

Sanctions Against Google Show Importance of Litigation Document Preservation

The Bottom Line

- Companies should be aware that their document preservation obligations apply to all forms of internal communications, including chats and other instant messenger applications.
- When instituting a litigation hold, companies should check the default settings of all electronic document storage platforms to ensure any automatic delete settings are turned off.
- Companies should consult with counsel if they have any questions about their document preservation obligations.

A recent federal court decision against Google serves as an important reminder about litigation document preservation obligations for companies that use internal messaging platforms. The March 28, 2023, order was for Google's failure to adequately preserve communications exchanged on its internal Google Chat message system. The ruling from the U.S. District Court for the Northern District of California stems from the case *In re Google Play Store Antitrust Litigation* (the Google Antitrust Litigation).

Google's Internal Chat System and the Litigation Hold

Under the Federal Rules of Civil Procedure, and parallel state rules, parties have an obligation to preserve relevant information when litigation is reasonably foreseeable.

Google uses an in-house instant messaging tool called Google Chat. Google Chat can be used for one-on-one chats, chats of three or more users or "rooms and spaces," where users typically discuss a particular topic or project. History can be turned "on" or "off" by Google Chat users, and different types of chats have different document retention settings. If the history is "off," Chats are usually not retained for a significant period of time. For example, one-on-one Chats with history turned "off" are retained for only 24 hours, and history "off" is the default setting for one-on-one Chats.

When Google became involved in the Google Antitrust Litigation, it issued a "legal hold" designed to comply with its

obligation to preserve relevant information. The legal hold was put in place in September 2020 and applied to approximately 360 employees. Reminders were sent to the employees subject to the legal hold approximately every six months. Although Google had the ability to turn the Google Chat history “on” for each employee subject to the litigation hold, it chose not to do so. Rather, Google left it up to each individual to determine which chats should be preserved, with the instructions that if a conversation “strays into a topic related to the legal hold,” the employee was “asked to turn history on at that point.”

More than a year after implementing the legal hold, in October 2021, Google informed the plaintiffs in the Google Antitrust Litigation that it had not suspended the 24-hour retention setting for “history off” Google Chats. Plaintiffs challenged this practice and sought discovery sanctions against Google for failure to preserve relevant information under Federal Rule of Civil Procedure 37(e).

The Court Order

Following extensive litigation relating to the Google Chat issue, including several hearings and a two-day evidentiary proceeding, the court held that Google fell “strikingly short” of its discovery obligations by failing to preserve Google Chat messages. In reaching this conclusion, the court emphasized that Google had informed the court 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.”

The court also found that Google made an untruthful representation when initially asked about Chat preservation because Google stated that the company had “no ability to change default settings . . . with respect to the Chat history setting.” The court was additionally troubled by the fact that Google “never mentioned Chat until it became a substantial problem... especially in light of its unlimited access to accomplished legal counsel, and its long experience with the duty of evidence preservation.” The court conducted a review of Google Chats and found evidence of “highly spotty practices” in terms of Google employees switching the chat history “on” when discussing information subject to the legal hold.

The court concluded that Google did not take reasonable steps to preserve electronically stored information, that Google “intended to subvert the discovery process” and that Google Chat evidence “was lost with the intent to prevent its use in litigation and with the intent to deprive another party of the information’s use in the litigation.”

The court then ordered that Google pay the plaintiffs’ reasonable attorney’s fees incurred in connection with the document preservation dispute and indicated it would later award non-monetary relief.

For More Information

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