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It's all in the Details: Text Messages and The Importance of Detailed ESI Agreements

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Written by Benjamin R. McKaig

Document collection and production now involves more than just sending opposing counsel emails. As business communication has evolved, so has the need for producing from various and evolving streams of communication. Text messages, whether from corporate or personal cell phones, have quickly become a primary means of communication, yet questions remain as to how these messages should be treated by the courts.

What do you do when you need to produce hundreds or even thousands of text messages that are relevant to the litigation? Do you produce all the texts in one chain? Do you limit the texts produced to a daily or weekly basis? Do you produce all the texts in that time frame even if they are not responsive? What if there is sensitive information or, like most of us, the parties use text messaging to converse about anything they can think of – in a stream of consciousness style of communication?

Overview: To Redact or Not To Redact?

Magistrate Judge Gary Stein addresses these text message issues in a ruling in *We the Protesters, Inc. v. Sinyangwe*.^[1] This case arises from the breakup of a nonprofit organization and the ensuing clashes over IP ownership. The parties had negotiated an agreement regarding how text messages would be treated in discovery but missed crucial details relating to document production, forcing the Court to decide what the parties intended.

Evidence showed the parties agreed to “collect and review all texts in the same chain [sent or received] on the same day” as any text “that hit on one of the agreed-upon search term[s].”^[2] This seemed to be a good start, limiting the text messages to relevant chains on a daily basis that hit on the search terms. However, the parties took drastically different interpretations as to what text messages needed to be ultimately produced.

Defendants reviewed the text messages and produced hundreds of chains that hit on search terms on a per-chain, per-day basis. They did not redact any of the text messages but instead produced all relevant text chains in their entirety. Plaintiffs, however, redacted non-responsive information in otherwise responsive text chains where the non-responsive messages did not provide context to the responsive ones.

At first glance, Plaintiff's decision to redact those not responsive texts seems to be a reasonable decision based on how text messages typically work. Text chains are not like email chains, which revolve around a singular subject, but rather are often an ongoing stream of consciousness communication between two or more

individuals. It is highly likely, if not certain, that text chains between two or more individuals touch on multiple topics throughout a daily period, not just the responsive search terms and subject matter related to the litigation.

However, Plaintiffs made the decision to apply these redactions, incurring great cost to do so, without consulting with Defendants or the Court. Defendants were obviously not thrilled when they produced unredacted text chains, while Plaintiffs redacted tens of thousands of individual messages for non-responsiveness, especially considering they were unaware of this decision by the Plaintiffs until they received their full production.

Defendants filed a motion to compel all text messages produced unredacted. Plaintiffs vehemently disagreed and opposed the motion, stating that Defendants could reproduce their text chains with redactions if they would like.^[3]

Treatment of Text Messages in Discovery

Email productions are well litigated and have plenty of case law to point to should there be disagreements, but production of text messages, and the nuances that come with text message chains, do not have a plethora of case law to refer to or a set of rules drafted to specifically address this issue. Look at a text chain with a friend or coworker on a day-by-day basis and see how the subjects discussed change often and abruptly. Now compare that to how emails are grouped by specific subjects, unlike the stream of consciousness writing style of text messages.

Magistrate Judge Stein began his analysis by stating that text messages “do not [] fit neatly into the paradigms for document discovery embodied by Rule 34 of the Federal Rules of Civil Procedure.”^[4] That rule was constructed around the idea of producing emails that resemble “conventional documents,” rather than all communications two or more individuals have over the course of days or years.^[5]

Magistrate Judge Stein noted that *Al Thani v. Hanke*, the “leading case on the issue of [text messages] in this District,” takes the approach that “a party must produce the entirety of a text message conversation that contains at least some responsive messages.”^[6] This precedent, the Court stated, controls in a situation where, as here, the parties “negotiated an agreement with respect to the treatment of text messages in discovery,” but “their agreement was less than complete.”^[7] Magistrate Judge Stein reasoned that parties can agree to allow non-responsive redactions of text message conversations, but in the absence of clear language in that agreement, “the applicable background law is supplied by *Al Thani*.”^[8]

Counsel for both parties agreed to “review all texts in the same chain on the same day” as any text “that hit on one of the agreed-upon search term[s].”^[9] Noticeably missing from this language is whether, or how, to redact irrelevant and non-responsive messages that do not provide context to the relevant text messages. Magistrate Judge Stein stated that “Plaintiffs understood the same-day period to define the scope of *review*, but not the scope of *production*, such that non-responsive or irrelevant messages included in a same-day text chain need not be produced and could be redacted.”^[10] Plaintiffs knew how to review the text message chains, but misunderstood how these chains would be produced and failed to communicate with Defendants or the Court to ask for clarification before implementing redactions on thousands of individual messages.

The Court reasoned its “task on this motion is [] more akin to filling a gap in the parties' incomplete agreement” than determining the ““right answer” to the redaction question.”^[11] Relying on *Al Thani*, Magistrate Judge Stein concluded “parties may not unilaterally redact otherwise discoverable information from text messages for

reasons other than privilege.”^[12] Importantly, the parties could have agreed to redacting text message chains for non-responsiveness, if and only if, they agreed upon it prior to producing those messages.

Conclusion: The Importance of Detailed ESI Agreements

There is a simple and easy takeaway from this case that should be the standard for all litigations and arbitrations: Parties must clearly and explicitly detail all the phases of collection, review, and production in an ESI agreement, rather than leaving certain nuances subject to interpretation, including how to collect documents, how to review documents, how to produce documents, and importantly whether redactions on documents, for reasons other than privilege, are permitted.

Due to the differences between the nature of text messages and emails, parties should treat text message conversations differently from emails and should negotiate explicit agreements with the opposing parties to govern what should be produced and if redactions are allowed for non-responsiveness. If during a review there are questions regarding whether the parties' agreement allows for the redaction of not responsive information, parties should meet and confer to iron these issues out instead of working independently. Like most disagreements regarding the interpretation of contracts, both parties can avoid the issue if they just stop, think, and discuss in detail the issues as they arise, rather than after production in arguing a motion to compel.

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^[1] *We the Protesters, Inc. v. Sinyangwe*, 348 F.R.D. 175 (S.D.N.Y. Dec. 18, 2024).

^[2] *Id.* at 176.

^[3] *Id.* at 177.

^[4] *Id.*

^[5] *Id.*

^[6] *Id.* (discussing *Al Thani v. Hanke*, No. 20 Civ. 4765 (JPC), 2022 WL 1684271 (S.D.N.Y. May 26, 2022)).

^[7] *Id.* at 178.

^[8] *Id.* at 179

^[9] *Id.* at 176.

^[10] *Id.* at 179 (emphasis in original).

^[11] *Id.*

^[12] *Id.* at 180 (internal quotations omitted).

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Benjamin R. McKaig

t 336.607.7381

bmckaig@ktslaw.com