

Oscar-Worthy Roles for Mobile Phones in Civil and Criminal Cases

Kevin F. Brady

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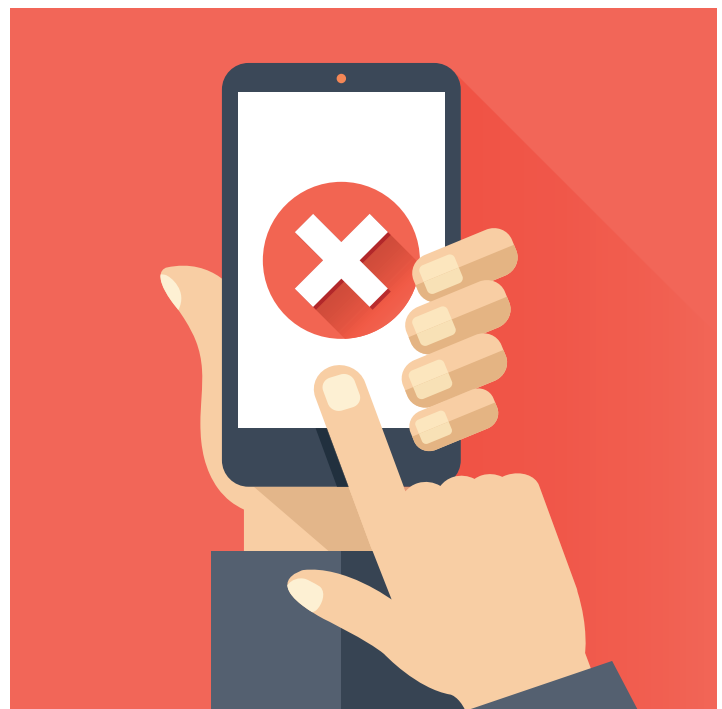
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In an interesting trend, the content (or lack thereof) on mobile phones — in the form of text messages, Snapchat video, and emoji — has influenced the outcomes in several cases.

So far in 2019, decisions in the following cases have turned on the availability of data on mobile devices: In *Paisley Park Enter., Inc. v. Boxill*, No. 17-cv-1212, (D. Minn. Mar. 5, 2019), a lawsuit over Prince’s music, the court granted monetary sanctions when defendants failed to disengage the auto-delete function on their phones, then wiped and destroyed the phones, and had no back-up data for those phones. In *NuVasive, Inc. v. Kormanis*, No. 1:18CV282 (M.D.N.C. Mar. 13, 2019), the defendant failed to turn off the 30-day auto-delete function on his iPhone, leading to the loss of text messages after the defendant was advised of his duty to preserve them. And in *DriveTime Car Sales Company, LLC v. Pettigrew*, No.: 2:17-cv-371 (S.D. Ohio Apr. 18, 2019), the court sanctioned the defendant under Fed. R. Civ. P. 37(e) for failing to take reasonable steps to preserve text messages when he switched to a different phone.

However, the summer blockbuster for the role of a mobile phone in a criminal case goes to the Kevin Spacey in *Commonwealth of Massachusetts v. Kevin S. Fowler (aka Kevin Spacey)* (Nantucket Dist. Ct. No. 1888CR000598). In a dramatic Hollywood-style conclusion, the criminal case against Kevin Spacey ended when the person who had accused Spacey of sexually assaulting him in 2016 at the Club Car Restaurant and Bar in Nantucket, Massachusetts, invoked his Fifth Amendment right not to incriminate himself.

According to news reports, Spacey got the alleged victim (who was 18 years old at the time) intoxicated and groped him for several minutes at the bar. During a pre-trial evidentiary hearing, the alleged victim was asked about the cell phone that he was using on the night that he said he was assaulted by Spacey. According to news reports, the alleged victim was said to have been texting his girlfriend while the alleged incident was going on and apparently even sent a short Snapchat video to her. However, the victim’s mother testified that before her son’s phone was turned over to police for a forensic examination, she



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looked through her son’s phone after he told her he had shot a video of Spacey’s actions, and she deleted some items from the phone that her son posted about a year after the alleged assault. She also testified that she did not find the video and she did not delete text messages about the alleged assault or anything else from that night. The alleged victim’s phone was turned over to police for a forensic examination and two Massachusetts state troopers testified that they returned the phone to the alleged victim’s father. However, the father testified that he did not remember getting his son’s phone back from the police. The phone was never located.

During the evidentiary hearing, when Spacey’s attorney informed the alleged victim that tampering with evidence was a felony, the alleged victim decided to invoke his Fifth Amendment right. Spacey’s attorney argued that the missing phone contained exculpatory evidence and asked the judge to dismiss the case. Subsequently, Cape and Islands District Attorney

Michael O'Keefe filed a *Nolle Prosequi*, abandoning the case "due to the unavailability of the complaining witness."

Properly accessing digital evidence on a mobile device can make or break a civil or criminal case. If the proper steps for extracting evidence are not followed, the result may be that the information from the phone is inadmissible in court.

If a mobile device is the subject of a criminal investigation or civil discovery, there are a few simple steps to follow to preserve information on the phone. First, lawyers should not attempt to extract evidence by themselves. Leave the investigation of the contents and the extractions of any evidence to the forensic expert. If you take possession of the phone, and the phone is off, leave it off. If the phone is on, leave it on and place it in a storage container with the charger (that will be needed later when the expert goes to examine the phone) and turn the device and the charger over to a forensic expert. Counsel should not conduct their own investigation into any of contents on the phone. Why not? One reason is that if

you don't know the password, incorrect password attempts may lock the phone permanently or wipe the contents. Also, phones with different operating systems may require different techniques to capture the information. Further, in going through the contents on the phone, you are leaving your digital fingerprints in the data and possibly altering the contents.

Finally, in terms of the Kevin Spacey case, it is important to note that this was a criminal trial and not a civil action. If this had been a civil case and Fed. R. Civ. P.

37(e) applied, at the very least, there would have been a discussion about whether the evidence on the missing/lost phone could be "restored or replaced through additional discovery," or from another source, for example, the girlfriend's phone. ⚖️

Kevin F. Brady is Of Counsel at Redgrave LLP in Washington D.C. and can be reached at kbrady@redgravellp.com.

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