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The Lynyrd Skynyrd Texting Case: Spoliation and Non-Party Texts

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It was a tragedy. The 1977 plane crash that killed Ronnie Van Zant and Steven Gaines almost ended the band Lynyrd Skynyrd forever. In the wake of the crash, the survivors swore an oath never again to perform as "Lynyrd Skynyrd." That oath made its way to court where it would be memorialized in a 1988 Consent Order outlining how and when surviving members could use the name "Lynyrd Skynyrd." In 2016, Cleopatra Records and its affiliate film studio Cleopatra Films (together "Cleopatra") hired a writer, Jared Cohn, to write and direct a screenplay about the plane crash. The studio secured the cooperation of one of the band's few surviving members, Artimus Pyle. Other heirs to the Lynyrd Skynyrd name, including members of the Van Zant family and original band member Gary Rossington, did not approve and threatened Cleopatra with legal action based on Mr. Pyle's involvement. Cleopatra and the Van Zants traded barbs, while Cleopatra distanced itself from Pyle to try and get around the 1988 Consent Order. The two sides could not resolve their disagreement and in May 2017, the Van Zants and others sued to block distribution of the film.

Behind this headline drama, a creeping legal problem was unfolding: allegations of lost documentary evidence. Artimus Pyle helped Cleopatra and Cohn with the film script. But Pyle did not have a computer, so he conducted all his business on his phone, through calls and texts. He and Cohn traded texts discussing the film, but the court would never see these texts. Plaintiffs did not name Mr. Cohn as a defendant; rather they issued him a subpoena. And sometime between the filing of the case, his subpoena, and his deposition, Mr. Cohn got a new phone. He saved and transferred his photos to his new phone, but not his texts.

The plaintiffs argued they were entitled to an adverse inference because Cohn had deliberately destroyed his text messages after getting a subpoena. These texts could have been central to their case, and plaintiffs had tried but failed to get the texts from Pyle. Defendants argued, among other things, that they could not be sanctioned for Cohn's conduct because they had no control over Cohn's texts. And they argued that even if they had control, plaintiffs suffered no prejudice from Cohn's conduct because plaintiffs could have gotten the texts from Pyle. The entire case went from filing to decision in just over three months, so the court found that plaintiffs had done enough to support their prejudice argument by just trying to get Pyle's texts. The court awarded an adverse inference against Cleopatra, saying it was "common sense" Cohn's texts were in Cleopatra's control.

This holding could have significant ramifications for how courts across the country will examine text message spoliation. Texts present uniquely complex legal concerns. Now that texting is more mainstream, companies will no doubt discover their employees texting for work. When confronted with litigation, many managers may wonder: is a company required to produce texts on its employees' personal phones, and when must the company preserve texts held by third-parties?

The current standard for document preservation come from another S.D.N.Y. case. Under the oft-cited *Zubulake* standard, the duty to preserve extends to "any documents or tangible things . . . likely to have discoverable information that the disclosing party may use to support its claims or defenses." 220 F.R.D. 212, 217 (S.D.N.Y. 2007). Parties have a duty to preserve all *Zubulake* information over which they have "control." And courts can take a broad reading of control. Control can include documents or information when "the party has the practical ability to obtain the documents from another, irrespective of his legal entitlements." *In re NASDAQ Mkt. Makers Antitrust Litig.*

The *Van Zant* court took a broad view of "control," finding that Cleopatra had "control" over Cohn's texts, even though he was not a Cleopatra employee, was not using a work phone, and was not a named party to the case. The court offered a list of reasons: (i) Cohn contracted with Cleopatra, (ii) he worked closely with Cleopatra, (iii) he "participated by providing documents and took a deposition," and (iv) he had a financial interest in the film at the center of the case. *Van Zant*, 270 F. Supp. 3d at 669-70. But these reasons suggest the court was motivated by something else. Cohn bought a new phone immediately after plaintiffs filed their case. He salvaged his photos but not his texts. And the court considered this behavior sufficient to warrant sanctions.

Cleopatra also knew that Pyle did all his business over the phone, but did not take action to ensure Cohn kept his business texts. Few cases go from filing to decision in three months, and most non-parties are not as involved with a case as Cohn. Add to this Cohn's suspect behavior, and the court's decision may be more limited than it first appears.

However, disputes about control of texts and preservation duties are now critical evidentiary issues. Content, not location, determines whether a text should be preserved. Whether employees use company phones or personal devices, companies should consider what they can do to preserve texts that might be relevant to pending or potential litigation. The *Van Zant* decision shows that courts in the Second Circuit will employ an expansive reading of control. Under this view, parties will sometimes have legal control over a non-party's texts and a duty to preserve them. With the increasing use of texts, parties and their counsel should include evaluation of texts and possible preservation obligations as part of their standard operating procedure for initial case assessment and response.

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