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## Preservation Obligations for Text Messages and Instant Messages

**Legal Update**

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Courts are starting to recognize that “texting has become the preferred means of communication.” *In re Pradaxa Prods. Liab. Litig.*, 2013 WL 6486921, at \*18 (S.D. Ill Dec. 9, 2013). Indeed, one survey found that 80 percent of people use texting for business and 15 percent of people surveyed indicated that over half of their text messages were related to business. Moreover, “80 to 90 percent of all companies have some instant messaging in use by employees,” and 80 percent of that IM activity takes place over external programs.” Seth A. Northrup & Li Zhu, *Let's Chat About the Legal Risks of Instant Messaging, Corporate Counsel*, March 14, 2014 (citation omitted).

Many companies do not preserve text messages or instant messages in the ordinary course of business, given that such activity typically takes place through phone carriers or external programs. Moreover, mobile devices and instant messaging applications are usually set to automatically delete these messages after a certain period of time, or the user may simply delete them.

The general rule is that there is no duty to preserve text messages and instant messages if a party does not routinely save those messages and litigation is not anticipated. However, once litigation is anticipated or commences, counsel needs to be prepared to advise their clients as to whether text messages and instant messages should be preserved.

### Failure to Preserve Text Messages and Instant Messages May Result in Sanctions

Given the increased use of text messaging and instant messaging for business purposes, it is not surprising that courts are requiring parties to produce such information.

For example, a federal district court in Minnesota held that the plaintiff was entitled to discovery of text messages and voice messages contained on a company-issued mobile phone of the defendant's employee. *Ewald v. Royal Norwegian Embassy*, 11-CV-2116 (SRN/SER), 2013 WL 6094600, at \*7 (D. Minn. Nov. 20, 2013). The court also rejected the defendant's argument that it was unaware of its obligation to produce text messages because “[i]t is no surprise to any of the parties in this case

that there were tablets, text messages, cell phones and laptops involved. All of these devices were known prior to the initiation of litigation, and it is common knowledge that ESI is contained all of these devices." *Id.* at \*10.

In addition, courts may sanction parties that fail to preserve relevant text and instant messages. In *Christou v. Beatport*, 2013 WL 248058, at \*14 (D. Colo. Jan. 23, 2013), the defendant failed to preserve text messages on an iPhone despite receiving a preservation notice. The defendant also lost the phone during discovery. The court rejected the defendant's argument that the phone did not contain relevant texts because "[t]he point is that neither the plaintiffs nor the Court will ever know." Consequently, the court ordered as a sanction that the plaintiff be permitted to introduce evidence at trial that the defendants had failed to preserve the text messages and argue that the jury should draw an adverse inference from this failure.

Similarly, a Minnesota federal court awarded an adverse inference sanction because the defendants failed to produce text messages in compliance with the court's discovery order. *First Financial Security, Inc. v. Lee*, 14-CV-1843 (PJS/SER), 2016 WL 881003, at \*5 (D. Minn. Mar. 8, 2016). The court stated that the defendants were "well versed in the use of text messages" and that "[i]t defies belief that experienced users such as defendants would have trouble locating text messages on their own phones (or asking someone to help them do so)." See also *Clear-View Technologies, Inc. v. Rasnick*, 2015 WL 2251005 (N.D. Cal. May 13, 2015) (awarding monetary sanctions and an adverse jury instruction because defendants deleted relevant text messages and "lost or threw away multiple mobile devices" that were used to access relevant communications and documents).

## Takeaways

Counsel should confer with their clients regarding the preservation of ESI, including text messages and instant messages, whenever their clients anticipate litigation or when they become a party to litigation. Counsel needs to understand their client's retention policies for text messages and instant messages and any challenges with preserving and collecting such information. If they need to be produced, counsel should confer with their clients to ensure that the key custodians subject to a legal hold preserve text messages and instant messages on company devices. Counsel should also confer with their clients to ensure that those key custodians subject to a legal hold turn off any automatic deletion feature so that the text messages and instant messages are preserved.