

How Courts Are Treating Cellphone Privacy in Discovery



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Cellphones are an essential part of our daily lives, and our frequent usage has produced large amounts of personal data. It is unavoidable that some of this data — be it email, text message or even GPS location data — may be relevant to litigation. In many instances, however, data on a cellphone is not relevant to any litigation and may be private and confidential. Accordingly, parties often resist discovery of cellphone data on the basis that it is overbroad and intrusive.

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When parties cannot agree on production of relevant data from a cellphone or similar device, courts have the power to order a forensic examination. Given the intrusiveness of such an examination, however, courts are careful to safeguard privacy interests and generally require a showing that a party has failed to produce relevant information before ordering a forensic examination.

A review of recent cases suggests the following best practices when seeking, or responding to a request for, the forensic examination of a cellphone or similar device:

- Tailor discovery requests to seek only relevant and proportional information that cannot be obtained elsewhere.
- Propose a protocol by which relevant information can be extracted by a neutral third party without disclosure of confidential, personal information.
- Work cooperatively with your opponent to limit discovery to matters proportional to the needs of the case, and make clear what you are not providing and why.
- Consider alternative, less burdensome or less intrusive sources for the information sought.
- When a forensic exam is unavoidable, insist that a neutral third party conduct the exam pursuant to an agreed-upon protocol that carefully limits what is to be disclosed to the data that is relevant and proportional to the needs of the case.

Governing Law

Electronically stored information on cellphones is subject to discovery pursuant to Federal Rule of Civil Procedure 34(a)(1)(A) and, like any other discovery, is subject to the proportionality limitations set forth in Rule 26(b)(1). Before permitting discovery of information on cellphones and similar devices, however, courts must balance privacy and confidentiality interests. The Advisory Committee notes to the 2006 amendment to Federal Rule of Civil Procedure 34 specifically caution that:

Inspection or testing of certain types of electronically stored information or of a responding party's electronic information system may raise issues of confidentiality or privacy. The addition of testing and sampling to Rule 34(a) with regard to documents and electronically stored information is not meant to create a routine right of direct access to a party's electronic information system, although such access might be justified in some circumstances. Courts should guard against undue intrusiveness resulting from inspecting or testing such systems.¹

Courts recognize that "[m]ere skepticism that an opposing party has not produced all relevant information" or "a mere desire to check that the opposition has been forthright in its discovery responses" are not sufficient reasons to warrant drastic discovery measures like an exhaustive forensic examination.²

Instead, courts have permitted "restrained and orderly computer forensic examinations where the moving party has demonstrated that its opponent has defaulted in its discovery obligations by unwillingness or failure to produce relevant information by more conventional means."³ Further, courts have made clear that "[t]he utility of permitting a forensic examination of personal cell phones must be weighed against inherent privacy concerns."⁴ Against this background we review how several recent cases have applied these principles.

Cases Where Courts Denied Forensic Examinations

In *Tingle v. Hebert*, Tingle alleged retaliation, invasion of privacy and defamation.⁵ In response to an earlier motion to compel, the court ordered Tingle to produce texts or emails exchanged with former or current employees of the defendants on his personal cellphone or personal email account, as well as any that had been deleted from his work-issued cellphone.

Tingle produced no new messages or emails, but rather a summary of 15 text messages already produced and verifications that a search had been conducted and that all responsive documents had been produced. The defendants filed a motion for contempt, arguing that Tingle's deposition testimony and social media evidence placed the verifications in question. The defendants requested that the court conduct an evidentiary hearing to determine what efforts Tingle had taken to comply with the earlier order, order an independent forensic examination of Tingle's personal cellphone and personal email accounts, conduct an *in camera* review of any documents found, and impose sanctions.

The court denied the defendants' motion for an evidentiary hearing, stating it had no reason to doubt the verification that all responsive documents had been produced. The court also denied the request for a forensic examination of Tingle's cellphone, explaining that:

Defendants' argument that additional responsive documents must exist based upon the existence of the Facebook messages with DeJean is the kind of "mere skepticism that an opposing party has not produced all relevant information" that is insufficient to warrant a forensic examination of Plaintiff's personal cell phone and personal email accounts.⁶

The court further held that the defendants had not addressed the inherent privacy concerns raised by the request for a forensic examination, nor made any showing that the request was proportional to the needs of the case.⁷

The plaintiff in *Valdes v. Greater Naples Fire Rescue District* alleged the defendant retaliated against him for taking leave to seek treatment for medical conditions developed in the workplace.⁸ The defendant requested that Valdes identify all documents, videos, voice recordings, text messages, social media comments and photographs with individuals who had knowledge relevant to his claims. Valdes produced portions of various text messages and emails sent from his mobile phone but responded that he was unable to identify any other documents or text messages because he had lost five cellphones since being employed by the defendant.⁹

Valdes proposed a compromise whereby the defendant would retain a third-party IT professional to conduct an examination of the devices and deliver a report to both parties on the contents recovered so that the defendant could conduct discovery that was narrowly tailored and proportional to the needs of the case.¹⁰

The defendant rejected the proposal and moved to compel a forensic examination of Valdes's electronic devices and email account information by the defendant's expert.¹¹ The defendant argued that the excerpts of text messages produced suggested that Valdes was admitted to rehab for his drug habit, and, therefore, the unproduced texts and messages were relevant to the defendant's allegation that Valdes had a drug addiction and did not suffer from a work-related condition. Valdes argued that the only relevant information was what the defendant knew at the time it made its adverse employment decision, and that the discovery sought was a gross invasion of his privacy rights and not proportional to the needs of the case.¹²

The court reasoned that “inspection of an opponent’s computer system is the exception, not the rule and the creation of forensic image backups of computers should only be sought in exceptional circumstances which warrant the burden and cost.”¹³ The court did not find exceptional circumstances to warrant the burden and cost of the defendant’s extensive request for production. First, the requests were made for the purpose of discovering whether Valdes was a drug user at any time, but the defense rested on the defendant’s subjective belief at the time of the employment decision. Second, there was little indication that relevant information regarding Valdes’s alleged drug use would be gleaned as Valdes had already produced some text messages and emails discussing the possibility of entering drug treatment.¹⁴ Third, there was no evidence Valdes committed any intentional spoliation. Finding that that the privacy invasion that the defendant’s “expansive electronic investigation would involve outweigh[ed] the usefulness of the proposed investigation,” the court denied the defendant’s request for forensic examination without prejudice.¹⁵

In *Landau v. Lamas*, a civil rights action against correctional defendants alleging sexual harassment and abuse, Landau served discovery requests seeking information concerning cellphones, computers and other internet-accessible devices possessed by the defendants; phone and internet service providers used by the defendants; and social media utilized by the defendants.¹⁶ Landau sought an order compelling Zong to surrender her cellphones for forensic examination by Landau’s expert. The court denied Landau’s request that Zong be compelled to surrender her cellphone for inspection by Landau’s expert on the basis that Landau’s support for the relief was “astonishingly speculative, sweepingly expansive in its scope, and largely divorced from the actual claims in this lawsuit.”¹⁷

The magistrate judge described the scope of Landau’s request as overly broad, disproportionate and particularly intrusive of personal privacy, and denied the request.¹⁸

Cases Granting Forensic Examination

By contrast, courts have compelled forensic examinations of data and devices when the moving party demonstrated that the nonmoving party defaulted on its discovery obligations. For instance, in *Timms v. LZM LLC*, a case involving alleged violations of the Fair Labor Standards Act and retaliation claims, the court held that the district court did not abuse its discretion in striking Timms’ complaint for failure to comply with discovery orders.¹⁹

While deposing Timms, the defendants became aware that, despite counsel's representation that all text messages had been lost, Timms still possessed, or had access to, relevant text messages.²⁰ Timms testified that she could access her text messages through cloud storage and produced paper copies of some texts, but not all messages that she was "known to have."²¹

Based on Timms' testimony and production deficiencies, the court granted the defendants' motion for a forensic examination of Timms's cellphone. The examination revealed that her text messages were not on the phone and were not available, and that the phone had either been reset or newly activated three days before the inspection.²² The defendants thereafter filed a motion for contempt of court and for sanctions, which Timms did not oppose. After a hearing, the district court sanctioned Timms for discovery violations by striking her amended complaint and awarding \$8,500 in costs and fees.²³

Timms argued on appeal that that she did not disobey the court's order because it only required production of the phone, not text messages located on a server and, further, that she made a "good faith effort" to provide the text messages but was "hindered by technological difficulties."²⁴ The court rejected this argument and found that the district court was within its discretion to impose sanctions because Timms "was uncooperative in [her] initial discovery production and subsequently did not abide by [the] court's discovery order aimed at remedying [the] problem."²⁵ As the court noted, the district court found "the onus was on [Timms] to provide the messages in a consumable form independent of any difficulties she encountered."²⁶

In *Red Valve Inc. v. Titan Valve Inc.*, a case alleging misappropriation of trade secrets and breach of contract, the court found that, as a result of Titan's violation of multiple discovery orders, an order permitting a forensic examination of its data sources and devices was warranted.²⁷ For instance, Titan was ordered to produce documents "missed" during an expedited discovery review before a hearing, but instead produced documents several days after the hearing.²⁸ Titan also failed to produce responsive documents because of an "unreasonable" and narrow interpretation of the court's order²⁹ and, in some instances, inexplicably failed to produce certain responsive documents at all.

In concluding that forensic discovery of Titan's devices was a justified sanction, the court found "substantial evidence tending to show, both that Defendants used these devices to access, use, and transfer ... confidential and proprietary information ... [and further] that

Defendants failed to return responsive documents relating to core issues” as required by the court’s order.³⁰ Additionally, screenshots of text messages strongly suggested that certain “highly relevant” information had been manipulated and omitted before production.³¹

The court further found evidence that one of the defendants deleted “any text messages, chats ... calendar entries, call records, Apple Notes, Internet history, voicemails, and any other use data generated on the device from March 2017 through [his] termination” in March 2018, and that of 13 USB devices that had been connected to one of the defendant’s computers, only two had been located.³² The court determined that forensic examination was necessary and warranted under the circumstances.

Conclusion

As the cases above make clear, forensic examination of a cellphone is a drastic and intrusive measure that courts will not grant without substantial justification. Courts will order forensic examination, however, when the moving party has demonstrated that the nonmoving party has willfully defaulted on discovery obligations.

Endnotes

- 1 Fed. R. Civ. P. 34, Advisory Committee Notes to 2006 Amendments.
- 2 *Tingle v. Hebert*, No. 15-626-JWD-EWD, 2018 U.S. Dist. LEXIS 60301 at *18-20 (M.D. La. Apr. 10, 2018) (*collecting authorities*).
- 3 *Id.*; *Landau v. Lamas*, No. 3:15-CV-1327, 2017 U.S. Dist. LEXIS 206158 at *14-15 (M.D. Pa. Dec. 15, 2017) (*collecting authorities*).
- 4 *Tingle*, 2018 U.S. Dist. LEXIS 60301 at *24-25.
- 5 *Id.* at *2-3.
- 6 *Id.* at *21-22 (citing *Nola Spice Designs, LLC v. Haydel Enters.*, 2013 U.S. Dist. LEXIS 108872 (E.D. La. Aug. 2, 2013)).
- 7 *Id.* at *24-25.

8 *Valdes v. Greater Naples Fire Rescue District*, No. 2:17-cv-417-FtM-29CM, 2018 U.S. Dist. LEXIS 152744 (M.D. Fla. Sept. 7, 2018).

9 Valdes testified at deposition that he had lost his current cellphone only four days before the deposition.

10 *Id.* at *7.

11 *Id.* at *5.

12 *Id.* at *12.

13 *Id.* at *13 (citing *Middle District of Florida Discovery Handbook*, 26 VII(C) (2015)).

14 The court chided the defendant for failing to attach the text messages that Valdes had produced, stating that the court was “unable to ascertain the precise content of the communications and consider the full extent of Plaintiff’s production efforts regarding text messages and other communications.” *Id.* at *15.

15 *Id.*

16 *Landau v. Lamas*, No. 3:15-CV-1327, 2017 U.S. Dist. LEXIS 206158 (M.D. Pa. Dec. 15, 2017).

17 *Id.* at*8.

18 *Id.* at *23 (citations omitted). See also *Par Pharm. v. Quva Pharma*, 2019 U.S. Dist LEXIS 30828 (D.N.J. Feb. 27, 2019) (denying motion to compel forensic examination) (citing *The Sedona Principles, Third Edition (2018)*, Cmt. 5.g).

19 *Timms v. LZM, L.L.C.*, No. 15-20700, 657 Fed. App’x 228 (5th Cir. July 5, 2016).

20 *Id.* at 229, n. 1.

21 *Id.*

22 *Id.*

23 The court found Timms waived her argument as to costs and fees because she failed to object at the hearing or file a motion for reconsideration.

24 *Id.* at 230, n. 2, and 231.

25 *Id.* at 231.

26 *Id.* at 230, n. 2. *See also Mujica v. Basco*, No. CGC-14-542023, 2015 CA Sup. Ct. Motions LEXIS 24589 (Ca. Sup. Ct. Sept. 8, 2015) (granting motion to compel examination of cellphone by a neutral who would provide a confidential report summarizing their findings, including whether any of the information was privileged in order to balance plaintiffs' privacy rights against defendants' right to discovery).

27 *Red Valve, Inc. v. Titan Valve, Inc.*, No. 18 CVS 1064, 2019 NCBC LEXIS 5 (N.C. Sup. Ct. Jan. 11, 2019).

28 *Id.* at *8.

29 *Id.* at *10-*11.

30 *Id.* at *20-*21.

31 *Id.* at *22-*24.

32 *Id.*

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