

Practice Pointer: Leave Your Phone at Home on Deposition Day

August 26, 2014

Your deposition is scheduled to start in an hour. You're walking out your front door, about to drive to your company's lawyer's office. Your palms are beginning to sweat. You're worried you've forgotten your phone, your wallet, or your building passkey. Or worse yet, that you've forgotten how to best phrase your company's position, which your General Counsel went over with you for several hours in the conference room yesterday. Your company's General Counsel knows your mobile phone number - she asked for it specifically. Your company's outside counsel asked for it specifically. They might need to call you. You might need GPS directions from your phone. Your family might need you in an emergency. You pat your pockets and are relieved to find your phone, wallet, and passkey. You're ready to go, right? Maybe, or maybe not. In a growing number of recent depositions related to everything from commercial contract litigation to personal tort claims, we have seen counsel use the presence of a witness's mobile phone at a deposition to get information in discovery. We've spoken with other outside counsel, and with litigation support vendors who say they're seeing the same thing. Here's a fictionalized example of how it works: **Q:** Mr. Witness, do you have your mobile phone with you today?

A: Yes, but I left it in the car so it wouldn't interrupt us. **Q:** Thank you, that was thoughtful, but would you mind bringing it in after the next break?

A: Sure. *[Break]* **Q:** Does your mobile phone have your CEO's mobile phone number, birth date, personal email address and Twitter handle in it?

A: Uh, yes, actually, I think I do have most of those things. *Defense counsel:* Wait a minute, I object, that's improper, you can't ask him that. **Q:** Of course I can. He's a fact witness with personal knowledge. There's a confidentiality order in place. We asked for this in discovery, but your responses aren't due yet. You can object if you like when the time comes, but if the witness knows, I'm entitled to an answer. So, Mr. Witness, does your mobile phone have the ability to log in to your company's system and open documents that you are entitled to access?

A: Yes, I can do that. **Q:** Great, please take a look on your phone right now and tell us if you can find "Smoking Gun.doc"

A: Oh, look at that, here it is. Increasingly, our mobile phones and the tablets we carry with us everywhere can access our company's documents and records. Most of this kind of material was once obtained only through a formal discovery request, an investigation by counsel and client, and a formal document production. But now, a sophisticated opposing counsel can use the deposition of a technologically capable witness to try to create a shortcut around those formalities. They may even do it in a conscious effort to obtain material that a party might successfully resist producing if more traditional discovery approaches were undertaken. A deposition can be an awkward and messy forum in which to try to hash out which of your company's documents opposing counsel can see. So, if your mobile phone or tablet contain, or can access, your company's data, consider leaving it at home. Talk to your counsel about the possibility and make a reasoned decision about how to handle it. Maybe you can dust off that old plug-in GPS device if you need directions. Maybe you can borrow a spouse's phone so you can be reached in an emergency. Or maybe you'll decide that opposing counsel may just be wasting her deposition time by trying something like this. But be aware of this technique, and make a conscious decision about it.

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