
Text Messages are Part of the Record

There have been several court cases where emails have become exhibits in the proceedings. Because of this, most people are more cautious about what they write in emails because they understand that they have the potential to become part of the public record. This same caution also needs to apply to text messages.

Many people use text messages for quick, informal communications. Text messages are not stored long-term on a central server like email messages. In fact, the only wireless company that temporarily stores them is Verizon, and it deletes them after 3 to 5 days. Because of this, the only way to obtain text messages is to physically obtain the device on which they were sent or received. This lack of permanence and the informal nature of text messages has led people to use them to send inappropriate or incriminating content.

Current Case Law

Text messaging is now ubiquitous, and the courts are catching up. In a recent ruling, a Colorado Court of Appeals issued the following statement in regards to authenticating text messages for use in court:

“First, a witness with personal knowledge must testify that printouts of text message(s) accurately reflect the content of the message(s). Second, a witness with personal knowledge must provide testimony establishing the identity of the purported sender of the text message(s). Identity may be established through a combination of at least two of the following: (1) the phone number was assigned to or associated with the purported sender; (2) the substance of the text message(s) was recognizable

as being from the purported sender; (3) the purported sender responded to an exchange in such a way as to indicate circumstantially that he or she was in fact the author of the communication; or (4) any other corroborative evidence under the circumstances.” *People v. Heisler*, 2017 COA 58, ¶ 15.

This ruling establishes a precedent that will make it easier for text message to be used as evidence in legal proceedings.

Litigation Hold

During litigation, companies and individuals are often subject to a litigation hold, which means they are required to preserve any evidence (e.g., paper records, emails, texts) pertaining to the case. Text messages, even those on a personal device, are discoverable and may be subject to the hold. Failure to comply with the hold can result in legal sanctions and may even lead the court to instruct the jury to infer that the destroyed information was harmful to the destroying party's case.

What This Means for Counties

Text messages, even those sent or received by personal devices, can be used as evidence in legal proceedings. Before hitting the send button, consider the tone and content of the message. For more information, contact CTSI at 303 861 0507.

