New York Law Journal
Technology Today
WWW.NYLJ.COM
ALM.
VOLUME 267—NO. 108
TUESDAY, JUNE 7, 2022

FEDERAL E-DISCOVERY

Party Not Unreasonable in Limiting Text Search to Company Devices

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Recent headlines have highlighted the increased scrutiny by U.S. regulators on the use of personal devices for communications in the financial services industry. Such communications, which are often in the form of text or app-based messaging, can raise concerns with regulators when conducted contrary to company policy or in a manner that may skirt recordkeeping requirements.

SHUTTERSTOCK

In the civil litigation context, text and app-based messages may be considered as part of the allowable scope of discovery along with paper documents, email, and other electronically stored information (ESI). That permissible scope typically requires consideration of a number of factors, including proportionality, relevance, privilege, privacy, and possession, custody, and control.

In a recent decision from the U.S. District Court for the Southern District of New York, a magistrate judge addressed whether a party should be subject to spoliation sanctions for an alleged failure to preserve text messages—both on company devices and on personal devices. Providing some helpful guidance in this developing area of the law, the court found that the defendant did not act unreasonably in limiting its search for potentially relevant text messages to company-issued devices, especially in light of the demands of discovery and the existence of a corporate policy prohibiting the use of personal devices for business.

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'La Belle'

In *La Belle v. Barclays Capital*, 340 F.R.D. 74, 2022 WL 121065 (S.D.N.Y. Jan. 13, 2022), the plaintiff sued his former employer for unlawful retaliation. Plaintiff La Belle sought discovery sanctions against Barclays, alleging, inter alia, that the defendant had "engaged in spoliation by failing to preserve text messages to or from" two of his former supervisors. Id. at 77.

Analyzing the plaintiff's various claims of spoliation, the court observed that in seeking spoliations sanctions, the plaintiff must establish at the outset "that the party having control over the evidence had an obligation to preserve it at the time it was destroyed." Id. at 81 (citation omitted). This obligation attaches "when [a] party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation." Id. at 82 (citations omitted).

With respect to the text messages of the former supervisors, the court assumed, arguendo, that prior to the plaintiff's termination in August 2018, the former supervisors' cellphones contained some text messages concerning the plaintiff and relevant to his claims. See id. at 77, 83. In mid-July 2019, during discovery, plaintiff's counsel requested "[a]ll communications and documents" between the two supervisors relating to plaintiff. Id. at 83. Shortly thereafter, in September, the plaintiff "specifically informed Barclays by letter that this request included text messages, though La Belle did not mention that he was seeking a search of personal cellphones." Id. at 84.

The defendant addressed its discovery efforts relating to text messages by noting "that any texts to or from Barclays-issued devices would have been subject to Barclays' 10-year document retention protocol" and that it "collected 'all text message data preserved from the Barclays-issued devices for [both supervisors]' on November 26, 2019." Id. Barclays conceded that by "late 2019," it was aware of the plaintiff's interest in one particular supervisor's personal device. *See id.* Barclays "preserved and produced ESI on Barclays-issued devices but did not undertake those efforts as to any personal cellphones until 'late 2019' in light of Barclays' policy forbidding its employees from conducting business on their personal cellphones." Id. at 83.

> Based on the evidence on record before him, Judge Gorenstein weighed the demands of discovery in this matter against the defendant's ESI search efforts and corporate policy, and determined he could not find that Barclays acted unreasonably.

The court found that "[a]lthough La Belle insists there must be additional texts, it is his burden to show that preservation did not occur." Id. at 84. It observed that "[t]he only evidence La Belle has provided on this score is an email from [one supervisor to the other] asserting that a text was sent on a particular date, combined with the fact that this text was not produced." Id. With "no testimony" that the supervisor had received the text message, and with the supervisor's "sworn testimony that his Barclays-issued device was unreliable with texting," the court determined that the plaintiff's "evidence [was] simply insufficient for this Court to find that texts were not produced to plaintiff from the Barclays devices because they had been destroyed." Id.

Personal Devices

On the issue of the text messages allegedly located on the

supervisors' personal cellphones, the court stated that its "consideration of this issue must be evaluated against the backdrop of the specific Barclays policy that prohibited employees from discussing company business on such devices without company approval." Id. Analyzing the policy and the actions of the defendant, the court concluded:

> While it is a close question, we are not prepared to find that Barclays acted unreasonably in assuming that its employees complied with such a policy—notwithstanding LaBelle's claim that employees frequently violated the policy[.] … Certainly, it is a better practice for a company to make a searching inquiry of all relevant employees to determine whether they violated a company policy regarding use of devices. But in light of the enormous demands that discovery places on any party, we do not find that Barclays acted unreasonably in assuming the policy was followed and limiting its document search to company-issued devices until the issue was brought to its attention. La Belle was obviously aware of the company policy and it would have been simple enough for his attorney to have specified in his July document request or his September letter to defense counsel that personal devices should be included in Barclays' search.

Id.

The court ruled that the defendant's "duty to search for messages on [the two supervisors'] personal cellphones did not arise until there was some indication that evidence relevant to plaintiff's claims was contained on the personal devices of those employees." Id. As it was "La Belle's burden to prove all elements of spoliation, including that evidence was destroyed with some degree of culpability[,]" id. at 85, and he failed to do so, the court denied the sanctions motion.

The court ruled that the defendant's "duty to search for messages on [the two supervisors'] personal cellphones did not arise until there was some indication that evidence relevant to plaintiff's claims was contained on the personal devices of those employees."

Conclusion

In his analysis, Magistrate Judge Gabriel Gorenstein focused on a concept that has evolved as a key part of assessing the permissible scope of discovery and, relatedly, the sufficiency of discovery and preservation efforts—reasonableness. Based on the evidence on record before him, Judge Gorenstein weighed the demands of discovery in this matter against the defendant's ESI search efforts and corporate policy, and determined he could not find that Barclays acted unreasonably. Whether the result would have been different if the plaintiff had offered some additional evidence or had specifically requested personal devices earlier in the discovery remains an open question.

In addition to taking note of Judge Gorenstein's reasoned analysis on this "close question," parties should be aware that while the existence of policies setting forth acceptable and expected uses of technology may be instructive to courts—and regulators, too—it is not dispositive. Indeed, the existence of such policies along with evidence of ongoing violations, as we are seeing in the regulatory context, may be especially impactful.