

Are Text Messages Important – And Admissible in Court?

Legal Viewpoint

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Yes, to both if they are deemed *reliable*. In today's world of instantaneous communications, we exchange text messages on a minute by minute basis, but where do they go? An employer who relies on a text "discussion" with an employee to be preserved in perpetuity may be greatly disappointed when a text is not available or retrievable later. Unfortunately, a client of mine believing an alleged harassment issue was resolved with an employee deleted the employee in his contacts, which in turn deleted the critical string of text messages. Of course, it was not resolved and was later unable to retrieve *any* of the texts that would have exonerated him and was greatly compromised in resolving the dispute. Unlike emails, which are typically stored and preserved on a central server, there is no central data repository for text messages. Certain carriers may store text messages for a short period of time of only 3 to 5 days. Typically, the only way to obtain a text message weeks or months after it was sent is to retrieve it from one of the actual devices that sent or received the message. If the device is not available and the cell phone carrier cannot produce the deleted texts, as in my client's case, they will be lost forever.

Texts have become the "New Email"

We have rightfully become very cautious when it comes to sending emails, and are sensitive to the fact that emails can end up as exhibits in court proceedings. Many times, we send an email to provide a "paper trail." The same caution is now equally necessary for text messages, which are often just as important and sometimes saltier and more personal than emails. Think of text messaging as the younger cousin of email. As emailing became the main form of electronic communication in nearly every social or business matter, it also became admissible in court. As the cell phone has now become the primary communication device, the growth of text messaging has exploded. As a result, text messages are now becoming critical evidence in litigation.

Colorado Law Deems Texts Admissible

In a 2017 Colorado case, *People v. Heisler*, rules were announced for authenticating text messages for use in litigation. The defendant, *Heisler*, was convicted of harassing his ex-girlfriend through frequent calls and text messages after she asked him to stop communicating with her. Prosecutors introduced printouts of many of the text messages sent by him as evidence of the alleged harassment, and he was convicted and sentenced to 30 days in jail. On appeal, *Heisler* argued that his conviction should be overturned because the text messages had not been properly authenticated before being introduced into evidence. The Colorado Court of Appeals disagreed and set forth a four part test to determine whether text messages should be allowed as evidence in Court. If this test is met, as it was in *Heisler*, texts are now considered reliable, and therefore admissible in court in Colorado. "Losing" your phone may also subject you to an adverse inference for not protecting evidence (n/k/a the "Tom Brady Defense").

How Can We Protect Ourselves?

Now that text messaging has become prevalent in personal and business worlds, we must assume they will matter and be admissible. Employers will be wise to implement policies for the use and preservation of text messages and the *automatic deletion* of if preservation is important. Clearly, the electronic world is only getting more complex and continues to evolve. You may want to know in advance if your cell carrier preserves or deletes text messages in the event they may be needed later. It would be better to know this in advance, rather than after the fact if such information is critical to you personally or to your business.

Do you have a legal question? Send your inquiry question to Jeff@klfpc.com. Appointments are available in both Black Hawk and Denver offices.

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