# Text Messaging—The Digital Evidence Revolution

By Judge Herbert B. Dixon Jr. (Ret.)

The concept of sending a text message to a cell phone was first demonstrated in December 1992. The message "Merry Christmas" was sent from a computer because mobile phones did not have keyboards. Since that proof-of-concept event, SMS (short message service) technology now accounts for an estimated 18.7 billion texts sent daily worldwide, 6 billion of which occur within the United States. This estimate does not include app-to-app messaging such as WhatsApp, WeChat, Viber, and Slack. Considering the staggering volume of text message usage, it is no surprise that text messages are often a part of everyday and high-profile legal cases. These high-profile cases include the January 6 hearings involving the attack on the U.S. Capitol, the Amber Heard/Johnny Depp defamation case, the Michelle Carter "texting suicide" case, and others—all examples of litigation or investigations where text messages represent key evidence that can make or break the case.

## Text Messages as Courtroom Evidence

Only a little over a decade ago, the use of text message evidence seemed novel. Now, text message evidence is often part of a litigan'ts evidentiary arsenal. Divorce attorneys were among the first to report a sharp increase in using text messages as evidence in court cases.[1] However, the frequency of usage in court cases does not stop there. In criminal matters, police routinely seek search warrants to obtain digital evidence from a suspect's phone, including text messages.

The rising importance of text evidence in litigation is not surprising, considering that text messaging has become a primary form of communication for much of society. On average, Americans text twice as much as they call.[2] The traditional phone call, once a primary form of real-time communication, is momentary or transient. The substance of a call is not saved unless the call is recorded. Text messages, by their nature, create a record that can be preserved and distributed to others, as simply as by a screenshot of the text or more sophisticated methods that include forensic extractions of a phone's data. The courtroom value of texting comes about because it is a form of communication that users frequently create in haste with less forethought than drafting an email or preparing a memorandum. Text messages are often a valuable source of revealing or incriminating evidence for an opposing litigant. Understandably, text messages are used in court proceedings to demonstrate what a user was thinking or planning when the text was written—perfect evidence to prove motive and intent.

## Text Messages and Privacy Rights

The extent to which a person's text messages are afforded privacy rights under the Fourth Amendment is a matter of developing law. The trend seems to suggest that, similar to U.S. Postal mail and email, a sender's legitimate expectation of privacy is extinguished upon delivery to the recipient. In 2001, the Sixth Circuit Court of Appeals concluded that individuals who posted materials on a computer bulletin board lacked a reasonable expectation of privacy in the materials they posted on the board—the same as parties losing a legitimate expectation of privacy in an email or a letter, where the sender's expectation of privacy ordinarily terminates upon delivery.[3] Similarly, in 2005, the 11th Circuit Court of Appeals concluded that defendants in a drug trafficking case did not have a reasonable expectation of privacy in

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texts they received or sent.[4] Last year, the Massachusetts Supreme Judicial Court similarly concluded that a defendant did not have a reasonable expectation of privacy under the Fourth Amendment to his texts sent to and obtained from another person's phone.[5] However, contrast those situations where, in the absence of a warrant based on probable cause, courts have determined that a sender retained a legitimate privacy interest where the sender's text message was retrieved from the phone company or the sender's phone was recovered in his home.

## Fake Text Messages

One danger related to text evidence that courts have had to contend with is the extent to which text message evidence has been falsified. For example, a California woman sent hundreds of threatening text messages to herself, made to appear as if they came from her former boyfriend and his sister-in-law. She provided the fraudulent texts to the police, which resulted in the arrest of the former boyfriend and his sister-in-law. Later, police discovered that the woman had purchased a prepaid cell phone in the name of her former boyfriend's sister-in-law to send herself the fake texts.[6]

Additionally, there are other ways individuals have created fake text messages. With advancing technology, everyday individuals can create fake texts that look convincingly real. Software applications are easily found on the Internet to create phony text threads and text thread screenshots or to insert fake messages into an actual text thread.[7] Moreover, fake text messages have been created using only the phone itself. For example, someone wanting to falsely attribute an existing text to someone who was not the actual sender can accomplish this by going into their phone contacts and changing the name associated with the sender's number. Also, text messages can be backdated by manipulating a phone's date and time settings. Additionally, using iPhone's iMessage, users can send text messages between their email address and phone number and change the names to reflect a conversation between different persons.[8] As these technologies advance, fake texts will become easier to produce and more difficult to detect.

## Authentication of Text Messages

Text messages must be properly authenticated to be admitted in evidence. Courts have generally required text evidence to be authenticated in a manner similar to traditional forms of evidence. Generally, the burden for authentication of evidence is low.[9] Texts offered as evidence, commonly in the form of phone screenshots, can be authenticated through the testimony of a witness with knowledge that the text message is what it is claimed to be or by the distinctive characteristics of the text, including circumstantial evidence such as the author's known phone number or details specific to the author.[10] Because text messages can be faked, some have argued that expert witnesses trained in cell phone forensics should be used in cases containing text evidence.[11] Cell phone forensics experts conduct forensic extractions of a phone's data, allowing them to obtain a digital fingerprint identifying the information as it exists at that time. They also conduct manual examinations, where the examiner carefully manipulates the phone to access different areas of information, such as text message data and changes made by the user.[12] Without an expert witness, the admissibility of a contested text may be left to a credibility determination between the proponent and the challenger.

As text evidence becomes more common and easier to fake, it remains to be seen whether courts will employ more stringent authentication standards, including the need for an expert witness. Such determinations will be inherently difficult as they strike a balance between the need to ensure the accuracy of evidence and the desire not to impede access to justice. Many litigants, especially pro se parties, do not have the economic means to retain a forensic expert.

## Text Message Destruction and Emerging Technologies

The emergence of text messaging as a dominant form of communication and a vital source of evidence in litigation and investigations has made it an important part of institutional recordkeeping. For example, several states require government officials to retain their text messages under the open records laws (a.k.a. Sunshine Laws). In Missouri, a lawsuit was brought against former Governor Eric Greitens after it was discovered that, while in office, he and his staff used an app called Confide, which essentially rendered their text messages self-destructing. The app enables a user to send a text that vanishes without a trace once it is read and prevents the message from being saved, forwarded, printed, or captured via screenshot. The lawsuit alleged that in using the app, Greitens conspired to destroy records so that they could not be produced pursuant to an open records request. While the Missouri Court of Appeals noted that it did not condone the former governor's actions, it held that he had not violated Missouri's Sunshine Law, as the law only required government agencies to provide access to records then in existence. The court concluded that because the records had been immediately destroyed, they had never been retained by the governor's office. The court acknowledged in a footnote that Confide and similar apps could serve to undermine the transparency principle of Sunshine Laws and Missouri's law, enacted in 1973 before cellular phone technology existed. Transparency advocates have voiced concern that the ruling will incentivize government officials to use texting in conjunction with apps like Confide as an ongoing method to destroy records to avoid oversight.[13] The Missouri Supreme Court denied the plaintiff's application for consideration of the appellate court ruling.

## Final Thoughts

Text messaging has moved from whimsical thought to a full-blown way of life. Because of the casual nature of text messages, a litigant offering evidence of an opponent's text messages often argues that the text message is proof of intent, motive, or fact because of a lack of circumstances suggesting that the text message is contrived or a fabrication. An opponent's text messages can be a litigant's most potent evidence or a significant challenge to an opponent's credibility, which is why it is of fundamental importance that the court and litigants be mindful of unjust results if the evidence is fake or the evidence is eliminated by apps that routinely destroy the trail of evidence, or the standard for

admissibility of the evidence is too low to support a search for the truth.

Is it too soon to ask if a new form of communication technology is on the horizon that might make text messaging nothing more than antiquated technology? ■

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## Endnotes

1. *Survey Reports Increase in the Use of Text Messages in Divorce Court*, Harper, Evans, Wade & Netemeyer (Mar. 8, 2012), https://bit.ly/3QR6AHl.

2. *U.S. Texting Statistics*, The Local Project (2021), https://bit.ly/3chnrny.

3. Guest v. Leis, 255 F.3d 325 (6th Cir. 2001).

4. United States v. Jones, 149 F. App'x 954, 959 (11th Cir. 2005), *cert. denied*, 546 U.S. 1189 (2006).

5. Commonwealth v. Delgado-Rivera, 168 N.E.3d 1083, 1097 (Mass. 2021).

6. David Kravets, *Woman Jailed for Texting Threats to Herself*, Wired (July 12, 2010), https://bit.ly/3pHuqJO.

7. Mark Soloman, *Four Reasons Text Messages Require Expert Witnesses*, Soloman Crim. Def. (Oct. 12, 2017), https://bit.ly/3AG1mbU.

8. Lars Daniel, *Spoofs, Fakes, and Manipulation: The Challenge of Validating Messages and Social Media Content on Mobile Phones*, Themis Advocates Grp. (2022), https://bit.ly/3Tf8Jyj.

9. Farrell Fritz, *Two-Steps and Voila: How to Authenticate Text Messages*, JD Supra (Sept. 15, 2021), https://bit.ly/3KiHQFr.

10. Michaela Battista Sozio, *Authenticating Digital Evidence at Trial*, Am. Bar Ass'n (Apr. 27, 2017), https://bit.ly/3PNk45D.

11. Soloman, *supra* note 7.

12. Daniel, *supra* note 8.

13. Jason Hancock, *Appeals Court Finds Greitens' Use of Self-Destructing Text Message App Wasn't Illegal*, Mo. Indep. (June 7, 2022), https://bit.ly/3CqJVNG.