

Outside Counsel

Expert Analysis

Electronic Discovery And Vanishing Text Messages

As always, should you or any of your I.M. Force be caught or killed, the Secretary will disavow any knowledge of your actions. Good luck, Jim. This tape will self-destruct in five seconds.

—“Mission: Impossible” (1966).

Covert communications have come a long way since the old “Mission: Impossible” means of ensuring that confidential messages remain secure.¹ New technologies have emerged that let users set the shelf-life of text messages they have sent, causing the messages to expire and be deleted after a preset period of time.² This new means of communicating—where messages can be there one minute and gone the next—raises a host of questions for practitioners in the rapidly developing landscape of electronic discovery.

An informed discussion of the challenges inherent in these ephemeral text messages is necessarily grounded by the general principles governing what is discoverable, and the obligation to preserve evidence. As a preliminary matter, Federal Rule of Civil Procedure 26 sets forth broad guidelines for establishing what is discoverable. Rule 26(b)(1) provides, inter alia: “Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense[.] ... Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” Under this general framework, text messages, which have become a ubiquitous means of communication, are clearly discoverable.³

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The obligation to preserve evidence when a party “reasonably anticipates litigation” is “well established.”⁴ As Judge Shira Scheindlin held in *Zubulake v. UBS Warburg, LLC*,⁵ “[o]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a ‘litigation hold[.]’”⁶ A “litigation hold,” or “legal hold,” has been defined by The Sedona Conference⁷ as:

a communication issued as a result of current or reasonably anticipated litigation, audit, government investigation or other such matter that suspends the normal disposition or processing of records. Legal holds may encompass procedures affecting data that is accessible as well as data that is not reasonably accessible. The specific communication to business or IT organizations may also be called a “hold,” “preservation order,” “suspension order,” “freeze notice,” “hold order,” or “hold notice.”⁸

Preserving electronic evidence when one reasonably anticipates litigation is no easy task. For example, some metadata is changed by the simple act of turning a computer on.⁹ In such an instance, spoliation can be avoided by the simple practice of avoiding turning on the computer until it

can be done by an expert in a forensically sound manner. However, when dealing with disappearing text messages, lawyers may be faced with the problem of failing to act quickly enough to preserve the data in question, which may result in the data being lost forever.

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• **Know What to Look for.** This new mode of communication highlights the need for practitioners to keep abreast of emerging areas where discoverable evidence may be found. Discovery should not be limited to only traditional avenues such as paper documents and e-mails, but, where appropriate, should be viewed expansively to include new avenues of communication, including text messages, social media, Twitter, instant messaging and the like. For example, according to the American Academy of Matrimonial Lawyers, 81 percent of its members have either used, or have been confronted with evidence from Facebook, MySpace, Twitter and the like in the last five years.¹⁰ Attorneys should be aware of these avenues of discovery, and be diligent in both seeking them out and preserving discoverable evidence.

• **Cease and Desist—the Internal Litigation Hold.** Once the duty to preserve kicks in, clients need to be apprised of the scope of the litigation hold being implemented—in writing, where appropriate.¹¹ In the case of

clients who make use of this sort of texting application, they will need to be advised to cease using it in a manner that would result in potentially discoverable evidence being destroyed. Of course, letting a client use such an application for some purposes and not for others could be a recipe for disaster, should they inadvertently text on a discoverable topic.

Prudence might dictate halting the use of secret texting altogether, at least until litigation is completed (or no longer anticipated). Practitioners will also want to round up the actual smartphones believed to have discoverable material in an effort to preserve these text messages before they expire, as the failure to preserve such material could be a sanctionable offense.¹² Finally, the logistics of how to get a copy of the text in question before it disappears could be difficult.

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• **Cease and Desist—the External Litigation Hold.** Consider the following hypothetical: on day one, a text message set to delete itself in 30 days is sent. On day seven, litigation is reasonably anticipated, and the duty to preserve the hypothetical text commences. However, the text in question resides not only on the sender's and recipient's devices, but on the server of the company offering this secure messaging service.

As such, in addition to circulating an internal litigation hold notice, the third party company offering the secret texting application should receive notice of the litigation hold as well, to notify it to cease its routine deletion of texts despite its agreement to do so after the predetermined period has elapsed.¹³

• **Reasonable Retention Policy?** Many companies have document retention policies governing the length of time that documents are preserved. The use of a mode of communication that permits users to specify that text messages can expire after as short a period as one minute likely runs

afoul of many traditional policies. Moreover, even if a policy would permit such a short retention span, it is questionable whether courts would view such a document retention policy as reasonable.¹⁴

• **Is It Really Gone?** While every situation is different, it is sometimes possible for deleted files to be recovered via computer forensic investigation. For example, in a recent breach of fiduciary duty action in the Eastern District of Virginia,¹⁵ certain third party witnesses were ordered to produce their computer for forensic inspection to review it for documents not produced pursuant to an outstanding subpoena. They were also ordered not to touch the computer, other than turning it off. Forensic review revealed that not only had the computer been used after the court's explicit order to the contrary, but that over 500 files had been manually deleted. The forensic reviewer was successful in recovering some of the files, many of which were highly relevant and should have been produced. As such, there exists at least the possibility that texts "deleted" after the preset period has elapsed could be recovered via computer forensic review.

Conclusion

Self-deleting texting applications are finding use in a number of industries. As a Feb. 4, 2011 Wall Street Journal article reported, one doctor required his staff of approximately 40 individuals to start using one such service, as it gives physicians a means to communicate that complies with applicable federal regulations.¹⁶

Only time will tell how prevalent the use of such services will become, the effects such self-deleting texting technology will have on the world of electronic discovery, and how this area will evolve. As the use of vanishing text messages becomes more common, it is increasingly important for practitioners to be aware of the unique electronic discovery challenges they pose—both to effectively litigate cases and to avoid potential sanctions for spoliation.



1. For the uninitiated, *Mission: Impossible* was a television show that debuted in 1966, which featured the Impossible Missions Force (IMF), a group of secret agents. Most episodes of *Mission: Impossible* began with the leader of the team getting a highly confidential mission via cassette tape, which would self-destruct after the details of the mission were imparted. See, e.g., "Mission:

Impossible," Wikipedia, The Free Encyclopedia, http://en.wikipedia.org/wiki/Mission:_Impossible (last visited March 4, 2011).

2. See Lauren A.E. Schuker, "Secret Texting... Pass It On," *The Wall Street Journal*, Feb. 4, 2011, at B11 (describing companies offering self-deleting texting applications, including, e.g., a company called TigerText which offers an application that permits users to send text messages that will be deleted from all servers and users' devices after a period of time selected by the user: from one minute up to 30 days).

3. It should be noted, however, that Rule 26(b)(2)(B) provides limits on the production of electronic documents: "A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.... [T]he court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C)."

4. See, e.g., *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Secs., LLC*, 685 F.Supp.2d 456, 466 (SDNY 2010) (citing *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001)).

5. 220 F.R.D. 212 (SDNY 2003).

6. *Id.* at 218.

7. The Sedona Conference® is a research and educational institute dedicated to the advancement of law and policy in the areas of antitrust law, complex litigation and intellectual property rights. The Sedona Conference's Working Group on Electronic Document Retention and Production, which has authored numerous publications in the area of electronic discovery, consists of judges, attorneys and other experts who meet, discuss and publish on issues relating to electronic discovery.

8. The Sedona Conference® Glossary (Second Edition) (citation omitted).

9. Timothy Carroll & Bruce Radke, "Recognizing the Risks and Avoiding the Pitfalls of eDiscovery, Privacy & Data Sec. L.J. (November 2008), http://www.vedderprice.com/docs/pub/cb5f29bd-e684-4c55-b619-18723ba89e37_document.pdf.

10. See Leanne Italie, "Divorce Lawyers: Facebook Tops in Online Evidence in Court," *USA Today*, June 29, 2010, http://www.usatoday.com/tech/news/2010-06-29-facebook-divorce_N.htm.

11. See, e.g., *Pension Comm.*, 685 F.Supp.2d at 465 (holding that "the failure to issue a written litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information[>").

12. See, e.g., *Se. Mech. Servs. Inc. v. Brody*, 657 F.Supp.2d 1293 (M.D. Fla. 2009) (granting adverse inference instruction due to the bad faith wiping of text messages, e-mails, and other items from BlackBerry).

13. The logistics and ability of purveyors of these secret texting applications to actually halt the deletion of certain texts, or texts sent or received by certain users—either on the user's devices or on their servers—in response to a litigation hold is uncertain. The authors presume that these companies have mechanisms in place to deal with just such an eventuality.

14. According to Jeff Fowler, an attorney in O'Melveny & Myers' Electronic Discovery and Document Retention Practice, "the law stipulates retention policies must be implemented in good faith and that courts may see unreasonably short retention periods as an attempt to shirk legal obligations." Kurt Marko, *The Paperless Office & Document Retention Policies*, Cary F. McGovern, *The Fileman's Blog* (Oct. 23, 2009), <http://www.carymccgovern.com/2009/10/23/the-paperless-office-document-retention-policies/>.

15. *Sonomedica Inc. v. Mohler*, Civil Action No. 1:08cv230, 2009 U.S. Dist. LEXIS 66060, at 6 (E.D. Va. May 6, 2009).

16. A.E. Schuker, "Secret Texting...Pass It On," *The Wall Street Journal*, Feb. 4, 2011, at B11.