ALM | LAW.COM

New York Law Journal

Technology Today

E-DISCOVERY

Court Rejects Unilateral Responsiveness Redaction of Text Messages

By H. Christopher Boehning and Daniel J. Toal

February 3, 2025

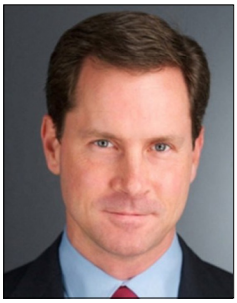
What exactly is a "document?" For many decades, in the context of discovery there was no question – holding up a piece of paper, or some stapled together, the meaning of "document" was clear.

Eventually, email became the primary mode of business communication and the world was introduced to electronic discovery, codified in the Federal Rules of Civil Procedure in 2006 as discovery of electronically stored information ("ESI"). A straightforward analogy between emails and paper documents was often helpful and appropriate in discovery because, except for the electronic part, there were many similarities between memos and emails.

Since then, however, newer forms of communication that do not resemble traditional documents have eclipsed email, including chat, text messaging, and app-based messaging (not to mention emojis, emoticons, and GIFs). And, yet, the Federal Rules, designed for paper and email, still apply.

H. CHRISTOPHER BOEHNING *and* DANIEL J. TOAL *are litigation partners at Paul, Weiss, Rifkind, Wharton & Garrison.* ROSS M. GOTLER, *deputy chair and counsel, e-discovery, and* LIDIA M. KEKIS, *e-discovery attorney, assisted in the preparation of this article.*

H. Christopher Boehning



Daniel J. Toal

What happens when the two collide – when how we usually would treat paper or email discovery might not be directly applicable or workable for newer forms of e-discovery data? For example, how do we reconcile text messages, which often reflect streams of consciousness over time, with the traditional notion of "document" discovery?

A magistrate judge in the Southern District of New York recently navigated this issue in an opinion that addressed the question whether, absent an explicit agreement, a party is able to unilaterally redact text messages for responsiveness.

We The Protesters

In *We The Protesters, Inc. v. Sinyangwe*, 2024 WL 5154077 (S.D.N.Y. Dec. 18, 2024), disagreements within a nonprofit organization led to a bitter breakup in which a co-founder left and cre-

ated a new company. The organization sued the co-founder and new company alleging, *inter alia*, trademark infringement and unfair competition.

The defendants counterclaimed with similar allegations. During discovery, the parties discussed the production of emails and other electronic evidence, including text messages and Twitter direct messages. The parties "had agreed to collect and review all text messages in the same chain on the same day whenever there was a text message within the chain that hit on one of the agreed-upon search term[s]." *Id.* at *2.

The plaintiffs interpreted this agreement to require the production of only "messages from the same-day period that were responsive or provided context for a responsive text message." *Id.* As such, the plaintiffs redacted portions of text messages they had identified as nonresponsive or irrelevant.

Since then, however, newer forms of communication that do not resemble traditional documents have eclipsed email, including chat, text messaging, and app-based messaging (not to mention emojis, emoticons, and GIFs).

When the parties eventually produced text messages, the defendants discovered the plaintiffs' redactions and objected, claiming "that plaintiffs' unilateral redaction of text messages within a same-day text chain was improper." *Id.* After the parties were unable to resolve the issue during a meet and confer, the defendants moved to compel the production of text messages in unredacted form, which is how the defendants had produced their own text messages.

Text Messages and Agreements

The court first examined the unique challenges posed by text messages in discovery, "an increasingly common source of relevant and often critical evidence in twenty-first century litigation." *Id.* Unlike emails or email chains, which "can be viewed as a single, identifiable 'document,'" text messages "do not . . . fit neatly into the paradigms for document discovery embodied by Rule 34 of the Federal Rules of Civil Procedure, which was crafted with different modes of communication in mind." *Id.*

The court questioned whether, "[f]or discovery purposes, should each text message be viewed as its own stand-alone 'document' or item of ESI? Or is the relevant 'document' the entire *chain* of text messages between the custodian and the other individual or individuals on the chain—which could embrace hundreds or thousands of messages going back for years?" *Id.*

Referencing the specific issue before it, the court continued, "Should the producing party be allowed to redact non-responsive texts and, if so, to what extent? Litigants, and courts, are still in the process of figuring out how to answer these questions." *Id.*

The court noted that federal courts have "adopted different approaches with respect to text messages," from requiring the production of "the entirety of a text message conversation that contains at least some responsive messages" to allowing a producing party to "unilaterally withhold portions of a text message chain that are not relevant to the case" to a middle ground between the two. *Id.* at *3.

The former approach is what the court said was taken "in the leading case on the issue in this District, *Al Thani v. Hanke*, No. 20 Civ. 4765 (JPC), 2022 WL 1684271 (S.D.N.Y. May 26, 2022)." In *Al Thani*, the district court "applied, in the context of text messages, the general rule restricting a producing party from redacting unrelated, nonprivileged information from an otherwise responsive document." *Id.*

Turning to the topic of agreements between parties, the court then noted that when handling text messages as part of discovery, parties "are free to—and are well-advised to—mitigate the risk of this uncertain legal regime by coming to their own agreement about how to address text messages in discovery." *Id.*

And especially, as in this case, when both parties will have mutual burdens relating to text messages, "an agreed-upon protocol is particularly sensible[.]" *Id.* Here, however, the parties' agreement regarding text messages was "less than complete." *Id.* at *4.

For example, the plaintiffs' counsel had memorialized their agreement via email: "We are amenable to reviewing all texts in the same chain sent or received on the same day as any text that hits on any of the search terms. Please confirm whether [defendants] are prepared to do the same. . . . Counsel for defendants replied: 'Confirmed.'" *Id.* Through verbal and email discussions, the parties had agreed on certain aspects of discovery, including "that a same-day chain represented the appropriate unit of production." *Id*.

> The defendants counterclaimed with similar allegations. During discovery, the parties discussed the production of emails and other electronic evidence, including text messages and Twitter direct messages.

Even so, this overall agreement "did *not* explicitly address . . . whether, in producing those same-day text chains, texts deemed irrelevant and non-responsive would be redacted or instead, the chains needed to be produced in their entirety." *Id.*

Without that explicit agreement and understanding as to redactions, each party interpreted the agreement differently. The court observed that "neither counsel called or emailed (or texted) its adversary to engage in that discussion. . . . That failure to communicate has now spawned the instant discovery dispute." *Id.* at *4, 5.

The Court's Resolution

In resolving the dispute and answering the question whether the plaintiffs could unilaterally redact nonresponsive or irrelevant portions of text messages, the court determined it was "important to view it through the prism of the parties' prior agreement and discussions (and lack of discussions)." *Id* at *5.

Notably, the court stated that "its task on this motion is not to determine what the 'right answer' to the redaction question is in the abstract. That would be the case if the parties had identified their different positions prior to production, unsuccessfully met and conferred, and brought the dispute to the court for resolution.

But that is not what the parties did; rather, they proceeded to perform their agreement without realizing it was incomplete." *Id.* Instead, the court wrote, its task was to fill "a gap in the parties' incomplete agreement" with reliance on the "applicable background law[.]" *Id.*

For this law, the court turned to *Al Thani*, which the court observed was not only the leading case in the Southern District of New York on the topic, but also "authored by the district judge who presides over this very litigation." *Id.* Plainly stated by the court, "*Al Thani* holds squarely that 'parties may not unilaterally redact otherwise discoverable' information from text messages for reasons other than privilege. . . . Yet that is precisely what Plaintiffs did." *Id.*

As such, the court here thought that "[i]t should have been clear to plaintiffs that *Al Thani* operated as a default rule forbidding redactions in text message chains absent a judicial decision, or an agreement by defendants, permitting redactions." *Id.* With this default rule in place, "if Plaintiffs wanted to make redactions without defendants' agreement, Plaintiffs needed to seek court permission to do so.

Having formed an agreement with defendants that resulted in defendants' production of unredacted text messages, Plaintiffs were not free to decide on their own that redactions to Plaintiffs' production were appropriate." *Id.*

Moreover, the court looked to another district decision, *In re Actos Antitrust Litigation*, 340 F.R.D. 549 (S.D.N.Y. 2022). In that case, the defendants produced emails as inclusive threads, providing the "final email chain in lieu of producing each separate constituent

email." *Id.* at *6. This resulted in the production of only the fielded metadata for the final chain, and not for each email, which the plaintiffs in that matter wanted.

In *Actos,* the court explained that by not discussing email threading earlier while negotiating the parties' discovery protocol, the plaintiffs there "were not provided the opportunity to negotiate how email threading might be accomplished in an acceptable manner." *Id.* As such, the *Actos* court "rejected defendants' unilateral decision to use email threading and required them to produce the earlier-in-time emails." *Id.*

Following the rationale of the *Actos* court, the court here determined, "If plaintiffs wanted to redact their text messages, it was incumbent upon them to negotiate an agreement to that effect with defendants or, in the absence of an agreement, bring the issue to the court for resolution before defendants made their production. It would be unfair to allow plaintiffs access to defendants' unredacted text messages while simultaneously permitting plaintiffs to redact their own text messages." *Id.*

Thus, the court found "the absence of a provision in the parties' agreement allowing redaction of text messages to preclude Plaintiffs from unilaterally making such redactions." *Id.*

With that, the court granted the defendants' motion and required the plaintiffs to produce unredacted text messages, but left a conferral obligation for the parties to discuss the treatment of highly sensitive text messages "containing personal or intimate information, competitively sensitive information, political discussions or views, or other embarrassing information[.]" *Id.*

Takeaways

We the Protesters provides valuable guidance, even as courts continue to take differing approaches to the discovery of text messages. First, the opinion highlights how important it is to review applicable case law and standard practices in your jurisdiction prior to taking key discovery steps or raising discovery disputes to the court.

While this may often go without saying, here the court made it explicit that the plaintiffs should have known about the existence of a leading case from the same district that applied the general prohibition on responsiveness redactions to text messages, even more so since it had been decided by the very district judge presiding over their matter.

Next, the court highlighted the value of agreements between parties when they have a similar burden relating to an uncertain e-discovery topic, such as the redaction of text messages. Though not addressed by the court, in more asymmetrical discovery situations, where one party is faced with a far greater discovery burden than the other, reaching such agreements on discovery topics may be less straightforward and more fraught.

And finally, the court in *We the Protesters* opens the door to some broader issues around modern e-discovery. For example, the court acknowledged the need to consider a balance between privacy and discovery, directing the parties to discuss special treatment for nonresponsive, highly sensitive text messages.

And while the court ultimately followed district precedent and treated text messages just like emails or paper documents in applying the general prohibition against responsiveness redactions in discovery, it raised important questions: what is a document, and are the Federal Rules of Civil Procedure, in their current form, appropriately crafted to address the realities and complexities of today's e-discovery?