

California Electronic Discovery Act: Part Four

By:

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Part Four in a multi-part series on the topic.

Searching for evidence in the form of email, text messages and instant messaging is increasingly important in lawsuits. However, requests for this type of evidence during the discovery phase can be seen as a fishing exercise and place undue burdens on the company who has to produce such, especially if the requests are not tailored to specific categories of information and limited. As a result, judges, applying rules of evidence, may be inclined to limit such discovery. For example, see the [Model Order](#) Regarding E-Discovery in Patent Cases, issued by an Advisory Council on the Federal Circuit. In states such as California, courts often balance the requesting party's right to obtain broad discovery with the privacy rights guaranteed by the state constitution, especially when email is used for personal as well as business purposes.

As with other forms of evidence, social media, emails, and text messages are subject to authentication before they can be admitted as evidence in a case. Many of the rules involving electronic communications continue to evolve through the courts and state legislatures. For example, the authentication issue with respect to text messages was the central reason for reversal of a drug possession conviction in a Pennsylvania case, decided on appeal in 2011. In [Pennsylvania v. Koch](#) (September 16, 2011) the court reversed the conviction because text messages used as key evidence were not sufficiently authenticated, even though they originated on the defendant's phone.

The court in *Koch* noted that text messages are different than emails since they are intrinsic to a particular cell phone, and less likely than email addresses to be accessed by more than one person or used without permission. But the court observed "as with e-mail accounts, cellular telephones are not always exclusively used by the person to whom the phone number is assigned." And, in any case, emails and text messages are "documents and subject to the same requirements for authenticity as non-electronic documents generally."

Unfortunately for the state, the court held that "[g]laringly absent in this case is any evidence tending to substantiate that Appellant wrote the drug-related text messages." Among other things, this conclusion was reached because the nature and context of some of the messages suggested they may have been written by others.

Koch demonstrates the importance that electronic communication such as email, text messages, and instant messaging serve as evidence in lawsuits, but also confirms that mere discovery of this information does not guarantee its admissibility at trial. As with all electronic communication, these messages need to be authenticated, be it through testimony, the context and content of the electronic communication, or by other means.

As technology becomes more prevalent throughout every facet of society, electronic discovery, and the importance of admissible electronic communication will continue to play an ever increasing role in the legal system.

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