

The State of E-Discovery as Social Media Goes Mobile

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Brief History of Electronic Discovery (e-discovery) in the U.S.

- ▶ With the series of decisions in *Zubulake v. UBS Warburg* and the 2006 amendments to the Federal Rules of Civil Procedure, a new field within law practice appeared, the law regarding electronic discovery (e-discovery).
- ▶ The phase of litigation known as discovery has existed for many years, with opposing parties and their lawyers making requests and exchanging documents that are relevant to a case.
- ▶ E-discovery transformed this process from the paper-based, pre-Internet world of discovery to a whole series of rules and decisions related to how to identify, collect, preserve, analyze, review, produce and present electronically-stored information (ESI).
- ▶ New e-discovery industry developed.
- ▶ Efforts to determine standards and best practices, with EDRM being one example.

Electronic Discovery Reference Model (EDRM)

Electronic Discovery Reference Model

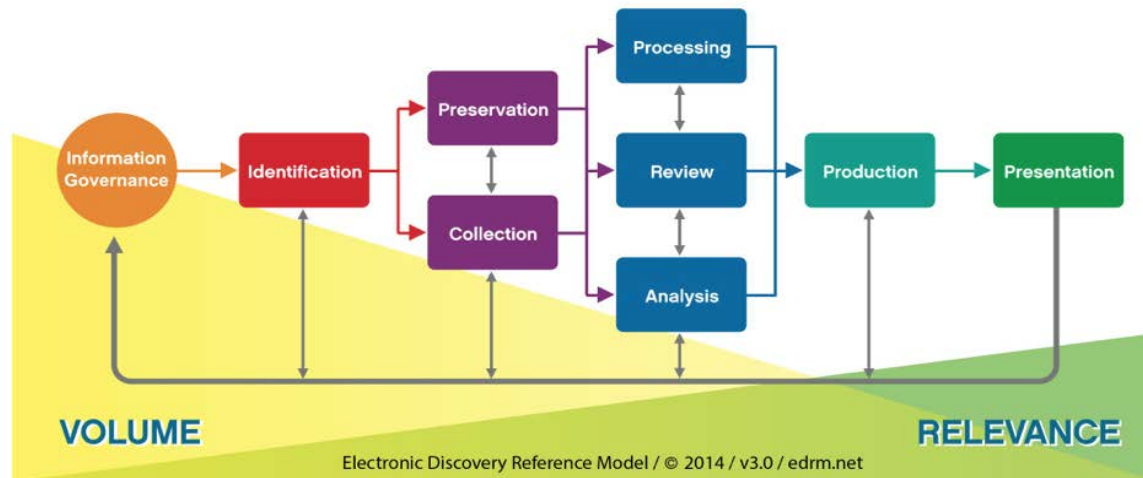


Figure 1 Diagram of the Electronic Discovery Reference Model

The Electronic Discovery Reference Model (EDRM) provides a framework for the e-discovery process from before litigation starts to the presentation of evidence in court. Note that the duty to preserve begins when litigation is reasonably anticipated. New focus is on Information Governance for clients, including issues with retention and destruction law, policies and procedures.

Challenges with New Technologies

- ▶ Not only is this evidence now primarily in digital form, but it also exists a wide range of media and formats, from word processing and spreadsheet files to photographs, blog postings, videos, emails and websites.
- ▶ The terminology Electronically Stored Information (ESI) was chosen to reflect current and potential future technologies and cast a wide net in the discovery process.
- ▶ Recent debates and court decisions have focused on ESI that is posted on social media sites (Facebook) and text messages.
- ▶ Another challenge is how to handle more informal and transient communications beyond text messages, including new services for mobile devices and messaging apps, such as WhatsApp and Snapchat.

E-Discovery and Text Messages

- ▶ Long line of cases supports the discoverability of text messages as yet another ESI format.
- ▶ In terms of civil cases, these cases represent a wide variety of kinds of litigation, including employee privacy, sexual harassment and retaliation, breach of a license agreement, non-competition, anti-trust, fraud and unfair trade practices, product liability, employment discrimination, breach of contract and personal injury.
- ▶ Sample cases include:
 - *City of Ontario v. Quon*, 130 S.Ct 2619 (2010) – note that this is a U.S. Supreme Court case.
 - *E.E.O.C. v. Original Honeybaked Ham Co. of Georgia, Inc.*, No. 11-cv-02560-MSK-MEH, 2012 WL 5430974 (D. Colo. Nov. 7, 2012).
 - *Passlogix, Inc. v. 2FA Tech., LLC*, 708 F. Supp. 2d 378 (S.D.N.Y. 2010).
 - *PTSI, Inc. v. Haley*, ---A.3d---, 2013 WL 2285109 (Pa. Super. Ct. May 24, 2013).
 - *In re Pradaxa (Dabigatran Etexilate) Prods. Liab. Litig.*, MDL No. 2385, 2013 WL 6486921 (S.D. Ill. Dec. 9, 2013)

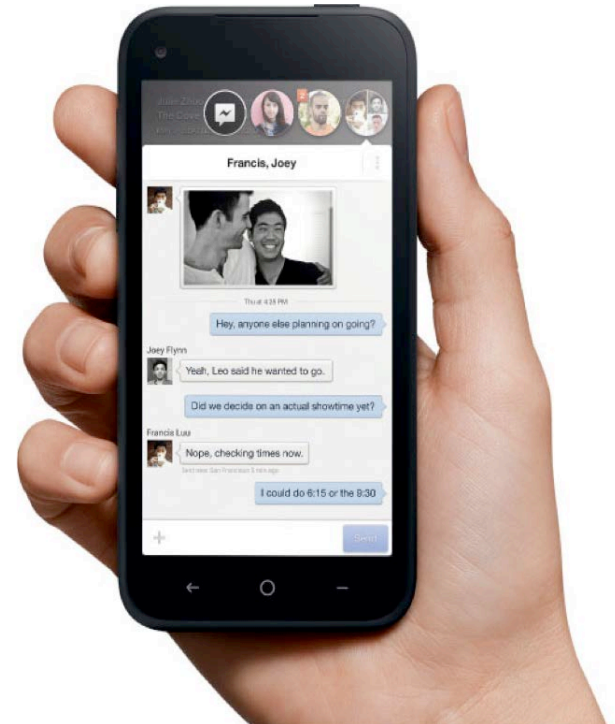
E-Discovery and Text Messages

- ▶ Concerns that lawyers have not kept up with the unique challenges with the preservation and admissibility of text messages.
- ▶ Importance of text messages as replacing email as major method of communication.
- ▶ Issues continue with cases from 2014–2015:
 - *Calderon v. Corporacion Puertorrique a de Salud*, —F. Supp. 2d—, 2014 WL 171599 (D.P.R. Jan. 16, 2014).
 - *Painter v. Atwood*, No. 2:12-cv-01215-JCM-RJJ, 2014 WL 1089694 (D. Nev. Mar. 18, 2014).
 - *Federico v. Lincoln Military Housing, LLC*, No. 2:12-cv-80, 2014 WL 7447937 (E.D. Va. Dec. 31, 2014).
 - *Finkle v. Howard Cnty., Md.*, No. SAG-13-3236, 2014 WL 6835628, (D. Md. Dec. 2, 2014).
 - *Small v. Univ. Med. Ctr. of S. Nev.*, No. 2:13-cv-00298-APG-PAL, 2014 WL 4079507 (D. Nev. Aug. 18, 2014).
 - *HMS Holdings Corp. v. Arendt*, No. A754/2014, 2015 WL 2403099 (N.Y. Sup. Ct. May 19, 2015).

Overarching Issues with E-Discovery and Social Media

- ▶ Importance of social media as ESI
- ▶ Forms and formats of social media
- ▶ Generated and stored on a number of types of hardware, including mobile devices, especially in an age of BYOD (Bring Your Own Device)
- ▶ Duty to preserve and sanctions for spoliation
- ▶ Federal, state, international, constitutional and common law privacy protections
- ▶ Social media and U.S. Stored Communications Act
- ▶ Social media and the U.S. National Labor Relations Act
- ▶ Social media Terms of Service
- ▶ Obtaining social media evidence: users as opposed to social media providers/vendors
- ▶ Evidentiary issues: authentication, relevance, over-broad requests

Mobile Messaging Apps Replacing Email



E-Discovery Issues with Mobile Messaging Apps

- ▶ Legal scholars are already expressing concerns with the e-discovery issues with mobile messaging apps because of their informal and transient nature and as well as the promises made in their Terms of Service.
- ▶ For example, see:
 - Danielle Young, *Comment: Now You See It, Now You Don't... Or Do You? Snapchat's Deceptive Promotion of Vanishing Messages Violates Trade Commission Regulations*. 30 J. Marshall Journal of Information Technology & Privacy L. 827 (Sum. 2014).
 - Ryan G. Ganzenmuller, *Comment: Snap and Destroy: Preservation Issues for Ephemeral Communications*. 62 Buffalo L. Rev. 1239 (Dec. 2014).
 - *Understanding Mobile Apps*. U.S. Federal Trade Commission, <http://www.consumer.ftc.gov/articles/0018-understanding-mobile-apps> (last visited 7/9/15).

What is Snapchat?



- ▶ The free mobile app, which was founded by students at Stanford University in 2011, now claims a user base of 100 million.
- ▶ By some metrics, it is the fastest-growing mobile messaging app in the United States.
- ▶ It is the most-buzzed-about of a new breed of social media apps that emphasize photo- and video-sharing.
- ▶ Snapchat's Terms of Service are now careful to describe both the circumstances in which ESI is deleted and when it is retained.
- ▶ They have also added qualifiers to acknowledge and clarify that sometimes data may be accessible outside of these guidelines.
- ▶ Specific provisions within Terms of Service that relate to e-discovery.

What is WhatsApp?

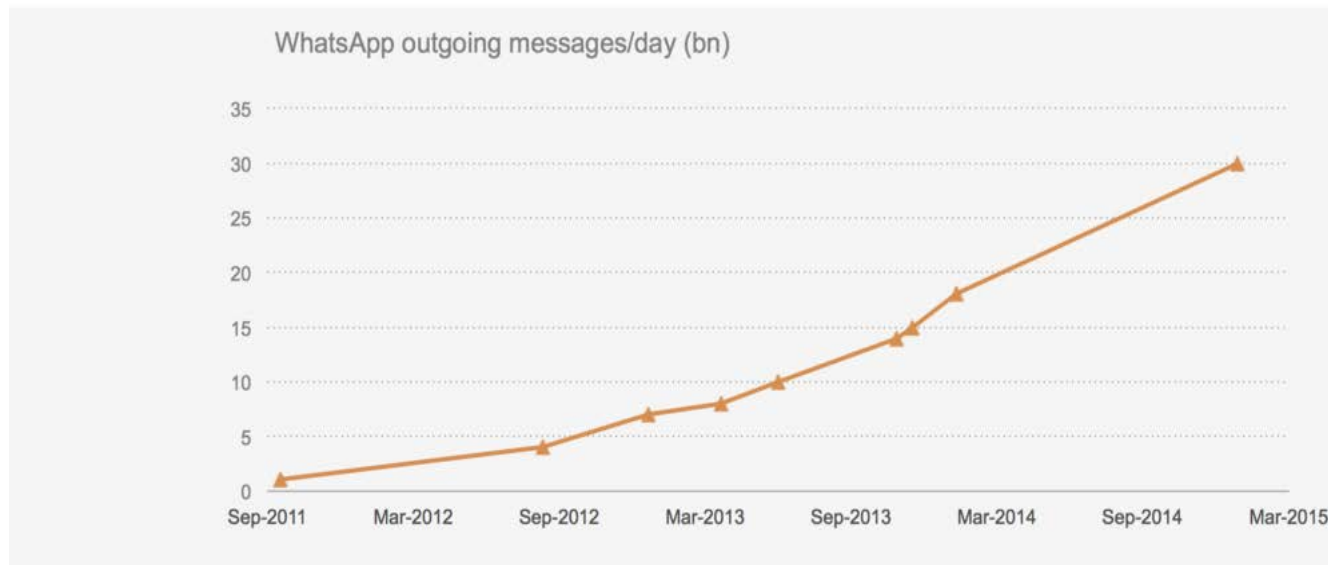


- ▶ An even more popular (if less talked-about) messaging app is WhatsApp.
- ▶ In fact, this platform is ranked by some data analysts as the most popular messaging app around the globe.
- ▶ WhatsApp, which was founded in 2009, is proud to tout its base of active as opposed to merely registered users -- more than 600 million as of August 2014, according to data cited in *Forbes*.
- ▶ In contrast to Snapchat, WhatsApp has designed for users' easy backup of communications.
- ▶ It contains settings to both save incoming media on its users' mobile devices and to back up chats, for instance to iCloud for iOS users, and send chat histories for the past 7 days to email.
- ▶ WhatsApp users are warned to have no expectation of privacy for status messages. (["WhatsApp :: Legal" 2015](#)).
- ▶ Specific provisions within Terms of Service that relate to e-discovery.

Popularity of Mobile Messaging Apps

WhatsApp now 50% bigger than global SMS

WhatsApp now doing 30bn messages/day – global SMS is ~20bn

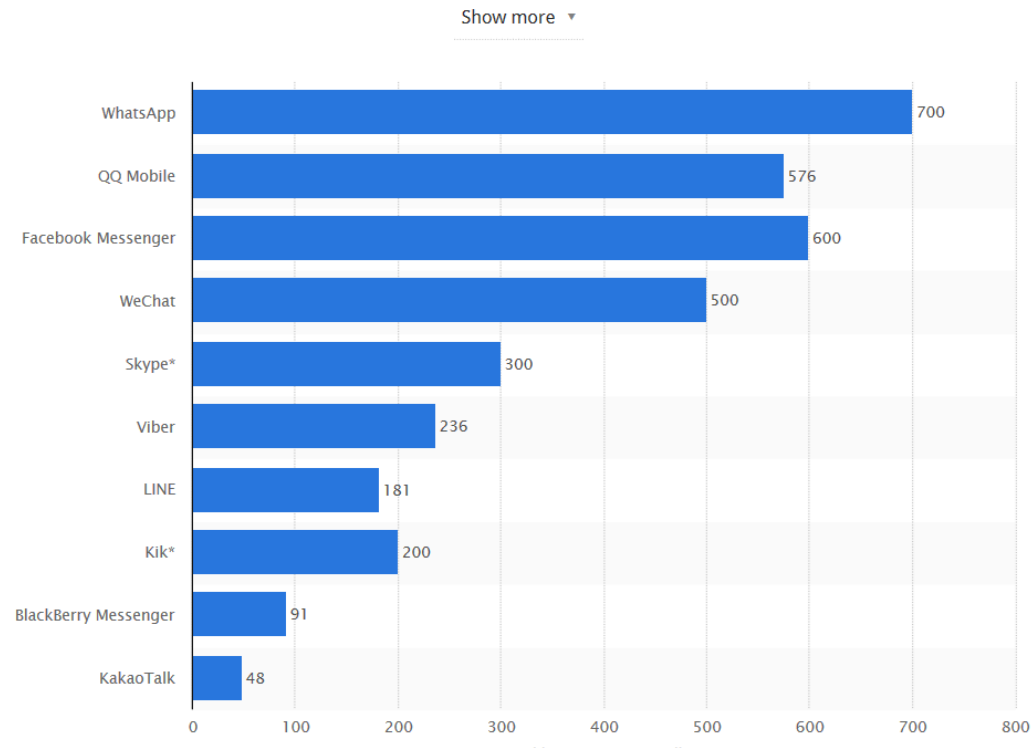


Source: WhatsApp, a16z

Popularity of Mobile Messaging Apps

Most popular global mobile messenger apps as of March 2015, based on number of monthly active users (in millions)

This statistic gives information on the most popular global mobile messenger apps as of March 2015, based on number of monthly active users. As of that month, 181 million users were accessing the LINE messenger on a monthly basis.



E-Discovery Issues with Mobile Messaging Apps

- ▶ While conventional wisdom and some of the appeal of Snapchat, WhatsApp and other mobile messaging apps is that their data and media “vanishes” or expires, a closer examination shows this is not always the case.
- ▶ A permanent archive of such data may be discoverable on a user’s personal devices. Examples: saved “MyStory” videos or “snaps,” the WhatsApp Chat Archive, user screenshots, deleted messages retained in /tmp/ directory.
- ▶ Snapchat’s company servers and those of other apps, as well as backup utilities such as iCloud or SnapSave, also retain data that may be discoverable.
- ▶ Popular mobile messaging apps in other countries and how to deal with these in an e-discovery process.

E-Discovery Issues with Mobile Messaging Apps

- ▶ Beyond texts, photos and videos, a user's metadata and header data can establish authenticity and context and should also be sought during e-discovery.
- ▶ Location data is of particular value for mobile messaging.
- ▶ Legal professionals retain a duty to ensure that there is no spoliation of a client's data on or from mobile devices or apps – damaged, deleted, altered or otherwise put beyond viable use once litigation is reasonably anticipated.
- ▶ Will “deletion by default” become the standard for other messaging and social media software beyond Snapchat?
- ▶ Under these circumstances, it will be even more important for lawyers and parties to act swiftly to freeze or stop such expiration or overwrites of relevant ESI.
- ▶ Parties may not even think about this kind of ESI – or the devices that it could reside upon – and not realize that it is included in their duty to preserve.



Figure 4 Screenshot of WhatsApp's Chat Settings showing the option to Save Incoming Media and for Chat Backup

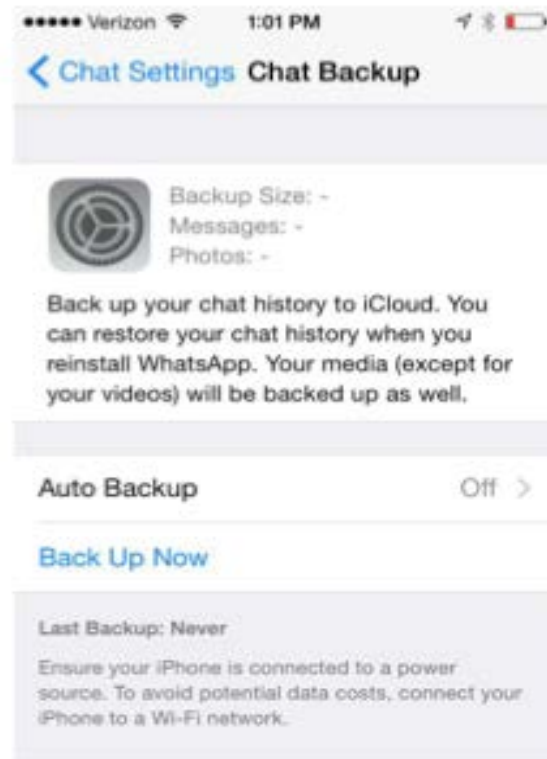


Figure 5 Screenshot of the WhatsApp Chat Settings showing where to toggle Auto Backup and detailing the iCloud backup

Support for E-Discovery of Mobile Devices – One Vendor's Services

http://senseient.com/?s=text+messages


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SEARCH RESULTS FOR: TEXT MESSAGES

MOBILE PHONE TEXT RECOVERY

Depending on the make and model number of your mobile phone, it may be possible to recover deleted items, such as: text (SMS) messages, pictures and videos, even if the phone has been deactivated from service. There is no guarantee that the items you would like recovered are still available on the phone.



Factors that can affect recovery include: the phone's make/model, the length of time that has passed since the relevant items were deleted, the number of new items that have been stored on the phone since the relevant items were deleted, or whether the phone has been reset or restored. We also need the phone to power on and communicate through its data port in order to perform any recovery.

We offer three service levels of recovery:

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E-mail Address (required)

Service of Interest (required)

Digital Forensics

Message (required)

Questions for E-Discovery and Mobile Messaging Apps

- ▶ Does a permanent archive of such data exist?
- ▶ How can legal professionals identify the scope of discovery and tailor it appropriately?
- ▶ How can this data be preserved and collected?
- ▶ What does spoliation mean in this context?
- ▶ How can recent cases involving text messaging apply?
- ▶ What are the duties of the lawyer under the ethical rules, specifically American Bar Association (ABA) Model Rule 1.1 on competence, which includes the benefits and risks of relevant technology?
- ▶ Can technology-assisted review (TAR) help with this (including for non-text-based ESI)?

Amendments to the Federal Rules of Civil Procedure (FRCP)

- ▶ **Supreme Court Approves Proposed Amendments to Federal Rules of Civil Procedure, Submits Proposals to Congress for Approval (By K&L Gates on April 29th, 2015).**
 - Today, April 29, 2015, Chief Justice John G. Roberts submitted the proposed amendments to the Federal Rules of Civil Procedure which “have been adopted by the Supreme Court of the United States” to Congress for final approval.
 - Absent legislation to reject, modify or defer the rules, they will become effective December 1, 2015.
 - For a copy of the U.S. Supreme Court’s submission to Congress, see <http://www.ediscoverylaw.com/2015/04/articles/news-updates/supreme-court-approves-proposed-amendments-to-federal-rules-of-civil-procedure-submits-proposals-to-congress-for-approval/>.

Amendments Address Several Issues and Themes

- ▶ Early judicial case management, intended to speed up the process, encourage collaboration and reduce delays at the beginning of litigation – *see* especially Rules 4(m), 16(b)(1), 16(b)(2) and 16(b)(3)
- ▶ The scope of discovery, with proportionality being the key – *see* Rules 26(b)(1) and 26(c)(1)
- ▶ Rule 34 – which governs the production of documents, ESI and tangible things
- ▶ Failure of parties to preserve electronically stored information (ESI) and to more clearly define the consequences for this failure – *see* Rule 37

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- ▶ Victor Li, *Looking Back on Zubulake, 10 Years Later*. ABA Journal (Sept. 1, 2014),
http://www.abajournal.com/magazine/article/looking_back_on_zubulake_10_years_later (last visited 7/9/15).
- ▶ Jordan D. Maglich, *Major Changes Coming to Federal Rules of Civil Procedure*. The Federal Lawyer 62 (Mar. 2015), at 36–38, 45.
- ▶ Christa Miller & Lee Papathanasiou, *Three Steps to Prepare for Decentralized Mobile Forensics*. Evidence Technology Magazine (Sept.–Oct. 2014), at 12–15.
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- ▶ Daniel R. Miller & Bree Kelly, *E-Discovery in 2015: Will You Feel the Earth Move Under Your Feet?* K&L Gates Legal Insight (Jan. 2015), <http://www.ediscoverylaw.com/files/2015/01/E-Discovery-in-2015.pdf> (last visited 7/8/15).
- ▶ Brendan Morgan, *Ensuring Admissibility of Mobile Evidence in Court*. The Federal Lawyer, 62 (Mar. 2015), at 66–69.
- ▶ Sharon D. Nelson & John W. Simek. *Social Media: Preservation, Harvesting and Authentication*. Sensei Enterprises, Inc., 2014.
- ▶ *Social Media Evidence – How to Find It and How to Use It*. ABA Section of Litigation, ABA Annual Meeting, August 8–12, 2013.
- ▶ Dave Stafford, *Texts Present Unique Challenges in Evidence Preservation and Admission*. The Indiana Lawyer (Feb. 17, 2015), <http://www.theindianalawyer.com/texts-present-unique-challenges-in-evidence-preservation-and-admission/PARAMS/article/36325> (last visited 7/8/15).

Additional Resources for Electronic Discovery

- ▶ EDRM (Electronic Discovery Reference Model), <http://www.edrm.net/> (last visited 7/9/15).
- ▶ K&L Gates Electronic Discovery Law, <http://www.ediscoverylaw.com/> (last visited 7/9/15). Includes a searchable database of case summaries at <http://www.ediscoverylaw.com/e-discovery-case-database/>.
- ▶ Kroll Ontrack, <http://www.krollontrack.com/> (last visited 7/9/15). Includes a searchable database of case summaries at <http://www.ediscovery.com/pulse/case-law/>.
- ▶ Sensei Enterprises, Inc., <http://senseient.com/> (last visited 7/9/15).

Any Questions?

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