

# PRESERVATION OF TEXT MESSAGES IN CRIMINAL CASES

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In a lot of the criminal cases that come through our office — one of the key issues will be text messages sent by the defendant. Text messages are known as Short Message Services (“SMS”.) This often arises in Domestic Violence (“DV”) cases. DV cases generally stem from allegations of menacing, harassment, stalking, and aggravated harassment. Other types of criminal cases in which text messages come into play are drug and weapon sales.

As a defense attorney, the first thing that should be done when you are retained on a case involving text messages is send out a preservation letter to the specific cell phone carrier (“Carrier.”) This is to prevent the spoliation of the text messages from the earliest possible date. A preservation letter states that the Carrier should preserve the data and not purge it. It is key to note that text messages are only maintained for 3-5 days before they are purged. That is why sending out the preservation letter immediately is so imperative. It should always be sent by fax and first class mail.

Upon receipt of the preservation letter, your defense attorney will receive a letter back from the Law Enforcement Resource Team, or the Court Compliance Team of the particular Carrier. The letter will state the date range of the content requested, when the request was received, and the target mobile phone number. The form will also require the request or’s contact and billing information. Generally, the charge for preservation of text messages is billed at \$50.00 dollars per (5) day increment with a minimum of \$50.00 for each request. The charge is applied regardless of receipt of proper legal process. The charges begin on the first date requested. If you are the owner of the number, then you can fill out a

Consent Form for Text Messages. This form will authorize the carrier to release the information requested. Without this form, the Carrier will need a Subpoena Duces Tecus or another form of Court Order.



Once you receive the text messages, and they are helpful in your defense another item that must be considered is the ability to have them introduced as evidence at trial or a hearing. There are two key areas to be concerned about. The first is relevance. Basically that the messages pertain directly to the matter in controversy, and second that they are admissible. This will be easy if they can be certified by the custodian of the records at the Carrier.

In other cases, other types of electronic evidence may be at issue. In that case the preservation letter should demand that all electronic records, including email and compute files be preserved. The letter should make it abundantly clear that this letters constitutes a “litiga-

tion hold” for electronic records and paper documents. The facts and circumstances of the particular case dictate the letter.

The letter should state the following:

- All electronic records are to be preserved including email, and other electronic messages or communications, both sent and received, word processing documents or electronic files, spreadsheets, computer-aided presentations such as Microsoft PowerPoint, databases, calendars, personal information management systems such as Microsoft Outlook or Lotus Notes, electronic telephone logs, computer-aided design (CAD) files, voicemail, Internet usage files, including cache and cookie files, and electronically stored fax communications, among others.

- Reasonable steps should be taken to prevent said records from being destroyed including the immediate cease of all data destruction practices concerning this data

- The duty to preserve the data applies to hard drives, storage/portable drives, as well as any on-line backup

- The duty to preserve applies to paper printouts of the electronic records.

- If any of the aspects of this letter are unclear, the receiver should contact the sender to clarify