

E-Discovery Quarterly: Recent Rulings on Text Message Data

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By **Tom Paskowitz, Robert Keeling and Colleen Kenney** (May 10, 2024, 4:40 PM EDT)

This article is part of a quarterly column analyzing the most notable e-discovery developments from the previous three months. This installment takes a closer look at recent decisions involving the production or spoliation of text message data.

Electronically stored information on cellphones, and in particular text message data, represents one of the many challenges faced by lawyers and courts in the e-discovery space as a result of the proliferation of ESI in recent decades.

A few recent court decisions have surprisingly held that business-related texts on employee personal devices may be found to be within an organization's possession, custody or control, and therefore subject to the organization's preservation obligations.^[1]

But this leads to uncertainty when it comes to the preservation and collection of such data.

For example, the Sedona Principles — which provide guidance addressing the unique challenges posed by the production of electronically stored information — note that "mobile devices that are not synchronized with the organization's servers may require physical collection of the mobile device to meet preservation or discovery obligations." But, the principles continue, "it may not be necessary to image the device if the costs, burdens, and other issues associated with imaging the device outweigh the benefits of retrieving unique, relevant ESI from the device." ^[2]

The principles also note that "wholesale text message retention is regularly disproportionate for both sides of the litigation."^[3]

Given this uncertainty, it is not surprising that disputes involving the production or spoliation of text message data have figured prominently in recent court decisions. A few key themes can be derived from these decisions.

Unique Issues With Cellphone Data

Data on personal cellphones can be particularly beguiling from an e-discovery perspective in cases involving corporate defendants because the individual custodian, and not the organization, has control over the device. This can lead to issues involving the storage of information on the phone, auto-delete settings and what happens when a phone gets upgraded.

A **January order** from the Delaware Court of Chancery in *Goldstein v. Denner* highlights these pitfalls. In *Goldstein*, the plaintiff alleged that the defendants engaged in insider trading in connection with a proposed acquisition, and served discovery seeking communications involving one of the principals who negotiated the transaction.^[4]

In later granting spoliation sanctions regarding those communications, the court relied on extensive



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evidence showing that the principal's phone was never imaged or collected because the defendants' general counsel repeatedly told their outside counsel that there was a policy against using text messages for business purposes, and that the general counsel had looked through the principal's text messages and found nothing responsive.[5]

It was only after the plaintiff received text messages from other parties involving the principal that outside counsel looked into the principal's phone, but by that point, the principal claimed to have lost all of his text messages when he upgraded his phone to a new model.[6]

The U.S. District Court for the Southern District of Florida in *DeMartino v. Empire Holdings & Investments LLC* faced similar issues. Although the court ultimately denied spoliation sanctions, it concluded that one of the defendants lost relevant text messages by failing to take reasonable steps to preserve them.[7]

Like in *Denner*, the court relied on extensive evidence in the record regarding that defendant's conduct with respect to his personal cellphone, including that the defendant sent texts for business purposes, and that he purchased a new phone during the period at issue and performed a factory reset on the old phone after transferring all historical text messages to the new phone.[8]

It later turned out that older texts were deleted off the defendant's new phone as his storage ran out.[9]

These decisions reflect the importance of considering ESI sources on personal cellphones early in a litigation. As the court in *Goldstein* noted, "[r]elying solely on the client to identify the universe of relevant information, without reasonable inquiry to verify that the client accurately captured that universe, can lead to sources of information being overlooked." [10]

Intent Matters

Because cellphone data is under the possession and control of individual custodians if it is not collected or imaged by counsel, questions regarding the individual's intent can arise if data is lost.

Under Rule 37 of the Federal Rules of Civil Procedure, ESI "that should have been preserved in the anticipation or conduct of litigation" is considered lost when "a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery." [11]

If a court finds the loss prejudicial, it "may order measures no greater than necessary to cure the prejudice." [12] But, if the court finds that an offending plaintiff "acted with the intent to deprive another party of the information's use in the litigation," additional sanctions — including terminating sanctions — are authorized. [13]

Several courts have recently addressed the intent of individual parties and custodians as part of the sanctions analysis.

For example, in *Jones v. Riot Hospitality Group LLC*, the U.S. Court of Appeals for the Ninth Circuit in March **upheld** a U.S. District Court for the District of Arizona ruling that the plaintiff spoliated text messages with the intent to deprive the defendants of their use, where there was "ample circumstantial evidence that [the plaintiff] intentionally destroyed a significant number of text messages and collaborated with others to do so." [14]

The plaintiff had produced "thousands of text messages" and argued that this negated any finding of intent to delete any messages, but the Ninth Circuit relied on other evidence from the plaintiff's third-party imaging vendor suggesting that she had "deleted some messages from the very periods covered by her productions." [15]

The Ninth Circuit also relied on a screenshot of a relevant text from the plaintiff's phone that was no longer available as further evidence of intentional spoliation, in part because the plaintiff could not explain why some messages were selectively deleted. [16]

Based on this evidence, the Ninth Circuit affirmed the district court's finding that the plaintiff "affirmatively selected certain text messages for deletion while otherwise preserving text messages

sent around the same time." [17]

In late March, the U.S. District Court for the District of Nevada in *Armstrong v. Holmes* faced similar circumstances in granting a jury instruction regarding the spoliation of text messages where the record contained "prolific" relevant messages between the defendant and several people, but none between the defendant and her daughter — suggesting selective deletion. [18]

The defendant tried to argue that living with her daughter "reduced the need to send messages via text," but the court was unpersuaded because the defendant admitted that she "engaged in selective preservation of messages" by keeping "messages that she thought were important to the case, but delete[ing] the others." [19]

Credibility was also front and center in *Buddenberg v. Estate of Weisdack*, where the U.S. District Court for the Northern District of Ohio imposed sanctions for deliberate deletions and alterations of relevant text messages. [20]

The court noted evidence that one of her relevant texts "appears to start midstream," and others were deemed by a forensic investigator to have been altered. [21] And although the plaintiff denied having deleted any relevant text messages, the court discounted this testimony based on "her demeanor, carefully evasive answers, and pregnant pauses." [22]

Takeaways

As noted above, ESI on personal cellphones can present unique challenges because the cost, burden and other issues associated with collecting data may outweigh the benefits of collection. But, as the decisions above demonstrate, careful balancing of those considerations is important.

These decisions reflect that counsel should often be involved in that balancing regarding what text message data should be preserved, collected, reviewed and produced.

An inquiry into these questions — which may include consideration of the relevance of the custodian to the subject matter of the dispute and the extent to which custodians used their mobile phone for business purposes — typically should be made deliberately and early in a litigation or investigation.

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[1] See, e.g., *Goldstein v. Denner* ●, 310 A.3d 548, 573 (Del. Ch. Jan. 26, 2024); *Cap. Senior Living Inc. v. Barnhisser* ●, No. 22-CV-00606, 2024 WL 278105, at *5 (N.D. Ohio Jan. 25, 2024) (finding that a party had control over work-related text messages on a custodian's personal phone).


[2] The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production, 19 Sedona Conf. J. 1, 63 (2018).

[3] Id.



[4] Goldstein, 310 A.3d at 557.

[5] Id. at *561-62.

[6] Id. at *565.

[7] *DeMartino v. Empire Holdings & Invs. LLC* , No. 22-CV-14301, 2024 WL 712456 (S.D. Fla. Jan. 26, 2024), report and recommendation adopted, No. 22-14301-CIV, 2024 WL 707252 (S.D. Fla. Feb. 21, 2024).

[8] 2024 WL 712456 at *1.


[9] *Id.* at *6. A court in New Mexico faced similar issues when granting a motion to compel the plaintiff to produce text messages where it appeared that plaintiff's counsel did not review any text messages but instead had the plaintiff review and pull the text messages she decided were responsive and relevant. *Alsaadi v. Saulsbury Indus. Inc.* , No. 23-CV-291 KG/KRS, 2024 WL 531246, at *1-2 (D.N.M. Feb. 9, 2024). Cf. *Boston Retirement System v. Uber Technologies Inc.* , No. 19-cv-06361-RS (DMR), 2024 WL 555891 (N.D. Cal. Feb. 12, 2024) (denying a motion to compel additional text messages from two custodians because the plaintiff did not provide "compelling evidence" to substantiate that the text message productions were inadequate).

[10] Goldstein, 2024 WL 303638, at *23.

[11] Fed. R. Civ. P. 37(e).

[12] Fed. R. Civ. P. 37(e)(1).

[13] Fed. R. Civ. P. 37(e)(2).

[14] *Jones v. Riot Hosp. Grp. LLC* , 95 F.4th 730, 735-36 (9th Cir. 2024).


[15] *Id.*

[16] *Id.*

[17] *Id.* at 736.

[18] *Armstrong v. Holmes* , No. 322CV00375ARTCSD, 2024 WL 1345214, at *4 (D. Nev. Mar. 29, 2024).

[19] *Id.* at *4.

[20] *Buddenberg v. Est. of Weisdack* , No. 18-CV-00522, 2024 WL 159001, at *65, 74-75 (N.D. Ohio Jan. 16, 2024).

[21] *Id.* at *65-67.

[22] *Id.* at *74.