

Modern ESI: Preserving Deleted, Unsent and Edited Communications

Reprinted with permission from the [June 16, 2022 online edition of Texas Lawyer](#) © 2022 ALM Global Properties, LLC. All rights reserved. Further duplication without permission is prohibited, contact 877-256-2472 or reprints@alm.com.

In an increasingly digital society, discovery of electronically stored information (“ESI”) has become part and parcel of written discovery. In many cases, document productions consist entirely of ESI because the parties communicate almost exclusively through text message and email. While these written communications have the appearance of reliability, technological advances have, over time, rendered many digital communications less static and more open to manipulation. Litigators need to take heed of these advances to properly advise clients and effectively preserve, retrieve, and present evidence.

Of note, Apple recently announced that its latest operating system, iOS 16, will allow users to edit and unsend recently sent text messages. The new system is slated to roll out in Fall of 2022. Other platforms (e.g. Outlook, Facebook) have offered the ability to unsend messages for some time. However, the ubiquitous nature of text messages (particularly iMessages) and the additional ability to edit already-sent messages makes Apple’s latest announcement particularly noteworthy for litigators dealing with ESI. As practitioners prepare to accommodate this development, they would be well-advised to adjust their e-discovery practices and forms to address deleted, unsent, and edited communications on all

platforms.

Regarding preservation, practitioners should consider updating form preservation letters and instructing clients to ensure that iMessage and social media account settings are set to retain, backup, or archive messages as appropriate, bearing in mind that accounts may have default settings that are not in line with preservation obligations. As Apple releases more detail regarding how its new iMessage features will work, practitioners may need to provide more targeted instructions regarding preservation of edited and unsent iMessages.

In the meantime, it may be appropriate for preserving parties to quickly download or screenshot (depending on the platform) relevant communications before a sender unsend or edits. Notification settings may also be useful. For example, a user may opt to receive an email notification regarding every Facebook message received, effectively creating a backup of messages that the sender cannot unsend or delete. Similar settings for iOS 16 iMessages may mean the difference in protecting critical communications from deletion or revision by the sender.

Similar updates are appropriate for retrieval of ESI. It will take time for forensic imaging and e-discovery tools to catch up to with the technology and collect these new categories of iMessages. For now, practitioners should draft discovery requests and forensic imaging and search protocols with an eye toward capturing these messages, adjusting with time as we better understand where and how these messages will be stored. In certain cases, it may be appropriate to draw special attention to the inclusion of all edited or unsent iMessages in a request, as an opposing counsel or party may not know that they exist. As we understand more about how edited and unsent messages are stored, practitioners will need to assess how to present evidence of editing or unsending (or lack thereof) to a fact-finder.

As illustrated with Apple's latest development, the ESI landscape is ever-changing. Litigants and counsel who take the time to update their practices now will be best positioned to use these developments to their advantage.

 *Follow our coverage on [FACEBOOK](#)*