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FEDERAL E-DISCOVERY

Court Rejects Forensic Examination of Nonparty Cellphone

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Forensic examinations of computers and cellphones, by their very nature, represent one of the most invasive tools in discovery. While the complete imaging of a device may, at times, be warranted to find unique or deleted electronically stored information (ESI), such measures are not to be undertaken lightly. When discovery requests implicate personal devices—particularly those belonging to nonparties—courts may be tasked with navigating the delicate intersection of proportionality, privacy and procedural fairness. Judicial decisions over the past several years have underscored the necessity for a well-grounded justification and a clear demonstration of need before permitting such intrusive inspections.

A recent decision from the U.S. District Court for the Southern District of New York, *Liederbach*



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v. NYU Langone Hospitals, 2025 WL 1952440 (S.D.N.Y. July 16, 2025), reinforces this careful approach. The opinion not only illustrates the judiciary's protection of the interests of nonparties, but also affirms that mere conjecture or dissatisfaction with discovery cannot, standing alone, justify an order for forensic examination.

'Liederbach'

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medical leave. Among the issues before the district court here was the plaintiff's motion to compel the forensic examination of a nonparty witness's personal cellphone.

In response to the plaintiff's discovery requests, a nonparty employee of the defendant hospital searched her own cellphone for relevant text messages and provided screenshots of relevant communications to the defendants' counsel. Notably, she "did not turn over any text messages predating December 2023, however, because prior to the initiation of this suit, she obtained a new cellphone and older text messages were not transferred to the new device ... Her prior cellphone also did not save messages to iCloud, as this feature was

of their intrusive nature ... Forensic examination can be appropriate, however, where 'there is reason to believe that a litigant has tampered with the device or hidden relevant materials' or 'improper conduct on the part of the responding party.'"

In support of the motion to compel a forensic examination of the nonparty's cellphone, the plaintiff advanced two justifications: first, that the manual search by the nonparty was inadequate, as "self-collection by ESI custodians is strongly disfavored," and second, that the loss of older text messages constituted potential spoliation, particularly since she "changed phones after Plaintiff sent a pre-litigation preservation request in May 2022."

The court disagreed and emphasized that the witness—as a nonparty—was not subject to the same preservation and production obligations as named parties in litigation. It found the idea that the nonparty witness "should have hired an ESI vendor to search her phone for a limited set of text messages pertaining to the plaintiff is not reasonable or proportionate. Nor, in the circumstances of this case, would it have been reasonable to expect her to turn over her personal phone, containing all manner of personal and private information, to her employer to conduct an invasive and intrusive search."

Concerning allegations of spoliation, the court stated the plaintiff did not demonstrate that the defendant hospital had engaged in such conduct, nor was there evidence that the actions of the nonparty witness could properly be attributed to the defendant. Instead, the plaintiff had only argued that the nonparty witness, "by changing phones, engaged in spoliation." The court found it "doubtful that

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disabled in her settings." The plaintiff moved to compel a forensic examination of this phone, "hypothesizing that a forensic examination of the phone and any linked data sources might uncover backup messages or synced data."

The Court's Analysis

The court began its analysis by examining the appropriateness of forensic examinations in discovery. It stated that "forensic examinations of computers and cellphones are generally considered a drastic discovery measure because

these actions can properly be imputed to the defendant ... More fundamentally, this record does not support a finding of spoliation.” The preservation notice previously issued did not identify the nonparty witness as a custodian, so there was no requirement to preserve her device. Additionally, this individual was “not one of the employees whose actions were at issue in this lawsuit.” Based on these findings, the court concluded that sufficient cause to order a forensic examination had not been established and denied the motion to compel.

Forensic Examinations, Reasonableness and Proportionality

A standard forensic examination involves an individual relinquishing control of their device while a forensic image is created. This process results in the exposure of all ESI on the device—relevant and nonrelevant, personal and business-related. Although targeted data retrieval is sometimes possible, a substantial amount of private data may still become accessible through the examination.

In *Liederbach*, the court recognized the intrusive nature of such investigations and highlighted the necessity for applying standards of reasonableness and proportionality, particularly when the subject is a nonparty. The ruling indicates that courts generally will require a strong justification before authorizing forensic examination of nonparty personal devices,

especially in the absence of concrete evidence. In this case, speculative assertions were deemed insufficient to support the request.

The decision is consistent with Federal Rule of Civil Procedure 26(b)(1), which instructs courts to balance the likely benefits of discovery against associated burdens and costs. It underscores the principle that discovery procedures should remain reasonable and proportionate, particularly regarding nonparties.

Practitioners may view this decision as providing guidance for seeking ESI from personal devices, most notably that courts typically will require clear justifications for intrusive searches, along with a demonstration of reasonableness and proportionality. And with respect to nonparty witnesses, requesting parties should be ready to articulate precisely why less intrusive discovery methods are insufficient and why the information cannot be obtained from alternative sources.

Finally, nonparties may see in the *Liederbach* decision some of the potential risks associated with using personal devices for business purposes, especially if relevant data are available only on the device. The ruling, however, offers reassurance that courts can be expected to exercise caution before ordering imaging of personal devices, undertaking careful consideration and balancing interests in each case.