

Obtaining Text Messages During Discovery In Civil Litigation In New Jersey: A Framework To Consider

By: Donald E. Taylor, Esq. & James E. Tonrey, Jr., Esq.

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Text messages played a prominent role in the recent, well publicized trial of Dharun Ravi, who was convicted of invading the privacy of his college roommate who later committed suicide. “I got so creeped out after Sunday,” Mr. Ravi texted after surreptitiously viewing his roommate kiss another man. He also texted that he had an idea to “keep the gays away.”

While the prosecution successfully obtained Mr. Ravi’s text messages prior to trial in that criminal case, it raises the question of whether civil litigators may just as easily obtain such potential smoking gun evidence during business-related civil litigation.

One hardly needs statistics to understand that text messaging has become a way of life in the twenty-first century. Fueled by the proliferation of cell telephones, smart phones and other similar hand-held devices, text messaging has become a standard form of communication with its own language of abbreviations, acronyms and symbols. For persons wishing to communicate with distantly-located family members, friends, business colleagues, employees and the like, “texting” enables users to engage in real-time, electronic dialogue at any time and from virtually anyplace in the world.

For litigation counsel, obtaining potential witnesses’ past text messages could be very valuable. The witness’s text messages may provide insight into his or her contemporaneous thoughts, intentions and/or understanding concerning matters that may have become issues in a subsequently-filed lawsuit. Indeed, text messaging, in large part, brought down powerful, crusading New York Governor Elliot

Spitzer for his role in a prostitution scandal.

Text messages are not, however, as readily harvestable as other materials that may typically be obtained during discovery in a civil lawsuit. By their very nature, “texts” are not in paper document form, but rather are in electronic form only. Nor are texts likely to be printed out from or saved to a separate computer, which distinguishes texts from electronic mail. The fact is that, unless specifically saved on a user’s hand-held device, only the wireless service provider may have access to past text messages, and providers are not required to maintain texts for any set period of time. Policies vary amongst providers as to whether text messages are saved for more than a few days.

The unique attributes of text messages may hamper counsel’s ability to obtain them as a matter of right pursuant to generally applicable discovery rules. Rule 26 of the Federal Rules of Civil Procedure provide that 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.” Fed. R. Civ. P. 26(b)(2)(b). New Jersey Court Rule 4:10-2 contains an identical provision. N.J. Ct. R. 4:10-2(g). While there is a fair amount of written authority addressing text messages in the criminal context, there is little precedent addressing it in civil litigation. If text messages qualify as not being “reasonably accessible because of undue burden or cost,” the party seeking them in discovery may be required to establish “good cause” pursuant to Rules 26 or 4:10-2 and share in

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the cost of retrieval before being provided access to such text messages.

In light of this, litigation counsel may be well advised to adopt a pro-active approach to the discoverability of text messages. By way of example, in cases involving a likelihood of electronic discovery, counsel should be aware of its own client's duty to preserve such information, including the necessity of providing the client with a "litigation hold" letter that specifically includes text messages so that such preservation may be accomplished. In the leading case of *Zubalake v. UBS Warburg, LLC*, 220 FRD 212, 216-17 (S.D.N.Y. 2003), the Court explained that "[t]he obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation." Consequently, just as a client may have a duty to preserve electronic mail communications, the client may also have a duty to preserve text messages sent or received by its management and employees.

Likewise, counsel may find it necessary to include a specific reference to text messages in a litigation hold letter to the adverse party and/or counsel. Because courts can and will sanction parties for failing to preserve text messages, counsel is well advised to examine this issue thoroughly. See *Passlogix, Inc. v. 2FA Technology, LLC, et al.*, 708 F. Supp. 2d 378 (S.D.N.Y. 2010) (imposing monetary sanction of \$10,000 on a party for, among other things, failing to preserve text messages).

Counsel should also be prepared to establish during discovery an appropriate basis for an application to the Court to obtain access to a witness's past text messages. Assuming for purposes of argument that adverse counsel designates text messages as being not reasonably accessible (and thus, pursuant to Rules 26 and 4:10-2 cited above, not discoverable as of right), "good cause" will need to be established in order to obtain discovery of those text messages. To do so, counsel may consider establishing through interrogatories the witness's access to and/or ownership of a hand held device such as a smart phone, and follow that up with deposition questions to the adverse party or third party witnesses targeting the persons to whom text messages were sent or received. While counsel can do no more than speculate what the text messages may actually say prior to analyzing them, establishing the potential existence and relevancy of those prior text messages should be helpful in persuading the Court to permit the discovery. Likewise the aforementioned discovery will be useful in identifying the witness's hand held device so that it may be examined by an expert witness attempting to harvest those prior text messages.

Counsel should also expect to confront issues concerning potentially privileged information. Unfettered access to a litigation adversary's text messages could allow access to the texter's confidential communications with counsel or other professionals. In this scenario, the texter's confidential information, which may include attorney-client privileged communications,

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has been exposed. Counsel for the discovering party may have inadvertently provided a basis for being disqualified because counsel would now be privy to confidential information. Thus, counsel on either side of a dispute should be sensitized to these potential issues. More importantly, counsel may be better served by remaining pro-active and considering measures for the protection of such potentially confidential information -- such as, for example, the appointment of a special master/expert to take custody of, and/or harvest the pertinent text messages from, the hand held device -- before seeking such discovery. While potentially expensive, the cost may be money well spent in the long run, considering the alternatives.

define the norms for electronic communications, counsel may expect the law relating to the discoverability of text messages to undergo a similar evolution. That said, however, the foregoing sets forth a framework of litigation strategy regardless of the nuances that the underlying law may incorporate over time. We hope that you find this discussion helpful, and look forward to addressing any comments that you may have.



In sum, as text messaging continues to re-



Donald E. Taylor, Esq.
Commercial Litigation Team
phone: 732.855.6434
email: dtaylor@wilentz.com



James E. Tonrey, Jr., Esq.
Commercial Litigation Team
phone: 732.855.6199
email: jtonrey@wilentz.com

90 Woodbridge Center Drive
Woodbridge, NJ 07095

Meridian Center I, Two Industrial Way West
Eatontown, NJ 07724

110 William Street
New York, NY 10038

Two Penn Center Plaza, Suite 910
Philadelphia, PA 19102

Donald E. Taylor is a shareholder and James E. Tonrey, Jr., is counsel in the complex commercial litigation department at Wilentz, Goldman & Spitzer, P.A.

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