracy and insight

TAX ADVISORY SERVICES
BUSINESS VALUATION SERVICES
PRE-PLANNING TO MAXIMIZE YOUR ASSETS
FAMILY LAW LITIGATION SUPPORT

Richard M. Zimny, CPA
Susan M. Shaner, CPA

CONTACT INFORMATION
302.325.6900 SZIMNY@ZIMNYCPA.COM
WWW.ZIMNYCPA.COM