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'Quon' could have consequences for e-discovery

A broad Court ruling could collide with principles of preservation and production of outlier ESI.

BY FARRAH PEPPER AND JEFFREY D. COREN

While stories of "sexting" and cheating husbands are common fare in tabloid magazines, such salacious facts are a relative rarity in U.S. Supreme Court cases. It is equally unusual for the Supreme Court to issue opinions with the potential to touch upon aspects of electronic discovery. A perfect storm is brewing in the form of *City of Ontario v. Quon*, No. 08-1332, in which the Supreme Court will address a government employee's expectation of privacy in text messages sent from his employer-issued device—including spicy text messages sent to his wife and alleged mistress. Although *Quon* involves a public employer, the Court's ruling potentially could have far-reaching implications for workplace best practices in the private sector as well. In addition, *Quon* has the potential to extend its reach to other forms of electronic communication beyond text messages, including other types of "outlier" electronically stored information (ESI).

Text messages are just one form of outlier ESI, data that parties are more likely to overlook during the discovery process given that it may exist "out of sight" and/or "out of mind." Common sources of outlier ESI include cellphones and personal digital assistants, voice mail systems, instant messaging systems, chat rooms and Web sites. Few court decisions have addressed the preservation and production requirements of outlier ESI in litigation. Under certain circumstances, however, failure to preserve and produce outlier ESI has been held to constitute spoliation and resulted in sanctions such as an adverse inference.

Although *Quon* itself addresses the privacy of a public employee's text messages sent and received via pager, a broad ruling in *Quon* could very well collide with principles of e-discovery preservation and production of outlier ESI for private employers, as well.

BACKGROUND IN *QUON*

The Court will consider the U.S. Court of Appeals for the 9th Circuit's ruling in *Quon v. Arch Wireless Operating Co. Inc.*, 529 F.3d 892 (9th Cir. 2008), petition for rehearing en banc denied, 554 F.3d 769 (9th Cir. 2009), cert. granted, 130 S. Ct. 1011 (2009). The case involves Sergeant Jeff Quon, a member of the city of Ontario, Calif.'s SWAT team, who used his city-issued text-messaging pager for personal communications. There was no official city policy governing use of the pagers, but the city's general "Computer Usage, Internet and E-mail Policy" specified that e-mail and Internet usage would be monitored and that users should have no expectation of privacy. Quon signed this policy and also was later informed by his supervisors that text messages would be considered e-mail and audited under the policy.

The formal policy, however, was accompanied by an informal policy and practice that directly contradicted it. The informal policy and practice were that the supervisor would not audit the text messages of any employee who exceeded the city's 25,000-character monthly limit, as long as the employee paid the overage fees. Quon exceeded the usage limit a few times, and paid for the overages, before a supervisor (tired of being a "bill collector") requested transcripts of his text messages from Arch Wireless to determine whether the overages were work-related or personal. The city received the transcripts, without Quon's consent, and discovered that Quon's messages were often personal and sexually explicit communications sent to his wife and alleged mistress.

Quon sued the city of Ontario and Arch Wireless, which provided the text-messaging service, alleging violations of the Stored Communications Act (SCA), the Fourth Amendment and Article I, Section 1 of the California Constitution, which provides a right to privacy. The district court held that Quon had a reasonable expectation of privacy in his text messages, although the city's search was reasonable, and also held that Arch Wireless had not violated the SCA. *Quon v. Arch Wireless Operating Co. Inc.*, 445 F. Supp. 2d 1116 (C.D. Calif. 2006). On appeal, the 9th Circuit reversed and held that Arch Wireless had violated the SCA by releasing the transcripts to the city. The court also held that users of text messages have a reasonable expectation of privacy in the content of their text messages vis-à-vis service providers, analogizing text messages to letters and e-mails.

The court held that the "operational realities" of the Ontario Police Department—whereby employees had reason to believe that their text messages would not be audit-

ed as long as they paid any overage fees—created a reasonable expectation of privacy for Quon, despite his assent to a contrary policy. *Quon*, 529 F.3d at 907 (citing *O'Connor v. Ortega*, 480 U.S. 709, 717 (1987)). The 9th Circuit did not hold the search to be reasonable under the Fourth Amendment or the California Constitution.

In December 2009, the U.S. Supreme Court granted certiorari on the city of Ontario's appeal of the 9th Circuit's Fourth Amendment holding—but declined to review Arch Wireless' appeal of the SCA holding.

The Supreme Court will review three questions:

- Whether Quon had a reasonable expectation of privacy for the text messages in light of the divergent official and informal policies.
- Whether the 9th Circuit erred in considering whether the police department could have used "less intrusive [audit] methods," in contravention of existing Fourth Amendment precedent.
- Whether the senders of messages to Quon's pager had a reasonable expectation of privacy (regardless of what they knew about the police department's policies).

POTENTIAL IMPACT OF *QUON*

The Supreme Court has never before addressed an individual's reasonable expectation of privacy in his or her electronic communications such as e-mails or text messages, either generally or within the employer/employee context. *Quon* could conceivably become a landmark case by setting precedent regarding an individual's right to privacy in his or her text messages, a ruling with potentially overlapping impact in the spheres of employment law, privacy law, e-discovery and information management. In its broadest form, *Quon* could address the right to privacy in all electronic communications, including e-mail and outlier ESI.

A broad opinion in *Quon* may provide guidance on key areas of employer best practices and principles for technology and information management that the Supreme Court has not previously touched. Although it may not explicitly control private employees, given that they are not subject to the same Fourth Amendment protections with respect to their employers, *Quon*'s holding is still likely to be considered carefully by the private sector, given the similarities between the "reasonable expectation of privacy" test employed in common law privacy claims and the Fourth Amendment standard.

Case could have overlapping impact on employment law, privacy law and e-discovery.

First, the opinion could influence the language of all employer technology-usage policies. Following *Quon*, a prudent employer may need to expressly include text messaging (or other forms of electronic communications) in written technology-usage policies or risk waiving its right to audit such data.

Second, the opinion could influence how closely employers will monitor the informal policies of lower management, notwithstanding a company's formal technology-usage policy, given that a ruling in favor of Quon may establish that such informal policies can trump written policies.

Third, an opinion addressing Fourth Amendment privacy rights could indirectly influence the analysis of attorney-client privilege waiver in the context of employee communications, as well as steps that must be taken by employees to preserve the underlying privilege. Although *Quon* itself does not address attorney-client privilege issues, the ultimate holding regarding what expectations of privacy are "reasonable" could affect future arguments about privilege waiver. See, e.g., *In re Asia Global Crossing Ltd.*, 322 B.R. 247 (Bankr. S.D.N.Y. 2005) (relying on Fourth Amendment privacy principles in holding that a private employee had reasonable expectation of privacy in personal e-mails sent via employer's e-mail address, thereby preserving attorney-client privilege).

Finally, an opinion holding that a broad right to privacy exists in text messages on a company-issued pager can have profound implications in the e-discovery context. Such a holding would create confusion for private employers that seek to comply with discovery obligations without offending their employees' privacy rights. In the usual course of complying with discovery obligations, an employer generally will take affirmative steps to preserve employee data, use search methodology to identify potentially responsive information, review the employee data and ultimately produce data in litigation. All of these steps may be done with or without the employee's knowledge or consent, given the relatively limited privacy rights that are afforded to employees in the U.S. workplace.

However, should the *Quon* court hold that employees retain a much stronger right to privacy in their communications—even those that may be transmitted or stored on a workplace-issued device or system—then employers could be left scratching their collective heads about how to simultaneously respect their employee's privacy rights while still fulfilling their discovery obligations. Such a holding could throw U.S. employers into the uncomfortable position of seeking guidance from their counterparts in other countries with privacy regimes weighted in favor of individual rights, such as in the European Union. Moreover, such a holding could throw the existing assumptions about how discovery should be conducted into tumult, requiring both courts and litigants to reassess what the "best practices" for preserving, collecting, reviewing and producing data in response to litigation should be.

Oral arguments for *City of Ontario v. Quon* are scheduled for April 19. Spread the word—although one may wish to avoid doing so on a company-issued cellphone or pager.

Farrah Pepper is of counsel practicing in the New York office of Gibson, Dunn & Crutcher and vice chairwoman of the firm's electronic discovery and information law practice group. She can be reached at fpepper@gibsondunn.com. Jeffrey D. Coren is an associate in that office. He can be reached at jcoren@gibsondunn.com.