



MARCH 5, 2015

Litigation in the Era of Blurred Lines Between Work and Personal Data and Devices

Kelly A. Woodruff, Partner – FBM

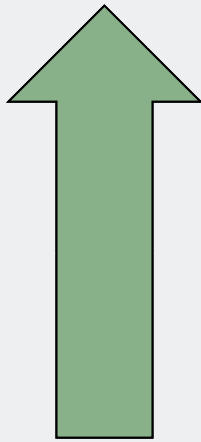
Racheal Turner, Partner – FBM

Chrysty Esperanza, Counsel – Square, Inc.

The Mobile Boom

In 2014:

69%



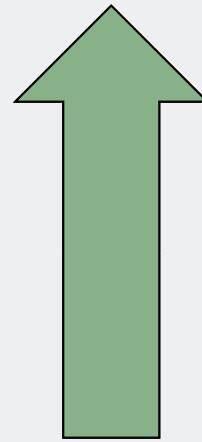
Global mobile
data traffic

7.4 Billion



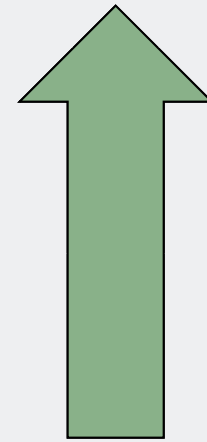
Mobile devices
& connections

45%



Average
smartphone
usage

1.6 fold



Number of
tablets

Source: Cisco Visual Networking Index: Global Mobile Data Traffic Forecast Update, 2014-2019 (Feb. 3, 2015)

The Mobile Boom

In 2014:

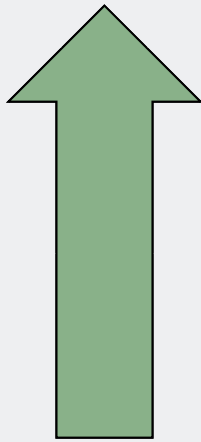
Mobile Devices > World's Population



The Mobile Boom

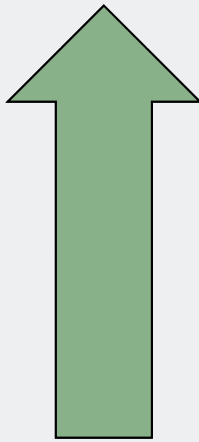
By 2019:

11.5 Billion



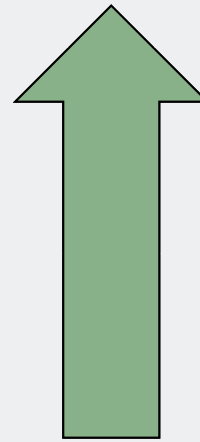
Mobile-connected
devices

1.5



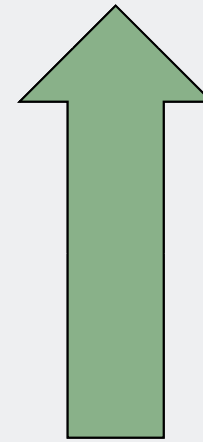
Devices
per capita

>50%



“Smart”
devices

10 fold



Global mobile
data traffic

Source: Cisco Visual Networking Index: Global Mobile Data Traffic Forecast Update,
2014-2019 (Feb. 3, 2015)

Our Mobile Addiction

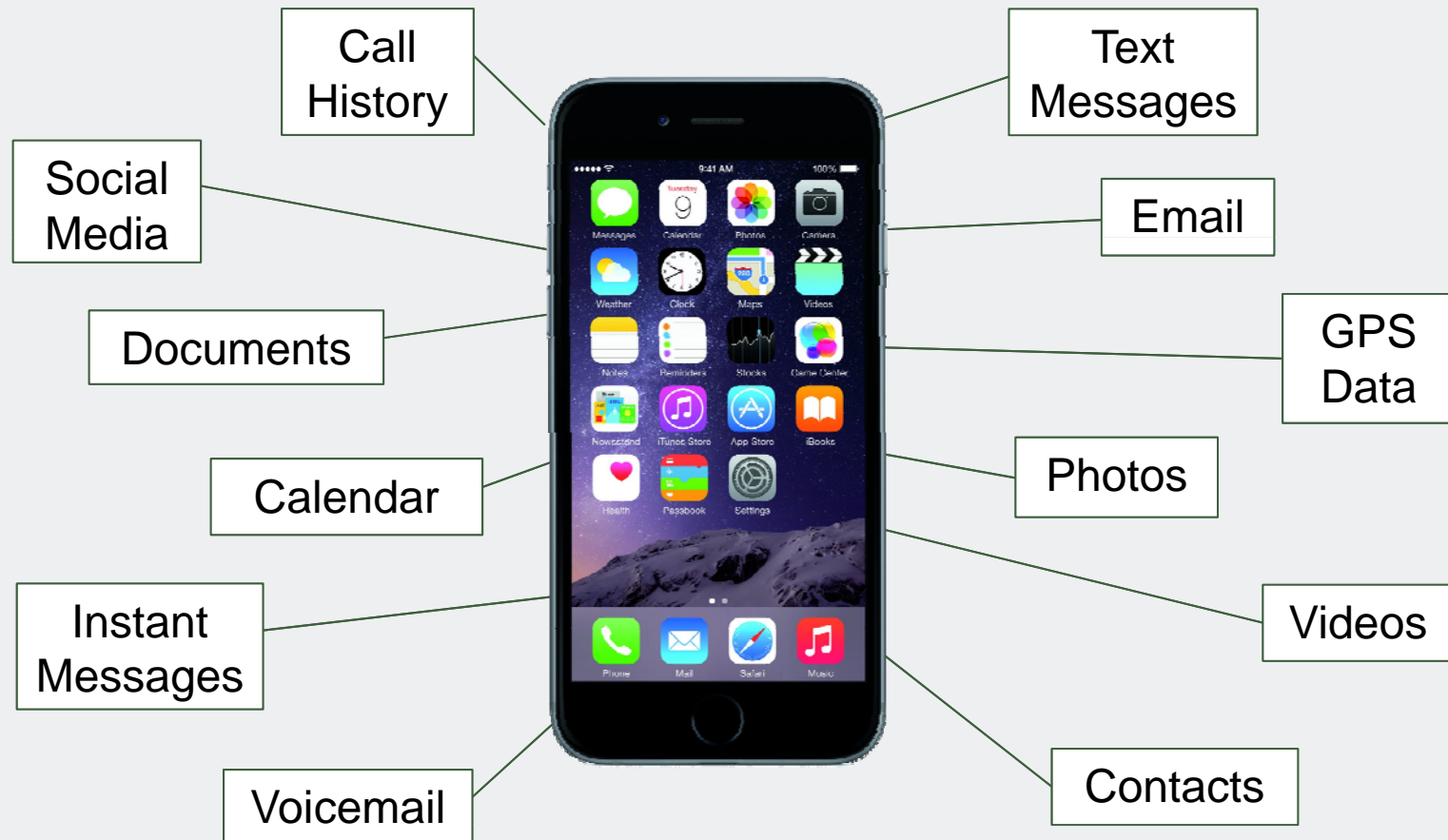


Cell phones “are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy.”

Riley v. California, 134 S. Ct. 2473, 2484 (2014) (Roberts, CJ).



Litigation Issues for Mobile Data



Duty to Preserve ESI

- A general duty to preserve evidence relevant to the litigation arises from the moment that litigation is reasonably anticipated.

Apple v. Samsung, 881 F.Supp. 2d 1132, 1136 (N.D. Cal. 2012).

Spoliation

- To determine whether to award spoliation sanctions, the court considers whether the moving party has established:
 - that the party having control over the evidence had an obligation to preserve it at the time it was destroyed;
 - that the records were destroyed with a culpable state of mind; and
 - that the evidence was ‘relevant’ to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.

Apple, 881 F.Supp. 2d at 1138; *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 220 (S.D.N.Y. 2003).

Litigation Issues for Mobile Data

- Consider . . .
 - With a BYOD policy, you're allowing corporate data to be stored on a device you neither own nor control;
 - In litigation, you may need to retrieve that data;
 - Some of which may only be available on the personal device;
 - And much of which will likely be mixed with employees' personal data.

Application to Mobile ESI

- “The litigation hold and the requirement to produce relevant text messages, without question, applies to that space on employees cell phones dedicated to the business which is relevant to this litigation.”
 - *In re Pradaxa*, 2013 WL 6486921 (S.D. Ill. Dec. 9, 2013)

Case Law

- *Broadspring, Inc. v. Congoo, LLC*, 2014 WL 4100615 (S.D.N.Y. Aug. 20, 2014)
- *Calderon v. Corporacion Puertorrique A De Salud*, 992 F.Supp.2d 48 (D. Puerto Rico 2014)
- *Alter v. Rocky Point School Dist.*, 2014 WL 4966119 (E.D.N.Y. Sept. 30, 2014)

Case Law

- *Passlogix, Inc. v. 2FA Tech., LLC*, 708 F.Supp.2d 378, 415-18 (S.D.N.Y. 2010)
 - *Failure to preserve relevant text messages and Skype instant messages from employees' personal device = spoliation*
- *Gilley v. Eli Lilly & Co.*, 2013 WL 1701066 (E.D. Tenn. Apr. 2, 2013)
 - *Failure to preserve digital files of photos taken on personal phone = spoliation*
- *Christou v. Beatport, LLC*, 2013 WL 248058 (D. Colo. Jan. 23, 2013)
 - *Failure to preserve text messages from personal phone = spoliation*

Collecting Mobile Data in Litigation

- Consider:
 1. How do you physically collect data that may be located only on a mobile device?
 2. How do you parse through corporate versus personal data on a mobile device?

Retrieving Data From Employees' Devices

Mary, want me to pick up dinner on the way home?



John, Dr. Martin agreed to use Drug A for off-label purposes! 😊

BYOD, Enterprise, or Hybrid?

- Cost
- Security
- Efficiency / Productivity
- Employee preference
- Collection of data

BYOD Policies Should Address

- Acceptable devices
- Acceptable use
- Payment for device and other charges
- Ownership of device, software, and data
- Required security
- Non-exempt (hourly) employees
- Privacy Issues
- Other disclaimers

Retrieving Data From Employees' Devices

- “The term ‘cell phone’ is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone. They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers.”
 - *Riley v. California*, 134 S. Ct. 2473, 2489 (2014)

Critical Components of a BYOD Program

1. Technology for managing devices connected to the network;
2. Policy outlining responsibilities of employer and users;
3. Agreement that users must sign stating they have read and understood the policy and will abide by it; and
4. Clear and consistent training and auditing.

Commingling Personal and Business Use

Mary, want me to pick up dinner on the way home?



John, Dr. Martin agreed to use Drug A for off-label purposes! 😊

No Reasonable Expectation of Privacy

- *Holmes v. Petrovich Dev't Co.*, 191 Cal.App.4th 1047, 1068 (2011):
 - “This is akin to consulting her attorney in one of defendants’ conference rooms, in a loud voice, with the door open, yet unreasonably expecting that the conversation overheard by Petrovich would be privileged.”

No Reasonable Expectation of Privacy

- *TBG Insurance Servs. Corp. v. Superior Court*, 96 Cal.App.4th 443, 453 (2002):
 - “He had the opportunity to consent to TBG’s policy or not, and had the opportunity to limit his use of his home computer to purely business matters. . . . By any reasonable standard, Zieminski fully and voluntarily relinquished his privacy rights in the information he stored on his home computer, and he will not now be heard to say that he nevertheless had a *reasonable* expectation of privacy.”

No Reasonable Expectation of Privacy

- *American Int'l Group v. Superior Court*, 2014 WL 7463887 (Cal. Ct. App. Dec. 23, 2014), *reh'g granted* (Jan. 16, 2015)
 - Employer's use and monitoring policy acknowledged and allowed occasional personal use of company-owned devices
- *TBG Ins.*, 96 Cal.App.4th at 450 n.5:
 - “When an employer requires consent to computer monitoring, the employee may have his cake and eat it too—he can avoid any invasion of his privacy by using his computer for business purposes only, and not for anything personal.”

No Reasonable Expectation of Privacy

- *City of Ontario, Cal. v. Quon*, 560 U.S. 746 (2010)
 - “[E]mployer policies concerning communications will of course shape the reasonable expectations of their employees, especially to the extent that such policies are clearly communicated.”
- *Hilderman v. Enea Teksci, Inc.*, 551 F.Supp.2d 1183 (S.D. Cal. 2008)
 - Takeaway: A limited search of company property for legitimate business reasons is reasonable, and thus not an invasion of privacy under California law.

Reasonable Expectation of Privacy

- *Doe v. CCSF*, 835 F.Supp.2d 762 (N.D. Cal. 2011)
- *Mintz v. Mark Bartelstein & Assocs. Inc.*, 906 F.Supp.2d 1017 (C.D. Cal. 2012)
- *Brautigam v. East Whittier School District* (LA Superior, filed June 2014)

Privacy Interests May be Lost

- *Sunbelt Rentals v. Victor*, -- F.Supp.2d --, 2014 WL 4274313 (N.D. Cal. Aug. 28, 2014)
 - “[Victor] failed to comport himself in a manner consistent with an objectively reasonable expectation of privacy. By his own admission, Victor personally caused the transmission of his text messages to the **Sunbelt** iPhone by syncing his new devices to his Apple account without first unlinking his Sunbelt iPhone.”

Other States' Privacy Protections Differ

- *Aventa Learning, Inc. v. K12, Inc.*, 830 F.Supp.2d 1083, 1110 (W.D. Wash. 2011)
 - “[T]he court can find no reason to distinguish between emails that were sent from or received on the company’s email system and emails that were accessed through the company’s laptop on [the employees’] web-based email accounts.”

How Do We Control Our Mobile Addiction?



"It keeps me from looking at my phone every two seconds."

FBM Contact Information



Kelly Woodruff
415-954-4403
kwoodruff@fbm.com
www.fbm.com



Racheal Turner
415-954-4988
rtturner@fbm.com
www.fbm.com