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Let's *Not* Just Chat About It: District Court Sanctions Google for Failing to Preserve Chat Messages in Antitrust Suit

In a highly anticipated opinion addressing allegations that Google failed to preserve relevant internal chat messages – despite assuring the court in a case management conference that it had – United States District Court Judge James Donato of the Northern District of California ordered Google to cover the plaintiffs' legal costs in pursuing a Rule 37 motion and left open the possibility of the plaintiffs later pursuing nonmonetary sanctions. Judge Donato's scathing opinion in *In re Google Play Consumer Antitrust Litigation* represents yet another cautionary tale for attorneys certifying that a client has taken appropriate steps to preserve all pertinent electronic discovery without providing meaningful oversight. While Judge Donato chose to focus his criticism (and ultimate sanction) on Google, he clearly was concerned with the lack of oversight and misleading representation by both Google and its attorneys.

The Google cases arise from a highly publicized multidistrict litigation (MDL) involving allegations that Google Play Store's practices were anticompetitive in violation of antitrust laws. The plaintiffs include several gaming companies, Attorneys Generals of 38 states (and the District of Columbia), and numerous consumer plaintiffs. The plaintiffs alleged that Google engaged in exclusionary conduct leading to Google monopolizing the Android app distribution market. After a long and tortured procedural history that included extensive discovery and motion practice, the plaintiffs notified Google that there was a notable absence of chat messages in its document production – messages, not surprisingly, sent through Google's own popular Google Chat messaging service. Google responded to the inquiry, informing the plaintiffs that the Google Chat messages were ephemeral data in that they were typically deleted after 24 hours. While it was possible to suspend this auto-delete function, a simple procedure referred to as "history

on,” Google indicated that it had not suspended the auto-delete function in connection with the litigation and preservation was governed by employee choice.

The record showed that Google also had an internal policy titled “Communicate with Care,” which was a training mechanism by which employees were given best practices concerning communications likely to be protected by attorney-client privilege. A major example of “communicating with care” included employees turning off the history function on chats, with one employee expressing, “[s]ince history is turned on, be mindful of putting anything discoverable here.” The Google Chat history function was set by default to “off” – resulting in automatic deletion –for chats among Google employees, and after the 24-hour chat lifespan, the chats were not recoverable. Although Google had a legal hold in place at the time the plaintiffs initiated the lawsuit, Google did not set the chat history function to “on,” leaving it up to the employees who were subject to the legal hold. Notably, while employees “were (1) instructed not to use Google Chat to ‘discuss any topics ... related to their legal hold,’ and (2) told that ‘if they [found] themselves in a conversation that strays into a topic related to the legal hold, [they were] asked to turn history on at that point to make sure that those messages [were] properly preserved,’” the record reveals that Google did not oversee the chat preservation process and failed to audit or monitor whether employees were abiding by the litigation hold.

The parties engaged in extensive court proceedings related to the preservation of Google chats, including a two-day evidentiary hearing before Judge Donato, as well as extensive briefing. Critically, as is the case when issues like this proceed through hearing, Google was forced to disclose the details of its litigation hold and other normally privileged internal discovery steps, as well as internal practices that Google would otherwise not typically be subject to disclose. After considering the lengthy record, Judge Donato held that, pursuant to Rule 37(e), Google should be sanctioned for both its failure to take reasonable steps to preserve data that should have been preserved and its intentional spoliation of evidence to prevent its disclosure to the plaintiffs in the litigation. Framing the dispute as whether “Google d[id] the right thing with respect to

preserving Chat communications,” Judge Donato pointed out that Google took a *laissez-faire* approach to its preservation duties after the lawsuits commenced. “Google falsely assured the Court in a case management statement in October 2020 that it had ‘taken appropriate steps to preserve all evidence relevant to the issues reasonably evident in this action,’ without saying a word about Chats or its decision not to pause the 24-hour default deletion.” Notably, Judge Donato expressed obvious dismay at the fact that Google “chose to stay silent until compelled to speak by the filing of the Rule 37 motion and the Court’s intervention.”

Even more perplexing to the court was that Google had not provided any explanation for its actions even though it had “unlimited access” to highly accomplished counsel, finding Google and its counsel’s actions amounted to intentional deprivation of the chats. The judge also found prejudice to the plaintiffs as the chats bore on substantive matters involving the antitrust litigation. Most importantly, in terms of the two-tiered approach to remedial measures and sanctions under Rule 37, the court found that the most serious sanctions under Rule 37(e)(2) would be warranted in this case as, on balance, the evidence establishes that Google acted with intent to deprive the plaintiffs of relevant evidence in allowing the “no history” chat discussions about the case to continue unabated.

As for the appropriate remedy, Judge Donato noted that any Rule 37(e) remedy must fit the wrong. Declining to issue terminating sanctions against Google, the court instead issued monetary sanctions including counsel fees incurred by the plaintiffs in preparation and filing of its Rule 37 motion. Judge Donato also left open the possibility of further non-monetary sanctions under Rule 37(e)(2), including a mandatory or permissive adverse inference at the close of fact discovery to give the plaintiffs time to fully appreciate the implications of Google’s actions.

This case is yet another example of emerging trends in e-discovery, including the absolute need for clients and outside counsel to actively manage the preservation and discovery process in a collaborative manner. As noted above, there has been a recent

uptick in courts holding outside counsel to task for failing to actively manage the e-discovery process. We have discussed this in [prior blog posts](#). It should come as no surprise that employees continue to utilize social collaboration tools to engage in substantive discussions at work, and as the use of these social collaboration tools continues to grow, courts will continue to hold clients and attorneys responsible for failing to take steps to prevent the destruction of relevant communications pertaining to the subject matter of litigations. We see here once again that unsupervised self-collection of electronically stored information (ESI), permission for employees to make individual determinations on preservation, failure to understand corporate communications *practices* (which often differ from stated corporate communication *policies*), and certification of incomplete or misleading discovery responses (something that is also directly redressable under Fed. R. Civ. P. 26(g)) all can lead to damaging and revealing discovery of otherwise privileged communications and, ultimately, serious sanctions.

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