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The Mechanics of Preserving and Producing Text Message

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Texting (or SMS) communications has proliferated in direct proportion to the use of mobile phones and has now become a routine alternative method of communication. Despite the ubiquitous use of text messaging, the concept of producing and requesting text messages in discovery still baffles attorneys and courts. Although in many cases, the production of electronically stored information ("ESI") may mean simply searching computers, the realm of discoverable ESI in Illinois can extend beyond conventional communications and documents. Illinois Supreme Court Rule 201 defines ESI as "any writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations in any medium from which electronically stored information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form." Ill. Sup. Ct. R. 201.

Text messages certainly meet that definition. The destruction of text messages has become increasingly more prevalent, creating an extra burden for attorneys. Thus, the obligation to preserve relevant text messages is a broad scope and requires swift action to prevent possible loss of discoverable information.

Start with the preservation letter.

Attorneys must be proactive and send a preservation letter to the opposing party and to their own clients. Once a preservation obligation has been triggered, reasonable good-faith efforts must be taken by the opposing party to preserve relevant ESI to the claims and defenses in the litigation or investigation. Additionally, it is necessary for an organization or party to immediately suspend routine ESI destruction (e.g., ESI subject to automatic deletion).

Because of the severe ramifications that may result from a party not complying with their preservation obligation, parties may prefer to take a conservative approach and deem a "trigger" to have occurred even when in doubt of potential litigation. Failure to provide text messages in litigation can sometimes be cured, but failure to preserve relevant text messages might be fatal.

What should be preserved in anticipation of litigation?

Among other things, the recent amendments to the Illinois Supreme Court Rules 201 and 204 provides litigants flexibility in production of discovery requests. The amendments allow parties to specify the format in which they want to receive documents. Ill. Sup. R. 2014(b). As specific text messages can contain hidden forms, the amendments allow litigators to avoid having to carefully define ESI to make sure they receive what they needed.

The nature of discoverable text messages requires the parties, and the court, to balance a party's interest in requesting production of text messages for litigation verses the extend a producing party might experience an invasion of privacy.[1] Illinois Courts have recognized the enormous storage capacity of most cell phones and how the search can reveal a digital record of a large portion of people's lives. *Carlson v. Jerousek*, 68 N.E.3d 520 (2016). Text messages may reveal information relevant to the case, but also may reveal intimate details of a person's life. Thus, when appropriate, a court can limit text message discovery when the privacy concern outweighs the need of text messages for litigation. However, a court is likely not to take such action unless the producing party requests an entry for a protective order under these circumstances.

Proportionality.

Because of the breadth of information text messages could share, Illinois Courts must weigh the proportionality of the information sought to determine whether discovery is permissible. Rule 201 and other related rules form a comprehensive scheme for fair and efficient discovery with judicial oversight to protect litigants and parties from harassment. Specifically, Illinois Supreme Court Rule 201(c)(3) allows the court to consider the proportionality of any discovery sought:

"When making an order under this Section, the court may determine whether the likely burden or expense of the

proposed discovery, including electronically stored information, outweighs the likely benefit, taking into account the amount in controversy, the resources of the parties, the importance of the issues in the litigation, and the importance of the requested discovery in resolving the issues."

Ill. Sup. Ct. R. 201(c)(3).

Thus, litigants can, and should, ask the court to order the opposing counsel to only produce text messages that are relevant to the litigation and do not invade a party's privacy rights.

However, there may be a problem: text message extraction cannot be limited to just "relevant" texts – at least not yet. Lawyers can, however, instruct that the extraction vendors or software only provide them with texts between certain business parties or numbers. This can potentially limit review of relevant exchanges and avoid matters of purely personal or intimate matters that are irrelevant. Generally, if lawyers ask for all the messages on the party's cell phone, even those not exactly relevant to the case, it is likely to backfire in court. *Hepse v. City of Chi.*, 207 F. Supp. 3d, 874 (N.D. Ill. 2018). Lawyers should limit production requests to items pertinent in their case.

So, how are text messages *actually* produced?

To aid in the management of text message production, some jurisdictions require parties to meet and discuss aspects of the ESI discovery which will be involved in the litigation and should be incorporated into a case management order under Illinois Supreme Court Rule 218. In the event parties are unable to come to an agreement on expectations of what is to be produced, the court may require additional discussions prior to the commencement of discovery, and may impose sanctions, if deemed appropriate. Courts expect attorneys from each party become knowledgeable about how their client has saved and backed-up their text messages prior to the meeting with opposing counsel. Early discussion of ESI issues and expectations may save litigants from unnecessary problems down the road in litigation.

Fortunately, there are multiple ways to export or save relevant text messages once the opposing party's cell phone is physically retrieved. First, a technician can use software available online to export relevant text message conversations. Using a third-party technician is the most defensible way to produce text messaging for ESI discovery, which makes it the preferred route despite the additional costs and parties sometimes being unwilling to hand over their cell phones.[2] Nonetheless, software allows technicians to download text messages into a file that can be subsequently produced.[3]

Also, litigants can use third-party apps that specialize in exporting text messages from smartphones. Exporting selected conversations with any of these third-party apps is simple; litigants can choose the relevant conversations, export format and save or email the conversations. This is also far more defensible than some other methods.

Finally, iPhone users can save an entire text message conversation using a somewhat convoluted process. However, this approach seems to be the least defensible because it is easy for the text message conversations to be tampered during the process. Text messages could also be screenshotted and shared to opposing parties, but this method might become overly burdensome depending on the length of relevant conversations. However, screenshotting does not preserve the metadata with the text messages and may not capture all of the potentially relevant messages.

Once extracted, a litigant should comb through the text message data and read the texts themselves. This might mean sifting through an abundance of texts, but just as there are apps to help you collect the text message data, there are case analysis software tools that can parse through exported messages and allow litigants to get very specific in their search. This helps litigants pinpoint precisely what they are looking for in a surprisingly short amount of time. The other party's attorney should also sift through the data and redact all the text messages that fall under some type of privilege.

What happens if the party doesn't produce all (or any) of the relevant messages?

If a party fails to produce the information, the litigant will have to issue a subpoena on the opposing party's cell phone provider. Federal law prevents companies from producing these documents without a court order or subpoena. Typically, cellular service providers preserve records of text messages for a short period of time. If a client comes forward with a lawsuit after the time the cellular service provider maintained the text messages, the only way possible to recover lost or deleted text messages is by hiring a forensic investigator to inspect the phone. However, there might be further complications when dealing with the party's privacy interests.

If a party fails to obey a court order, a litigant can file a motion to compel discovery. The court will review the filed motion and compel discovery, if deemed necessary to the present litigation, as soon as possible.

"In the face of discovery abuses, it is incumbent upon the opposing party to promptly request relief, and it is incumbent upon the trial court to consider the request, and, where indicated, to issue orders that will discourage further abuse. Before ruling on such a request, the trial court considers whether there is a good faith basis for the objection having been interposed. The court must determine whether the objecting party has set forth a colorable claim of privilege or whether the objector has made an adequate showing that compiling the requested information would require substantial expense, labor, or disruption of business." *Zagorski v. Allstate Ins. Co.*, 54 N.E.3d 296, 307-8 (Ill. App. Ct. 2016).

Illinois courts have a variety of measures to enforce compliance of production of discovery. If the producing party continues to ignore the order to produce the text messages, the party can then be held in contempt of court. The issue of sanctions for failure to preserve and produce digital information has been the subject of a host of decisions in state and federal courts throughout the country.[4]

Once the text messages are produced, what happens next?

After the relevant text messages are produced, a party may eventually seek to submit the text messages into evidence. The technicians that recovered the text messages

from the party's cell phone can provide the litigant an affidavit pursuant to rule IRE 902(11). Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(11) Certified Domestic Records of a Regularly Conducted Activity. The original or a duplicate of a record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written certification of its custodian or other qualified person that the record:

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of these matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

IRE 902(11).

Rule 902(11) allows the technician to provide an affidavit saying that the paper copy of the text messages is a true and correct copy of the text messages received from the opposing party. The affidavit is subsequently presented to the opposing counsel before trial and displays that the text messages are a record of "regularly conducted activity."

What if the opposing party fails to comply with the court order?

Spoliation of evidence is a reoccurring problem behind issuing sanctions against parties. Spoliation is defined as the destruction of significant alteration of evidence, or the failure to preserve property for another's use as evidence in a pending or reasonably foreseeable litigation.

In Illinois, Supreme Court Rule 219(c) discusses sanctions and penalties that are available against practitioners for failing to comply with any court order or Illinois Supreme Court rule. There are two typical sanctions available that are passed down by the courts. One sanction commonly enforced is the negligence instruction, in which the court gives the jury an instruction that requires the wronged party to prove that the spoliator acted with the willful intent to destroy or destruct evidence. The more severe sanction is the adverse instruction sanction when the court instructs the jury to assume the destroyed evidence, or lost ESI, would be unfavorable to the spoliator if the evidence was produced. The Illinois rule does not indicate whether it strictly follows the negligence instruction or the adverse inference instruction federal rule. The rule states:

". . . the court, upon motion or upon its own initiative, may impose upon the offending party or his or her attorney, or both, an *appropriate* sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred as a result of the misconduct, including a reasonable attorney fee, and when the misconduct is willful, a monetary penalty."

Ill. Sup. Ct. R. 219(c).

The 2015 Amendments to the Federal Rules of Civil Procedure have been interpreted by the courts in such a way to make it harder to get sanctions under the federal rules.

Takeaway.

In all, text messaging has led to some new issues on the common discovery requests. With new added complications to the discovery process, obtaining relevant text messages which may be in litigating a case can pose special challenges. The trick is appreciating the need to preserve some messages as well as understand how to request and obtain these communications, and how to use them once obtained.■

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1. The Privacy Act of 1974, https://osc.gov/Pages/Privacy-Act.aspx
2. For example, attorneys can use Decipher TextMessage to download iPhone and Android text messages with photos, attachments, and videos: https://deciphertools.com/decipher-textmessage.html
3. For a discussion on how to lay a foundation for the introduction of digital information, see the author's articles on the subject: "Self-authentication of digital records: New Illinois Rule of Evidence 902(13)," Illinois State Bar Association Trial Briefs, December 2018, vol. 65, no. 5; "What is the valuation standard for valuation of a minority interest in an Illinois LLC?," Illinois State Bar Association Trial Briefs, October, vol 65, no. 4; and "Self-Authentication of Electronic Evidence," Illinois State Bar Association Trial Briefs, September 2018, vol 65, no. 3.
4. *Cockerline v. Menendez*, 988 A.2d 575, 590 (N.J. Super. 2010) (citing *Manorcare Health Servs. v. Osmose Wood Preserving, Inc.*, 764 A.2d 475, 479 (N.J. Super. 2001)). *See Hynix Semiconductor Inc. v. Rambus Inc.*, 645 F.3d 1336, 1345 (Fed. Cir. 2011).