

## When Text Messages Disappear, Sanctions May Appear

By **Elizabeth Babbitt and Nicollette Khuans** (December 7, 2022, 5:29 PM EST)

While you might still be reeling from your newfound power to change the font on your iPhone home screen, lawyers should pay close attention to another modification: the ability to modify sent iMessages.

That's right — with the release of Apple's new update to its operating system (iOS 16 or later), recently sent iMessages can now be "unsent" or edited.[1]

These sorts of changes to communications technology are rolled out quickly and frequently, and they can affect what obligations a party has in terms of preserving electronically stored information. But, the Federal Rules of Civil Procedure are designed to account for and anticipate these changes in technology, including those that will affect a party's preservation obligations in discovery.

The days of issuing a static litigation hold memo that still refers to the preservation of a company's faxes are long gone. Parties are obligated under the Federal Rules to take efforts to preserve ESI, including SMS messages, iMessages and other forms of potentially relevant communications — and the sanctions for failing to comply can be severe.

As a general matter, this preservation obligation is triggered by a party reasonably anticipating litigation, and certainly by the filing of a lawsuit. If a court determines that a party intentionally took steps to deprive the other side of ESI in litigation, it may: (1) presume the lost information was unfavorable to the party; (2) issue an adverse inference instruction to the jury; or (3) dismiss the action or enter default judgment against the offending party.[2]

A litigant's preservation obligations have not changed, even as advancements in communication technology make such preservation efforts all the more difficult. When advising a client under a preservation hold regarding communications, the prudent attorney should identify all of the forms of communications that a client accesses or employs — including communications on clients' personal devices, to the extent they are used to communicate about the subject of the litigation.

Many of the latest forms of chatting, texting or DM-ing have so-called ephemeral features — in other words, a message can be sent or received and automatically and permanently deleted if a user engages certain settings. A witness or client may, unwittingly or otherwise, set their communications to automatically delete — potentially forever destroying communications about a case or potential case.

Courts have recognized that "disabling an autodeletion function is universally understood to be one of the most basic and simple functions a party must do to preserve ESI," as stated in the U.S. District Court for the Northern District of Illinois' 2021 ruling in *DR Distributors*



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LLC v. 21 Century Smoking Inc.[3]

What does this mean for parties who anticipate litigation or are actively engaged in litigation? Their counsel should identify all methods of communication the clients — or the clients' employees — and key witnesses are using professionally and personally to exchange information that is potentially relevant to the case. Interoffice chat functions like Slack should be preserved, and steps should be taken to disable any auto-deletion settings.

Critically, attorneys should stay current on updates to the communication platforms their clients or key witnesses are using.

With the release of Apple's new update, iPhone users can modify their recently sent iMessages by "unsending" or editing them. While Apple markets this feature as a way to fix a typo or recall an iMessage sent to the wrong person, it also gives rise to ESI preservation implications. Although the recipient may receive notice that an iMessage has been "unsent" or "edited" in their message thread, the original language of the initial message may not be preserved. Clients and witnesses should be warned against modifying their communications in a manner that might ultimately result in the spoliation of ESI and sanctions.

The ability to make electronic communications disappear without a trace is a tool available on many platforms, including Signal, Telegram, DingTalk, Snapchat and Instagram — among others. Courts have found that the use of such auto-deletion features or ephemeral messaging is sanctionable conduct when a party has an obligation to maintain such communications.

In 2020, the U.S. District Court for the Northern District of California terminated a lawsuit, *WeRide Corp. v. Kun Huang*, where the plaintiff company "left in place the autodelete setting on its email server, began using DingTalk's ephemeral messaging feature, and maintained a policy of deleting the email accounts and wiping the computers of former employees," because the repeated spoliation of evidence unfairly prejudiced the defendant's case.[4]

Last year, the U.S. District Court for the District of Arizona concluded in *Federal Trade Commission v. Noland* that the party's use of Signal messages — including the auto-deletion feature — resulting in the deletion of Signal messages, coupled with suspicious timing for the installation of the Signal app, showed that the party intended to deprive the other side of the information contained in the messages, and ordered an adverse inference sanction against the spoliating party.[5]

To ensure compliance with ESI preservation obligations when involved in or anticipating litigation, counsel should:

- Stay up-to-date on all forms of electronic communications used by the client, the client's employees and key witnesses, including their changing features — especially those relating to auto-deletion, editing, recall and ephemeral messaging capabilities.
- Confirm what platforms anyone subject to a litigation hold is using to communicate — including on their personal devices, to the extent they use those devices to communicate about the subjects of the litigation.
- Ensure that litigation hold directives require the disabling of any settings across various communication platforms that could interfere with their obligation to preserve ESI.

- Remind the client that it is best practice to avoid communicating regarding anticipated or active litigation beyond communications with their attorney.
- Explain to the client that the consequences for spoliating potentially relevant communications can be severe, including sanctions up to and including the entry of judgment against the offending party.

Check in with the client regularly to ensure their understanding of and compliance with their ESI preservation obligations, especially relating to evolving forms of communications technology.

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[1] iPhone User Guide: Unsend and edit messages on iPhone, available at: <https://support.apple.com/guide/iphone/unsend-and-edit-messages-iphe67195653/ios>.

[2] Fed. R. Civ. P. 37(e)(2).

[3] *DR Distrib., LLC v. 21 Century Smoking, Inc.* , 513 F. Supp. 3d 839, 979 (N.D. Ill. 2021).

[4] *WeRide Corp. v. Kun Huang* , Case No. 18-cv-7233, 2020 WL 1967209, at \*9-12 (N.D. Cal. 2020).

[5] *FTC v. Noland* , Case No. 20-cv-47, 2021 WL 3857413, at \*13-15 (D. Ariz. Aug. 30, 2021).