

Ephemeral Messaging and Permanent Consequences: How Google Was Sanctioned for Failure to Preserve Chat Communications

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With the advent of “work from home” arrangements and the proliferation of instant messaging platforms, many companies have embraced instant messaging applications for their employee’s communications. Instant messaging may be regarded as a more casual form of communication and companies may have shorter retention or no retention policies for these communications. However, as a recent case involving Google’s internal instant messaging shows, the handling of corporate instant messaging data may lead to serious consequences in the complex litigation context.

In *In re Google Play Store Antitrust Litigation*, Judge James Donato of the United States District Court for the Northern District of California recently awarded sanctions against Google based on lost chat data. No. 21-MD-02981-JD, 2023 WL 2673109, at *10 (N.D. Cal. Mar. 28, 2023). In this case, Google had a general policy of automatically deleting data within 24 hours from its internal instant messaging program, “Chat.” *Id.* at *1, 4. Google’s policy continued even after the litigation had begun. *Id.* Google did not suspend the deletion protocol for individuals subject to issued litigation holds. *Id.* In finding against Google, the Court observed several factors that are noteworthy with regard to the preservation of Chat communications:

- **The Court rejected the notion that Chat was used as a “social outlet akin to an electronic break room.”** While Google asserted that Chat was “typically” used for quick, one-off questions or personal discussions, the Court found that the evidence indicated that Chat was used to discuss “substantive business topics.” *Id.* at *5. Thus, the Court found that evidence potentially relevant to the litigation may not have been preserved.
- **The Court reprimanded Google for leaving the choice of whether to preserve Chat data to employees.** In the case, approximately 360 individuals were subject to a litigation hold, and around 40 individuals were designated as custodians. *Id.* Although Google had the technical capabilities to preserve the Chat history of all these employees subject to a litigation hold, Google decided to permit employees to decide which, if any, of their chats should be preserved. *Id.* Judge Donato rebuked this “carte blanche” arrangement and pointed to the “obvious danger of this approach” of employees not being capable of discerning which communications should be preserved. *Id.* at 9.
- **The Court rebuked Google employees’ spotty compliance with data preservation.** Testimony by Google employees indicated that they may not have been able or willing to comply with litigation holds requiring them to preserve their Chat communications. In one example, a Google employee testified that he “believed that he could

comply with Google’s document preservation obligations by creating and preserving a summary of a substantive business communication rather than preserving the actual communication itself.” *Id.* at *7. In another example, which the Court referred to as a “highly spotty practice[],” a Google employee said he or she was aware of litigation holds but still chose not to preserve their relevant chats. When another employee brought up the litigation holds, he or she responded, “Ok maybe I take you off this convo.” *Id.*

- **The Court reprimanded Google for utilizing a “don’t ask, don’t tell” policy for preserving communications.** The Court noted that “Google did not check to see if custodians were actually preserving relevant Chats as directed by the hold notice, and did nothing in the way of auditing or monitoring Chat preservation.” *Id.* at 6. The Court found that this decision “aggravated the situation.” *Id.* at *9.

Based on these facts and others, the Court concluded that “Google intended to subvert the discovery process, and that Chat evidence was ‘lost with the intent to prevent its use in litigation’ and ‘with the intent to deprive another party of the information’s use in the litigation.’” *Id.* at *9. The Court awarded reasonable attorney’s fees and costs to Plaintiffs for bringing the motion for sanctions. As to non-monetary sanctions, the Court indicated that it “would like to see the state of play of the evidence at the end of fact discovery” before making a decision on that point. *Id.* at *10.

While the full scope of sanctions is still unknown, the case still indicates what kinds of conduct toward preservation of instant messaging for the purposes of discovery obligations may warrant liability.

Companies facing litigation should take proactive steps to preserve all potentially relevant data, including instant messaging communications. This includes implementing clear policies for retention and preservation of instant messaging data, suspending automatic deletion protocols for individuals subject to litigation holds, and auditing or monitoring preservation efforts to ensure compliance. Leaving the decision of preservation to employees may not be sufficient, and employees may not be capable of discerning which communications are relevant to the litigation. Failure to take these steps may result in sanctions, including monetary and non-monetary penalties, and can be perceived as an attempt to subvert the discovery process.

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