

## Think Your Chats Are Private? Everything You Say Can Be Used Against You

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**M**ost businesspeople know that what they say in an email or a text message is discoverable and can be used against them in a lawsuit or arbitration. However, they may not be aware that their chats on Zoom, Microsoft Teams, Slack, Jive and similar platforms are also discoverable and may be admissible as evidence.

Many businesses use collaboration platforms to allow employees and others to communicate and to collaborate from remote locations. However, few businesses know that these platforms collect data, including recordings and transcripts of meetings, screen shares and chats. Recent case law has held that parties are required to preserve data, such as Slack messages, related to disputes or be subject to severe sanctions. *Drips Holdings, LLC v. Teledrip LLC*, 2022 WL 4545233 (N.D. Ohio 2022) (Defendant had a duty to preserve the Slack data when it knew or should have known of potential litigation from Drips; defendant failed to preserve the Slack data to deprive Drips of the evidence; mandatory adverse-inference instruction warranted).



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While most businesses are probably aware of the need to preserve email communications that may be relevant to a dispute, businesses should also be aware of their duty to preserve **all** possibly relevant evidence once litigation is threatened. This includes messages on mobile devices as well as messages, screen shares and meeting recordings on collaboration platforms, such as Slack or Jive, and “chats,” screen shares and recordings of virtual meetings. In a recent case, Google was sanctioned for deleting

Google Chat messages after litigation began, where employees routinely used Google Chat to communicate. The judge required Google to cover the plaintiff's reasonable attorneys' fees and costs for bringing the motion to compel. *In re Google Play Store Antitrust Litig.*, No. 21-md-02981-JD (N.D. Cal. March 28, 2023).

Similarly, the City of Seattle was sanctioned for failing to require various city officials to preserve thousands of text messages on city-owned mobile devices even after receiving preservation letters from the defendants. The judge ruled that the city officials' failure to preserve the text messages was egregious and warranted instructing the jury that it may presume that the deleted text messages were unfavorable to the city; the judge also awarded approximately \$600,000 in attorneys' fees and costs to the plaintiff. *Hunters Capital, LLC, et al. v. the City of Seattle*, No. C20-09830TSZ (W.D. Wash. Jan 13, 2023).

Virtual arbitration proceedings became common during the pandemic and raised concerns that witnesses could be coached via text or chat without the arbitrator's or opposing party's knowledge. To combat this, some arbitrators have added language to the witness oath requiring the witness to swear that they will be alone in the room when testifying and will not view any

text, chat or other communication during their testimony. If a witness is found to have violated this oath, their testimony may be disregarded.

Virtual arbitration proceedings also raised concerns that parties could improperly chat with an arbitrator during the proceedings. Fortunately, participants in a JAMS arbitration need not worry about a party chatting with the arbitrator, because JAMS disables the chat function during virtual arbitrations to prevent such *ex parte* communications.

While electronic forms of communication will remain a valuable tool for businesses, business owners need to keep in mind that they can become a problem if not handled properly when a dispute arises.

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