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Opinion

Technology: Is instant messaging the next email?

Companies can do a number of things to mitigate the risks brought by texts and instant messages

By Gareth Evans, Lauren Eber

Should instant messages be on your radar screen for legal holds, review and production? Email, until recently, often would be the only communication considered for preservation and use in litigation and investigations. Not so anymore. Text and instant messaging have become both ubiquitous and an increasingly important form of evidence. Although various types of text and instant messaging have been around for some time, the explosion in the use of portable devices — particularly smart phones — has propelled an increasing use of text and instant messaging for both personal and work-related communications.

A recent study published by the Pew Research Center on Sept. 16, 2013, entitled Cell Phone Activities 2013, reports that 91 percent of American adults own a mobile phone and 81 percent use their phone to send or receive text or instant messages. Broken down by age group, fully 97 percent of those 18-29 and 94 percent of those 30-49 send and receive such messages on their phones. Those in the 50-64 and 65+ age groups bring down the overall average at 75 percent (still high) and 35 percent, respectively.

Text messaging originally referred to messages sent using the Short Messaging Service. SMS text messages are limited to 160 characters, are transmitted through cellular carriers' systems, and are typically stored on those systems for a short period of time (for example, 48 hours to two weeks) in addition to being stored on the sender's and recipient's devices. One of the downsides of SMS messaging for users is the cost, estimated to be on average (globally) 11 cents a message. The emergence of mobile Internet access has led to the increasing adoption of IP-based messaging, carried via the Internet and without passing through a carrier's infrastructure, and usually having no cost to the user. OEMs also provide mobile-messaging services. Among the most prominent are Apple's iMessage, RIM's BlackBerry Messenger, and Samsung's ChatOn. Messages through these services and IP-based messages are typically, for all practical purposes, accessible only on users' devices. Notably, such messages may be extractable from the user's device or a computer onto which the device has been backed up even after a user has "deleted" them, provided they have not been overwritten with other data. Additionally, companies may provide internal instant messaging and chat applications in which messages are carried through the enterprise's servers or the servers of a vendor.

The sheer volume of text and instant messaging is staggering. Nearly 10 trillion SMS and 10 trillion IP-based messages will be sent in 2013. One IP-based messaging application, WhatsApp, reached six billion outgoing messages a day in 2012. As of June 2012, Apple's iMessage service had 140 million users who sent one billion messages a day. Granted, a large portion of these messages, even in the work context, are non-substantive and personal, such as "Where do you want to meet for lunch?" But it would likely be a mistake to simply assume that all employee texts and instant messages are of this nature. An increasing number of people are at least some of the time choosing instant messaging over phone calls and email for substantive work communications, preferring its immediacy and efficiency in getting information to and from colleagues and business partners. Younger generations accustomed to communicating by text and instant message are also more likely to use them as a form of work communication. Notably, as in the early

days of email adoption, users may be more informal and less careful about the contents of their text and instant messages.

Obviously, email is not going away any time soon, particularly in business. Everyone doing business can be expected to have an email address and its asynchronous nature means that senders and recipients do not need to be online at the same time. Email also provides a readily available record of who sent what to whom and when, and it is easily organized. Indeed, while overall email usage is expected to diminish due to the increasing usage of instant messaging outside of the workplace, business email is still expected to increase by 13 percent each year between now and 2016.

Text and instant messages, however, can be a factor in litigation and investigations. They have frequently been used as evidence in sexual harassment and wrongful termination cases, and often in litigation arising out of industrial and other accidents. Spoliation motions for failure to preserve text and instant messages have also become increasingly common. Prosecutors appear particularly interested in text and instant messages and they have pursued obstruction of justice charges for their deletion.

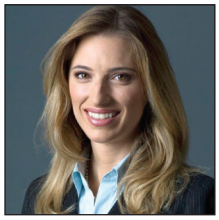
Companies can do a number of things to mitigate the risks. A policy that prohibits or limits the use of instant messaging for substantive business-related communications can be helpful. Realizing that such a policy may not always be practical or enforceable, however, a company could provide its own instant messaging service (or contract with a vendor to do so) that can avoid some of the problems associated with IP-based messaging, such as data security issues and the need to extract messages directly from a user's phone. As part of the legal hold process, companies can determine whether custodians had potentially relevant communications through text or instant messaging and whether it is advisable to preserve and collect them. Where it is necessary to extract data from a user's device, having a BYOD policy can greatly facilitate doing so.

Most importantly, recognize that email is no longer the sole form of messaging that should be considered for legal holds, collection, review and production. Various forms of relevant text and instant messages may exist on employees' mobile phones, devices and computers and on the servers of the company or of vendors with which the company contracts for messaging services. ■

About the Authors

Gareth Evans

Gareth Evans is a partner at Gibson Dunn. His practice focuses on complex litigation, including information technology, data privacy and e-discovery.



Lauren Eber

Lauren Eber is an associate at Gibson Dunn. Her practice focuses on complex litigation, including information technology, data privacy and e-discovery.