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CELLPHONE DISCOVERY: LOOKING BEYOND PHONE RECORDS.

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In a case that our firm handled earlier this year, with which I was involved, a truck driver was driving a gasoline tanker down the interstate. As he drove, he came across the scene of a crash being investigated by highway patrol. There were cruisers blockading the lane with their emergency lights on and an officer directing traffic by hand. Despite this, the driver, without even attempting to brake, plowed through multiple patrol cars and other emergency vehicles, killing one of the police officers investigating the scene. During the investigation, the police forensically examined the truck driver's cellular phone and determined that the driver had been looking at pictures on Facebook at the time of the crash.

In another case that I handled this year, a sixteen year old girl was driving down SR 53 outside Tiffin, Ohio. As she approached CR 592, a tractor-trailer turned left in front of her. With mere seconds to react, she was unable to avoid sliding under the trailer and died. Because she was a teenage girl, defense counsel assumed she must have been distracted by her phone, despite the fact that her cell phone records indicated she was not on the phone at the time of the crash. More importantly, defense counsel figured a jury would assume the same thing. A forensic examination of her phone provided over 1600 pages of data that proved that the girl was not talking on the phone, was not text messaging with anyone, was not chatting with anyone over the internet and was not browsing the Web.

Both cases demonstrate how merely requesting cell phone records is no longer sufficient discovery. These days the average cell phone is a hand held computer, and we use them for far more than making phone calls and sending text messages. Phones are cameras, photo albums, music players and video recorders. People use them to talk with family over skype, watch movies, shop online and make dinner reservations. Cell phones can do all of those things and so much more; however, they also maintain a record of virtually everything a person does on one. A driver's cell phone can produce a wealth of information.

A cell phone keeps records of more data than most people realize: Calendars, contacts, call logs, text logs (including content), email, and chat logs from applications on the phone, such as Facebook. The phone maintains records of the photographs, music and other data saved on it. It can keep a record of what wireless networks it has connected to, what webpages have been visited on it and what files were downloaded as a result of visiting those pages. A phone can also track where it has been based on GPS and cell tower access.

This data can be examined using hardware and software that extracts the data from a cell phone and can provide information such as when a certain file was created, when a certain chat message was sent, or when a certain file was last accessed. Even more, it can identify files, text messages, or other data that have been deleted (and sometimes when they were deleted). While the phone records for a truck driver's cell phone might show no phone calls or text messages at the time of the crash, examining the phone itself might well reveal that he was sending a message to someone over Facebook, watching a video clip from an email, or talking to someone over skype.

Accordingly, it is vital to examine a driver's cell phone in any case where distraction may be an issue. This includes your client's cell phone in some circumstances (as seen above). It is also important to remember that many truckers will have multiple cell phones that may need to be examined, such as a

work phone and a personal phone. The first step in conducting discovery of these phones is to include them in your preservation letter to both the motor carrier and the driver.

In more serious crashes, where criminal charges against a driver are likely, the police may well take the phone as evidence and have it forensically examined (in Ohio, this is frequently handled by the OSHP's Office of Investigative Services.) Do not rely on the police examination; they may not have the most up to date equipment and software. An expert can likely obtain more information than the police were able to.

Sometimes a driver's cell phone is damaged or destroyed. That should end your investigation. A phone can sustain a surprising amount of damage and still retain retrievable data, even if it has been burned in a fire or soaked with water. Ensure the phone is preserved, regardless of its condition. Your expert may very well be able to recover useable data from the phone.

Finally, the latest versions of the operating systems for both Apple devices and Android devices have implemented enhanced encryption of the data on their devices. This potentially limits the degree of access the police and your expert might have to the data on newer phones if they've been passcode protected. Therefore, discovery should also seek the current passcode for any phones requested.

Modern cell phones do so much more than just make phone calls and send text messages. Discovery must, therefore, delve deeper than just requesting phone records.

In investigating a driver's cell phone, remember:

- Preservation letters and discovery requests should include both work and personal phones. They should also include any removable data storage that was in the phone at the time of the crash, such as SD cards.
- A damaged or destroyed phone may still retain recoverable data.
- Do not rely on the police. They may not have the most up to date methods. Send the phone to an expert.
- Remember to ask for any current passcodes as part of discovery.

Please do not hesitate to contact me with questions.