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## **E-discovery Alert: Preserving Text Messages**

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*By: Michael B. Heister and Meredith M. Causey*

Contact:

Michael B. Heister  
501.379.1777  
[mheister@QGTlaw.com](mailto:mheister@QGTlaw.com)

Meredith M. Causey  
501.379.1743  
[mcausey@QGTlaw.com](mailto:mcausey@QGTlaw.com)

A recent decision by the Court of Chancery in Delaware serves as another reminder of the need for attorneys to advise their clients early and often about preserving non-traditional electronic communications. In *Kan-Di-Ki, LLC v. Suer*, 2015 WL 4503210 (Del. Ch. July 22, 2015), the court confronted the problem of text messages on a lost cellular phone.

In *Kan-Di-Ki, LLC*, the defendant sold his interests in two medical equipment companies to the plaintiff in two transactions totaling roughly \$4.3 million. A couple of years after selling his interests, the defendant went to work for a customer of the plaintiff, and defendant helped the customer re-negotiate existing agreements with the plaintiff and eventually the customer fired plaintiff. Plaintiff sued the defendant for breach of contract, among other things.

Before the trial, plaintiff moved for discovery sanctions regarding two types of evidence. The first was for emails that were deleted in the ordinary course before the defendant became aware that plaintiff might sue him. The interesting part of the court's decision pertained to the second collection of evidence – text messages that defendant sent third parties after he became aware of the possibility that plaintiff would sue him. The plaintiff claimed he lost his cell phone roughly a year after the lawsuit was filed.

The court ruled that the plaintiff had acted recklessly by failing to preserve the contents of his phone. The court's ruling was premised in large part on the fact that defendant had asked for plaintiff's text messages before the phone was allegedly lost and had been told that they were not "subject to deterioration, manipulation, or even just being forgotten." The court awarded defendant up to \$20,000 in attorneys' fees and made "narrowly tailored" inferences against the plaintiff where the record seemed incomplete due to the absence of text messages that "probably" had existed.

This opinion reinforces a few key lessons familiar to attorneys who work on e-discovery issues. First, be sure to analyze non-traditional sources of electronic information such as text messages. Second, discuss with your client whether that information is safe. Fires happen. Cellular phones get dropped in the bathtub. Telling the client not to erase the data may no longer be enough. Finally, communicate with opposing counsel early, and in writing, about potential sources of electronic information. If you educate opposing counsel about what should be preserved, the court is likely to be more sympathetic to you if a problem arises later because your guidance was ignored and evidence was lost.