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FEDERAL E-DISCOVERY

Text Messages: Coming to a Litigation Near You


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Text messages have become the communication mode of choice for many Americans, especially those in the age group now entering the work force. A 2010 study found that American teenagers sent an average of 3,339 texts each month, or six texts each hour they are awake, and those between ages 18 and 24 send nearly half that amount.[1] A recent decision dealing with text message preservation acknowledged that "texting has become the preferred means of communication."[2]

Recent, high-profile matters confirm the emerging role of text messages in litigation. The current "Bridgegate" scandal involving lane closures on the George Washington Bridge, the NFL inquiry into allegations of harassment among Miami Dolphins players, and the murder trial in South Africa of Olympic athlete Oscar Pistorius all offer examples of the prevalence of text messages.

Despite the increasing susceptibility of text message communications to discovery in civil litigation and their use in criminal investigations, parties continue to be surprised by the need to preserve text messages. This is partly because the privacy and formality expectations that govern text messages are different from those related to traditional forms of electronically stored information (ESI) subject to discovery.[3] The Ninth Circuit has held that society recognizes a reasonable expectation of privacy in the content of text messages (but not in the identity of their senders or addressees).[4] The U.S. Supreme Court, however, expressly declined to rule on the issue, warning that "[t]he judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear."[5] The court conceded, however, that text messages "are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification."[6]

Text messages are typically less formal than email in tone and style, and may be used for more personal communications, even in the workplace. Moreover, text messages are less likely to be preserved as a matter of course: Often, mobile phones are programmed to automatically delete texts after a certain period of time to free up space and users may manually delete texts for the same reason. When text messages are deleted, their content may be lost, and while some forensic methods may be used to retrieve deleted messages, doing so on mobile phones is more difficult than on computers. To preserve server space, mobile providers typically only preserve the time and phone number of incoming and outgoing texts rather than the full communication.

Nevertheless, a series of recent decisions should remind attorneys and parties to litigation that text messages are ESI and subject to discovery, and courts will treat them as such in ordering disclosure and considering sanctions.

Recent Decisions Sanctioning Parties for Deleting Text Messages. In *Calderon v. Corporacion Puertorrique de la Salud*,[7] an action in the District of Puerto Rico, the court confronted the issue of the plaintiff's spoliation of text message evidence. In discovery, the plaintiff produced allegedly harassing text messages between himself and an account he claimed belonged to the defendant. After the plaintiff admitted to deleting other text messages from his cellular phone,

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however, the defendants moved to exclude all text messages from evidence. In response to the defendants' subpoena, T-Mobile then produced the plaintiff's phone and text logs from the period relevant to the action, showing that the plaintiff had received 38 messages from the defendant that the plaintiff did not produce during discovery.

The court concluded that the plaintiff's deletion of the messages constituted spoliation. The court noted that the plaintiff's knowledge of the importance of the messages to the litigation was shown by his forwarding some of them to himself so he could print them, on the same day he submitted a sexual harassment claim to his employer. This, coupled with the plaintiff's subsequent deletion of other messages from the defendant, showed a "selective retention" which "indicates [the plaintiff's] belief that the records would not help his side of the case."[8] The court did not dismiss the entire lawsuit, as defendants had requested, finding the plaintiff's deletion of the texts was not sufficiently extreme conduct. Instead, it granted an adverse inference instruction. Although the plaintiff's conduct was not necessarily in bad faith, deletion of those additional messages prevented defendants from supporting their defense that the email address from which the plaintiff purportedly received harassing messages did not belong to the defendant.[9]

In other cases, courts have ordered monetary sanctions for the deletion of text messages subject to discovery. In *In re Pradaxa (Dabigatran Etexilate) Products Liability Litigation*, a case before the Southern District of Illinois, the court fined the defendants nearly $1 million, partly for their "egregious" conduct related to text message preservation.[10] Although the defendants' litigation hold memoranda directed custodians to preserve "electronic communications on hand held devices," they did not extend the hold explicitly to text messages until four months after receiving the plaintiffs' request for text messages and other documents. In addition, the defendants did not ensure that automatic text message deletion was disabled on company-issued cellular phones. When the defendants notified the court of their oversight, they stated that they had not realized employees used the text feature on their personal phones for work-related communications, but the court pointed out that a document they produced showed they had encouraged employees to use text messages to communicate with supervisors. The court excoriated the defendants for their "passive" behavior and stated they had an obligation to make certain that employees knew to preserve texts. The defendants' failure to disable the automatic deletion function on work-issued phones, which they had themselves programmed on the phones, placed them outside the safe harbor provision of Rule 37(e) for the good faith loss of information through the routine operation of a data storage system. The court rejected the defendants' argument that sanctions should not be imposed for failure to turn off auto-deletion in a text message system because it is "a less prominent form of communication" and "the production of text messages is too burdensome." Text messages, the court emphasized, are ESI and subject to discovery obligations regardless of their prevalence, and if a party considers their production burdensome, it must move the court to reduce the burden. Finally, the court stated that any custodian who refused to turn over her personal phone for review of work-related text messages would be subject to an order to show cause why she should not be held in contempt of court.

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Negligent failures to preserve text messages have led to sanctions as well. Early last year, a district judge in Colorado considered a sanctions motion in an action related to a dispute between nightclub owners over the hiring of disc jockeys.[11] The plaintiff moved for sanctions against a defendant who had made no effort to preserve text messages on his iPhone despite receiving a litigation hold memo, did not disclose any texts from the phone after receiving a discovery request, and subsequently lost the phone. The defendant argued that he did not book DJs via text message and thus his texts did not contain relevant evidence. The court responded, however, that this was not conclusive as to whether the texts held relevant evidence, adding that "[t]he point is that neither the plaintiffs nor the Court will ever know." The court concluded, however, that the merely negligent loss of the phone and the evidence it stored did not merit an unduly "harsh" sanction. Rather than an adverse inference instruction, it decided to allow the plaintiffs to introduce evidence at trial that the defendant had failed to preserve the text messages and to argue that the jury should draw an adverse inference from this failure.

Only Robust Text Retention Policies Will Avoid Sanctions. It is clear that courts regard text messages as ESI, and as discoverable as email. As text messages become a more common form of business communication, companies and their counsel should review their plans to preserve text message content. Parties conferring with opposing counsel on a discovery plan should also discuss ESI, including text messages. Regulated entities should be sure to consider all ESI, regardless of the format (including email, text, instant messaging and chat communications, SharePoint, blogs, and internal social media), as they develop data archiving procedures.

When parties issue a litigation hold notice, there may be times when they should explicitly note the need to preserve text messages. Parties suspending automatic deletion as part of data preservation on a matter should consider text messages. As *In re Pradaxa* emphasizes, discoverable material may also be found on personal devices. Firms with programs that allow employees to use work software on personal devices should consider reviewing their information technology usage policies to ensure they specify that employees must preserve data stored on those devices and allow the firm and its vendors access in the event of litigation or a government investigation.

Text messaging is likely to become more prevalent, and its use more intertwined with the workplace and with the sorts of communications that give rise to disputes. As this occurs, it will become a fixture of modern litigation, and a key component of e-discovery obligations.

1. Nielsen, "U.S. Teen Mobile Report Calling Yesterday, Texting Today, Using Apps Tomorrow," Oct. 24, 2010, available at http://www.nielsen.com/us/en/newswire/2010/u-s-teen-mobile-report-calling-yesterday-texting-today-using-apps-tomorrow.html.
2. *In re Pradaxa (Dabigatran Etexilate) Products Liability Litigation*, 2013 WL 6486921 at *18 (S.D. Ill. Dec. 9, 2013).
3. See Fed. R. Civ. P. 34.
4. *Quon v. Arch Wireless Operating*, 529 F.3d 892, 904-08 (9th Cir. 2008).
5. *City of Ontario, Cal. v. Quon*, 560 U.S. 746, 759 (2010).
6. Id. at 760.
7. 2014 WL 171599 (D.P.R. Jan. 16, 2014).
8. Id. at *2.
9. See Fed. R. Evid. 106.
10. 2013 WL 6486921 at *16-*18, rev'd on other grounds, 2014 WL 274084 (7th Cir. Jan. 24, 2014).
11. *Christou v. Beatport*, 2013 WL 248058 at *14 (D. Colo. Jan. 23, 2013).