

## E-discovery trends in 2022

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With 2022 in the books, it is an opportune time to assess the trends in e-discovery during the year. Sanctions for preservation and production failures continue to feature prominently. Noteworthy in key 2022 sanctions cases, courts called out a lack of competence of attorneys in handling e-discovery matters. Failures to preserve and produce text messages from mobile devices continued to be an e-discovery sore point.

Workplace collaboration tools have increasingly become the subject of discovery, and of sanctions. Possession, custody, or control was at issue in an important e-discovery case. And, finally, the Supreme Court took on a case to decide the appropriate test to determine whether a dual-purpose communication is privileged.

### Sanctions and e-discovery competence

As in prior years, cases involving sanctions for failing to preserve and produce relevant and responsive electronically stored information (ESI) have continued to stand out. The most prominent cases in 2022 included *Red Wolf Energy Trading, LLC v. Bia Capital Mgmt., LLC*, \_ F. Supp. 3d \_, No. 19-10119, 2022 WL 4112081 (D. Mass. Sept. 8, 2022), in which the court issued case terminating sanctions against the defendants. While the court noted that the defendants had delayed producing and failed to produce key documents for three years, the final straw was defendants' failure to produce numerous Slack messages, including "smoking gun" communications.

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Competence — or, in this case, the lack thereof — was a particularly noteworthy issue in *Red Wolf Energy Trading*. Defendants asserted that a consultant in Kazakhstan they had retained, who had no experience in collecting Slack messages, was at fault. The court, however, pinned the blame on the defendants. "At a minimum, [defendants'] decision to utilize an unpaid novice in Kazakhstan to conduct its search for Slack messages, rather than an experienced vendor in the United States at a modest cost, ... was in reckless disregard of [their] duties under Rule 26 and to obey court orders."

The case highlights the serious consequences that may befall litigants who fail to engage sufficient resources to identify, collect,

and produce modern forms of ESI, which can pose novel and difficult challenges.

In a case sure to grab the attention of attorneys, the court in *DR Distributors, LLC v. 21 Century Smoking, Inc.*, No. 12 CV 50324, 2022 WL 5245340 (N.D. Ill. Oct. 6, 2022), allocated half of a \$2.5 million sanctions award to two of the sanctioned defendant's individual counsel (approximately \$1 million to one and \$250,000 to the other). The court had previously granted plaintiffs' motion for sanctions due to the defendant's failures to produce responsive emails and chats. See *DR Distributors, LLC v. 21 Century Smoking, Inc.*, 513 F. Supp. 3d 839 (N.D. Ill. 2021).

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Again, lack of competence was a key issue in the case. The court commented that "through a series of missteps, misdeeds, and misrepresentations, Defendants and the former defense counsel find themselves looking down the barrel of a sanctions motion Howitzer." Defense counsel's missteps included failing to arrange for the collection of relevant and responsive web email, failing to ensure that auto-delete was suspended on email accounts, generally failing to competently work with the e-discovery vendor and oversee its work, and retaining an e-discovery vendor that they had previously accused of incompetence.

*In re Keurig Green Mountain Single-Serve Coffee Antitrust Litig.*, 341 F.R.D. 474 (S.D.N.Y. 2022), is another sanctions decision that garnered a lot of attention in 2022. In a detailed and carefully analyzed decision, the court held that Keurig failed to preserve relevant ESI on 25 laptop computer hard drives of custodians, nine of which were outright lost. Nevertheless, the court found that plaintiffs only suffered prejudice from defendants' failure to produce three of the hard drives, and that plaintiffs had failed to establish by clear and convincing evidence that the preservation failures were

intentional (thus avoiding the most severe sanctions). The court imposed monetary sanctions and ruled, however, that plaintiffs could present evidence to the jury at trial regarding Keurig's failure to preserve the three hard drives.

### Text messages and mobile devices

Failures to preserve text messages on mobile devices continued to be the subject of many decisions. For example, in *Columbia Pictures Indus., Inc. v. Galindo*, No. 2:20-cv-03129, 2022 WL 3009463 (C.D. Cal. Jun. 14, 2022), *report and recommendation adopted*, 2022 WL 3369629 (C.D. Cal. Aug. 15, 2022), the court granted monetary and case terminating sanctions against a defendant who continued to send relevant Telegram messages set to auto-destruct after his duty to preserve attached.

Similarly, in *teamLab Inc. v. Museum of Dream Space, LLC*, No. 2:19-cv-06906, 2022 WL 1590746 (C.D. Cal. Mar. 10, 2022), the court found that the defendants' CEO spoliated relevant messages on the WeChat and Telegram messaging applications by failing to suspend auto-delete functions and by taking down a WeChat communication channel, which resulted in the loss of all messages on the channel.

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Likely the most famous case in 2022 involving the spoliation of text messages was *Schnatter v. 247 Group, LLC*, No. 3:20-cv-00003, 2022 WL 2402658 (W.D. Ky. Mar. 14, 2022), due to the involvement of a public figure. The court imposed sanctions on the plaintiff, the founder and former president of Papa John's Pizza, for failing to preserve relevant text messages and other ESI from several mobile phones that he used.

In particular, the plaintiff discarded four cell phones and had two other phones imaged (i.e., a bit-by-bit copy of their data was made) at particular points in time but failed to preserve text messages and other evidence that were likely generated or received on the phones after they were imaged. Further, he did not cease his practice of deleting individual text message strings after receiving a legal hold notice from his counsel. The court ordered monetary sanctions and held that the defendants could present evidence of the spoliation to the jury at trial.

### Workplace collaboration tools

Workplace collaboration tools such as Slack, Teams, and Google Workspace are increasingly becoming the subject of discovery and, consequently, of court decisions. In *Drips Holdings, LLC v. Teledrip LLC*, No. 5:19-CV-02789, 2022 WL 3282676 (N.D. Ohio Apr. 5, 2022), *report and recommendation adopted in part*, *rejected in part*, 2022 WL 4545233 (N.D. Ohio Sept. 29, 2022), the court granted a mandatory adverse inference jury instruction due to the defendants' spoliation of responsive Slack messages.

After the duty to preserve had attached, the defendants modified Teledrip's Slack retention settings from indefinite to seven days. Doing so resulted in all relevant communications on Teledrip's Slack platform being deleted.

In *Mobile Equity Corp. v. Walmart Inc.*, No. 2:21-cv-00126 (E.D. Tex. Jan. 4, 2022), ECF No. 114, the court ordered the defendant to produce relevant and responsive messages from up to 40 Slack channels believed to contain relevant information. In *Red Wolf Energy Trading*, discussed above, the court ordered the production of Google Workspace and Slack documents, and sanctioned the defendants for their failures to produce documents from those sources.

### Possession, custody, or control

Whether a party is deemed to have possession, custody, or control of — and therefore a duty to preserve — relevant ESI stored in the systems or devices of non-parties continues to be an important issue in e-discovery. In *In re Pork Antitrust Litig.*, No. 18-cv-1776, 2022 WL 972401 (D. Minn. Mar. 31, 2022), the court held that defendant Hormel Foods did not have possession, custody, or control of text messages on employees' personal mobile devices. The case involved allegations that Hormel conspired to limit the supply of pork and fixed prices, carried out by the exchange of information involving competitively sensitive information.

The court rejected the plaintiffs' argument that Hormel's bring-your-own-device policy provided it with a legal right to the text messages because the policy did not grant Hormel express ownership rights to the messages. The court also held that while Hormel could ask its employees to turn over their text messages, it did not have the practical ability to require them to comply.

### Privilege

Finally, the Supreme Court granted certiorari in *In re Grand Jury*, No. 21-3197, to review whether the attorney-client privilege protects against disclosure of dual-purpose communications — i.e., those involving both legal and non-legal purposes — where obtaining the legal advice of an attorney was a significant purpose of the communication.

Fourteen *amici curiae* filed briefs supporting the petitioner's argument that the Court should reject the single primary purpose test that the 9th U.S. Circuit Court of Appeals applied in the case (the single primary purpose test provides that a communication is only privileged if its sole primary purpose was for receiving or rendering legal advice). One of their arguments is that modern communications are not limited to topic-specific memoranda or discrete letters and emails, but rather they are more often strings of messages on email, chat, or text message platforms, collaboration platforms, and other contexts (such as comments embedded in an electronic document) where legal advice is requested and received interwoven with other content that is not legal in nature. A decision is expected early next year.

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### About the author



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