

Discoverability of text messages in a lawsuit

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Discovery is often the most painstaking part of a lawsuit. Almost assuredly during this process, one party will serve a discovery request requiring the other to produce all “documents and communications” relevant to the case. This includes documents most people associate with normal business, including contracts, letters, and emails.

However, the manners by which we communicate for business purposes are constantly evolving. Text messaging, for example, is quick, easy, and informal. From this convenience spawns a common question: Do I need to produce text messages relevant to my case? The answer is yes. If they may be relevant to the case, those messages are discoverable.

Given this reality, clients need to inform their lawyers about all manners by which they have communicated, related to the lawsuit. Similarly, lawyers need to ask clients whether any relevant communications occurred via text message. It’s a two-way street.

Openly disclosing the existence of relevant text messages is one piece of the puzzle. Retrieving them is another and is often burdensome and expensive. Deleted messages are almost impossible to recover without hiring an independent specialist. Even then, their recovery is not guaranteed. Moreover, cellphone providers only store texts in the cloud for a specified period, often no longer than a few months. Typically, any deleted texts are long gone by the time a lawsuit is filed.

An effective way to obtain the messages is to physically

possess the phone from which they were sent or received. This raises another question: How should these messages be produced? It is common to produce screenshots, but where the texts are dense and voluminous, it can be time consuming and expensive. An alternative to screenshotting is to purchase specialized software, which is not always a realistic option.

The Oklahoma Discovery Code recognizes this difficulty, at least implicitly, by providing that a party is not required to provide discovery of “electronically stored information” when it is “not reasonably accessible because of undue burden or cost.” However, this not a blanket protection because courts determine whether an undue burden exists on a case-by-case basis.

Though text messages may make our lives easier, they drastically complicate the already burdensome and expensive discovery process. Clients and lawyers alike need to be aware that text messages are discoverable, and they have duties to produce them absent a showing of undue burden.

For more information on this alert and its impact on your business, please call 405.235.4100.



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