

# TIPS FOR HANDLING TEXT MESSAGES IN DISCOVERY

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**N**on-email electronic forms of communication have been with us for quite some time. The text message was first invented in 1992. AOL Instant Messenger was released in 1997, and Blackberry Messenger followed in 2005.

The release of the iPhone in 2007, coupled with the rise of cheaper (or free) text messaging greatly increased the adoption of these types of communications. Since that time, adoption and usage of text and instant messaging have increased exponentially. In some cases (and particularly among Millennials and members of Generation Z), texting and instant messaging have come to augment or even replace email as the primary method of communication.

More recently, the rise of remote work in the face of the pandemic has made text messages (along with instant messages, direct messages, and every other type of electronic communication) a ubiquitous feature of business communication. Text messaging already posed significant challenges in the litigation context; its increase usage, combined with the pandemic and its implications for how individuals work and communicate, has brought those issues to a fever pitch.

## Are Text Messages Discoverable?

Like all new electronically stored information ("ESI"), text and instant messaging have resulted in unique challenges in

the discovery context. Most jurisdictions have ruled that these types of communications are discoverable. The Court of Chancery has made it clear in a series of decisions that not only are text messages discoverable, but that they often have heightened importance. The Court in *Kan-Di-Ki, LLC v. Suer*, C.A. No. 7937-VCP (Del. Ch. July 22, 2015) found that text messages were subject to discovery when it ruled that a party spoliated evidence when he lost his cell phone. The Court reiterated its position in *In Re Oxbow Carbon LLC Unitholder Litigation*, C.A. No. 12447-VCL (consol.) (Del. Ch. June 2, 2017) when it ordered Delaware counsel to oversee the identification and collection of potentially relevant text message data.

Finally, the Court in *In re Appraisal of Kate Spade Company*, C.A. No. 2017-0714-AGB (Del. Ch. June 21, 2018) raised a key point regarding the importance of text messages when then Chancellor Bouchard mused whether parties should collect and review potentially relevant text messages as a matter of course.

While this article primarily focuses on text messages, it is important to note that other mobile data, including photos, notes, and instant messages from apps such as WhatsApp and Facebook messenger are also generally discoverable.





## Preservation

Text messages are, by definition, ephemeral. Law Insider defines ephemeral data as “information that change rapidly over time and may be lost if not collected immediately (e.g., within days or weeks).”<sup>1</sup>

There are different degrees of ephemerality; text messages fall on the less ephemeral end, while instant messages sent on Snapchat would be at the extreme end of ephemerality. Regardless, the automatic or accidental deletion of texts is a constant challenge of which lawyers must be aware.

A combination of forced obsolescence and the insatiable need to upgrade to the most recent cell phone pushes individuals to constantly replace their cell phones. Cell phone contracts last two or three years, and often a new contract comes with a new phone. This has led to a culture of disposability surrounding cell phones, thus resulting in more challenges.

Further, iPhone settings make it easy to set text messages to automatically delete after a certain period of time. Users often are not even aware that this setting is even in effect, as it may have been set up when the phone was activated at the local cell phone store or by a company’s IT professionals.

Clients must be informed of their preservation obligations early and often, and they must be armed with the appropriate information to ensure that accidental destruction does not occur.

Finally, discovery is typically stayed at the start of litigation, sometimes for months or years. This means that an individual may receive a litigation hold that details his or her preservation obligations, but then is not contacted by counsel to identify and collect relevant text messages until far in the future. This causes even more delay and chances for accidental destruction of cell phone data.

These various factors lead to one simple conclusion: clients must be informed of their preservation obligations early and often, and they must be armed with the appropriate information to ensure that accidental destruction does not occur. It may even make sense to take the additional step to collect the cell phone data if a lawyer is fairly certain that discovery will ultimately ensue.

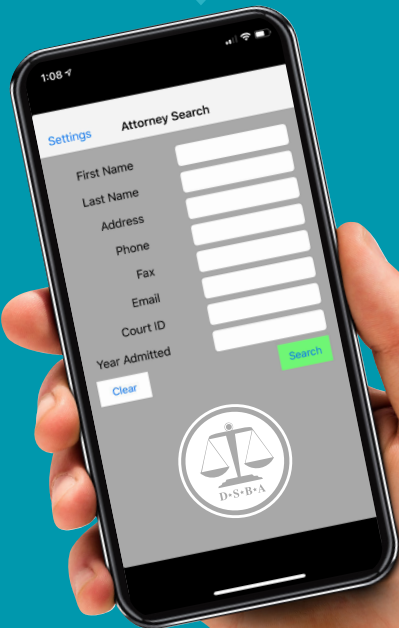
## Control, Identification, and Location

In the employment context, many companies do not issue cell phones to their employees, but they do allow their employees to use their personal devices for business purposes (also known as Bring Your Own Device, or BYOD). This can lead to custody challenges, and often leads to a conundrum (akin to issues surrounding personal email) in which relevant information related to a company may exist on an employee’s cell phone, thus leading to a potential subpoena if the determination is made that the employee, rather than the employer, has possession, custody, or control of the cell phone data.

Cell phone users are often under the mistaken impression that their texts are not discoverable, which can lead to several challenges, including the decisions they have made on how to use that cell phone. It can often be shocking for an individual to be informed that his or her phone is now discoverable and that the data will need to be collected and reviewed for production.

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This can be a difficult conversation and, because of this, it is one that should occur very early in the litigation.

It is a challenge to even identify “where” text message and other cell phone data may reside. In addition to being stored directly on the device, cell phone data could be in the cloud, backed up to a computer, or even printed out to hard copy. Custodians of these records often do not even know exactly where the records are stored, as the cloud backup may have been activated by company IT or the person who sold them the phone. They may be unaware that a backup of their phone exists on their computer if they often plug their phone into a laptop or desktop.

### Collection and Searching

Like all other aspects of discovery and cell phones, effectively capturing data from a device and ensuring that it can be searched and reviewed is challenging. While eDiscovery in the context of email and traditional non-email electronic files has become more widely available and less expensive for a variety of litigants, the same cannot be said for the collection of cell phone data. Almost assuredly a litigant will need to hire a vendor to use special tools to capture and then actually search and review the data.

It is important that text messages are “processed” and searched in a logical way. Individuals speak differently over text than they do over email. An individual text message is usually going to be much shorter than an individual email. Many single text messages may be between 5 to 10 words. Usually, text messages will make more sense when the conversations themselves are grouped together, and vendors and litigators need to be mindful of this when processing the collected data.

This also means that standard search terms are not always appropriate or

effective. Often, parties will agree to review entire conversations with relevant recipients or senders or key time frames rather than using traditional search terms when deciding what to review.

Finally, it is important to speak with any vendor regarding how the texts will be rendered in a review tool. Emojis and emoticons have become common place in text message communications and have become important in litigation. Several recent Chancery matters have dealt with emojis and emoticons being highly relevant in determining the intent of the sender of the text.

### Review and Production

Reviewing and producing text message communications also pose unique challenges. Attorneys are used to providing estimates to clients based on the number of documents to be reviewed. Text messages, however, by their very nature, are reviewed at a much higher speed than traditional ESI. This can impact burden arguments during discovery disputes.

Finally, it is important that parties meet and confer to ensure that the text messages are ultimately produced in a manner that is usable by the receiving party and that can easily be referenced at deposition and court filings.

### Summary

The world of ESI is constantly shifting, and this is particularly true with text messaging and cell phone data. It is important that litigators continue to educate themselves regarding these new technologies and the challenges they pose, while understanding that an experienced vendor will be of great use in navigating these issues. ⚖️

### Notes:

1. “Ephemeral Data Definition.” Law Insider. Accessed March 16, 2022. <https://www.lawinsider.com/dictionary/ephemeral-data>.