

Smartphones Can Be an e-Discovery Gold Mine or Sinkhole

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The Florida Supreme Court recently considered the data storage capability of a smartphone in the context of a Fourth Amendment search and seizure case. The Court reported what we all intuitively know to be true: “Modern cell phones can contain as much memory as a personal computer and could conceivably contain the entirety of one’s personal photograph collection, home videos, music library, and reading library, as well as calendars, medical information, banking records, instant messaging, text messages, voicemail, call logs, and GPS history. Cell phones are also capable of accessing the Internet and ... may also contain web browsing history, emails from work and personal accounts, and applications for accessing Facebook and other social networking sites. Essentially, cell phones can make the entirety of one’s personal life available for perusing...” *Smallwood v. State*, 113 So.3d 724, 729 (Fla. 2013). The Court’s description of the vast amount and nature of electronic information that may be stored on a smartphone makes it clear they can be an e-discovery gold mine for parties seeking discovery in civil litigation. For the party charged with the duties to preserve, collect and produce such ESI, however, smartphones are a potential sinkhole. Courts are now routinely imposing sanctions on parties for failing to preserve cell phones and the extensive data they can store. For example, in *Christou v. Beatport, LLC*, 2013 WL 248058 (D. Colo. Jan. 23, 2013), the defendant failed to make a forensic image of his iPhone in response to a litigation hold letter delivered at the outset of litigation and then later lost the phone just before plaintiff served a specific request for production for his text messages. Even though no evidence existed that the defendant used text messaging services for relevant communications, and even though the Court found the defendant’s failure to preserve the iPhone ESI merely negligent conduct, the Court still imposed spoliation sanctions. The sanctions in *Christou* – not to mention the time and expense incurred responding to the sanction motion – could have been easily avoided by proper forensic imaging of the smartphone when the duty to preserve arose. Keep in mind that text messages, just like emails, are usually recoverable even though they are “deleted” from the user interface on the phone. Dozens of inexpensive apps now exist that restore deleted SMS messages from a smartphone. These apps work with traditional text messages transmitted through the cell phone carrier’s network as well as instant messaging services delivered through the Internet. Of course, using a vendor to recover and collect deleted text messages and all the other smartphone ESI described by the Florida Supreme Court in *Smallwood* will usually provide the litigant with a better forensic chain of custody should the

preservation and collection processes ever be questioned in court. The bottom line is that the smartphones used by the parties in litigation today store a lot of relevant ESI. Counsel and clients should continue to educate themselves about the importance of preserving smartphone ESI, the availability of forensic imaging and recovery tools, and the risks of failing to stay on solid ground during document preservation efforts. An e-discovery sinkhole can appear overnight and swallow the merits of your case if you are not careful. Meanwhile, we should aggressively pursue smartphone discovery from opposing parties. There's a lot of gold out there to mine. If you have any questions or need assistance with an e-discovery issue, please contact our firm.

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