



SUMMER 2023 E-NEWSLETTER

At Digital Mountain, we assist our clients with their electronic discovery, digital forensics, cybersecurity, and data analytics needs. For this E-Newsletter, we discuss mobile device messaging risks to organizations, as well as legal and data security implications.

Courts Send More Signals to Preserve Texts

Judges are not having it with the idea that text messages just disappear from mobile devices. Ever since ephemeral messaging apps, like Signal, or traditional messaging apps, like iMessage, started including auto-delete message functions, the Courts have held a consistent stance: if discoverable electronically stored information is intentionally deleted, including via ephemeral messaging functions, there's going to be some Rule 37(e) sanctions coming. This position is consistent with the courts upholding rules for other categories of evidence under applicable rules. Therefore, looking at a couple of recent cases where judges are not tolerating any digital sleight of hand is a beneficial reminder.



Bad Behavior on Both Sides

In *Hunters Cap., LLC v. City of Seattle*, No. C20-0983 TSZ, 2023 WL 184208 (W.D. Wash. Jan. 13, 2023), a bevy of disappearing text messages and two actual cellphones led to Rule 37(e) sanctions against the defendant and one of the plaintiffs for their failures to preserve electronically stored information as required. The messages that disappeared from the phones of the City of Seattle's (Defendant) mayor, chief of police, and fire chief were text messages among the three officials in group chat, i.e., just those three individuals texting each other collectively. So, while more than 160,000 messages involving those three people were discovered among the messages of other city employees, a voluminous number of texts among the three arguably highest-ranking city officials were "lost." The mayor claimed that the texts were deleted primarily because she enabled a 30-day deletion setting on her phone before a litigation hold was received, albeit after the complaint was filed. The fire chief forgot his passcode and had to reset his iPhone, wiping all his messages in the process, more than two months following the start of litigation. And rounding out the trio of creative approaches, the police chief found the time to delete more than 27,000 text messages because she thought the city was keeping them somewhere else. On the opposing side, the court was not impressed with one of the plaintiffs' selective text deletions because erasing those texts undermined the plaintiff's loss claims and the discoverable texts could have been

presented as mitigating evidence by the City. As far as the plaintiff who lost not one, but two cell phones while enjoying the outdoors boating and hiking, the court declined, perhaps with raised eyebrows, to issue sanctions. Everyone else was appropriately sanctioned.

Timing is Everything

Generally, it's considered a best practice not to delete, wipe, or change settings to automate the messaging clearing process after you file a complaint. Such is the case in *Pable v. Chicago Transit Auth.*, No. 19 CV 7868, 2023 WL 2333414 (N.D. Ill. Mar. 2, 2023), where the court found that the plaintiff engaged in selective housekeeping on his Signal messaging app both before and after litigation started. To compound matters further, the plaintiff made false statements regarding the deletions at his deposition. How false were the statements? So false that the Chief Operating Officer of Signal was willing to testify against the claim the plaintiff made. Not unsurprisingly, the plaintiff's case was dismissed with prejudice and stands as a cautionary example of what not to do.

Who's Watching History

As eDiscovery and digital forensics professionals, we're often asked to confirm whether and when the preservation of chats, texts, emails, and other electronically stored information began, often by confirming if or when an app's "history" setting was enabled. That's why in *In re Google Play Store Antitrust Litig.*, --- F. Supp. 3d ---, 2023 WL 2673109 (N.D. Cal. Mar. 28, 2023) Judge Donato's Rule 37(e) sanctions caught our attention. In this matter, evidence shows that Google failed to preserve messages sent over its Google Chat in-house messaging platform. In fact, even after training employees to "Communicate with Care," which included appropriate behavior during litigation holds, Google continued to allow employees to set their Chat history settings as they wished. When questioned about Google's ability to set Chat history to preserve messages from the administration side of the app, Google contended that it was not possible to do so. Unfortunately, evidence presented to the court showed otherwise, leading Judge Donato to write, "Why this situation has come to pass is a mystery. From the start of this case, Google has had every opportunity to flag the handling of Chat and air concerns about potential burden, costs, and related factors." Judge Donato declined terminating sanctions and reserved ordering specific costs, fees, or other sanctions until later dates. The lesson here is that the ultimate responsibility to preserve under a litigation hold rests with the organization – not each individual employee.

Testing their Patience

No matter how damning the evidence is, the courts do not have much patience for spoliation or failure to preserve evidence, irrespective if that evidence is digital or document. Testing the court's knowledge of how ephemeral messaging works, seeking ways to evade mobile device discovery, or simply leaving the choice to the individual employee isn't wise. The courts know that they can turn to eDiscovery and digital forensics professionals, like Digital Mountain, to investigate, track, and report on what's there and gone when it comes to mobile device data. The best strategy? Save the messages and forget the tricks because anything else may cause your case to go up in smoke.

Please direct questions and inquiries about electronic discovery, digital forensics, cybersecurity, and data analytics to info@digitalmountain.com.

UPCOMING INDUSTRY EVENTS

DFRWS USA 2023
Baltimore, MD: July 9-12, 2023

MASTER'S CONFERENCE JULY 2023
Seattle, WA: July 19, 2023

PFIC 2023 VIRTUAL
August 1-4, 2023

ABA2023 ANNUAL MEETING
Denver, CO: August 2-8, 2023

SANS DFIR SUMMIT
Austin, TX: August 3-4, 2023

[Click here to see more upcoming events and links.](#)



Digital Mountain, Inc. Founder and CEO, Julie Lewis, will be presenting at various upcoming industry events. Please send requests for speaker or panel participation for her to marketing@digitalmountain.com.

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