

1. An order from the U.S. District Court for the Northern District of California granting a motion for sanctions against Google for failing to preserve internal Google Chat messages, where Google declined to set a default hold on all chat messages for the relevant custodians, instead relying on the custodians themselves to ensure preservation of relevant chat messages but failing to monitor the custodians' preservation.

In *In re Google Play Store Antitrust Litigation*, --- F. Supp. 3d ----, 2023 WL 2673109, No. 21-md-02981-JD (N.D. Cal. Mar. 28, 2023), U.S. District Judge James Donato addressed a motion for sanctions against Google for failing to preserve relevant messages using Google's in-house instant messaging tool, Google Chat, where the decision to preserve the messages was largely left to individual custodians.

In this antitrust multidistrict litigation, Plaintiffs alleged that Google illegally monopolized the Android app distribution market by engaging in exclusionary conduct. *Id.* at *1. During discovery, Plaintiffs asked Google about a "curious lack of [Google] Chat messages in its document productions." Google responded that Google Chats are typically deleted after 24 hours and that Google had not suspended this autodeletion even after the litigation began, instead leaving it to employees to make their own personal choices about preserving Google Chat messages. Plaintiffs subsequently moved for sanctions on the grounds that Google failed to preserve relevant electronically stored information (ESI), and the court held an evidentiary hearing on the motion.

Judge Donato began his factual findings by noting that Google is "a frequent and sophisticated litigation party," that its employees "are no strangers to document production and discovery obligations," and that Google has thousands of employees who are under a litigation hold for document preservation. *Id.* at *2.

Judge Donato next summarized evidence that Google employees receive training to "Communicate with Care," involving live group trainings presented by lawyers to teach Google employees how to handle written communications. *Id.* at *2-3. Among other things, these trainings provided "rules" for communicating, such as to "Avoid Communicating When Angry or Tired." Judge Donato highlighted that the training appeared to discourage Google employees from using chat programs to communicate as an alternative to email because "off the record" chats could still be saved by copying and pasting the contents of the chat into a document or email. Judge Donato noted that "[t]he apparent concern is that the chat might then be retained for a much longer period of time than off-the-record chat messages usually are."

The "Communicate with Care" training also gave specific instructions to Google employees about strategies for seeking to make their emails and other communications "protected by the attorney-client privilege," including by copying attorneys on emails and labeling communications as privileged, but the training also noted that privileged documents must be sent "for the purposes of getting legal advice." Judge Donato highlighted several examples of internal Google communications that "actively expressed concerns about the possibility of disclosure in litigation and the risks of preserving Chats."

Judge Donato then summarized the evidence regarding Google Chat, which can take the form of one-on-one chats, group chats involving three or more people, or "rooms and spaces," which are "topic- or project-based types of conversations that are specifically oriented around a particular item or subject matter." *Id.* at *3-4. A "threaded room" is a room with a general topic, where its members can have "threaded" conversations about various subtopics. He noted that "Google Chat is an essential tool used daily by Google employees."

Judge Donato next discussed the evidence regarding preservation of Google Chats. He explained that “history” is off by default for all Google Chats among Google employees with the sole exception of threaded rooms, but history can be turned on or off by users for a particular Google Chat. Under Google’s standard retention policy, one-on-one Google Chats with history off are retained for 24 hours only, after which they are deleted forever and cannot be recovered. One-on-one chats with history on are retained for 30 days; “History-on” chats in a group conversation or “flat (non-threaded) room” are retained for 18 months; and “threaded room” messages are also retained for a period of 18 months. Google employees can “turn on history” for a Google Chat to preserve it for longer than its default retention period.

Judge Donato summarized that a Google employee can retain Google Chat messages with a “forward to inbox” feature, which “allows a user to select an individual message and up to four preceding messages and send those to their email inboxes for longer-term archiving.” Once in the user’s personal Gmail inbox, the chats would be subject to an 18-month default retention period. He noted that a Google employee could copy and paste a chat into a document saved to the employee’s Google Drive, which would remain on Google’s systems “indefinitely unless removed by the Googler themselves.”

Judge Donato next described that a Google information governance employee testified that the retention policy for Google Chats was “animated by the goals of protecting privacy, reducing the cost of storage, guarding against cybersecurity risks, and promoting employee productivity and efficiency” and that Google Chat was “typically” used for “quick, one-off” questions like an invitation to grab coffee or for “sensitive,” personal topics like “birth announcements” or “promotion[s].” *Id.* at *4-5. But Judge Donato found that there was an “abundance of evidence” that Google employees routinely used Google Chat to discuss substantive business topics, including matters relevant to litigation.

Judge Donato explained that approximately 360 individuals were subject to the legal hold for this case, but Google did not set the Google Chat history to “on” as the default for all employees who were subject to a legal hold. *Id.* at *5. As a result, Google left it up to each individual hold recipient to decide which, if any, of the one-on-one or group chats where history was off should be preserved. Employees were instructed not to use Google Chat to “discuss any topics that are related to their legal hold” and to turn on history if the discussion in a Google Chat turned to matters covered by a legal hold. *Id.* at *6. Finally, Judge Donato noted that a “Google Chat Retention FAQs” document advised Google employees that the “History ON setting” should be used when discussing a topic identified in any legal hold notice, but Google did not check to see if custodians were actually preserving relevant Google Chats and “did nothing in the way of auditing or monitoring [Google] Chat preservation.”

Judge Donato found that “Google employees who received a litigation hold in this case were unable or unwilling to follow the [Google] Chat preservation instructions, and sometimes disregarded the instructions altogether.” Judge Donato gave examples of Google employees who received the hold notice but who kept the Google Chat history off. *Id.* at *6-7. Judge Donato concluded that “Google left employees largely on their own to determine what Chat communications might be relevant to the many critical legal and factual issues in this complex antitrust litigation,” which was “a fundamental problem with Google’s approach to [Google] Chat preservation.” Judge Donato also reproduced and discussed two Google Chat conversations providing “evidence of highly spotty practices in response to the litigation hold notices.” *Id.* at *7.

Turning to his conclusions of law, Judge Donato first summarized the relevant provisions of Federal Rule of Civil Procedure 37(e) regarding failures to preserve ESI. He highlighted the Committee Notes for

Subdivision (e), which state that the rule embodies the “common-law duty” of “potential litigants ... to preserve relevant information when litigation is reasonably foreseeable.” Judge Donato noted that it was not in dispute that Google bore this duty as of August 2020, when the first relevant lawsuit was filed.

Judge Donato then noted that the relevant question was, did Google do “the right thing with respect to preserving [Google] Chat communications in this case?” *Id.* at *8. He noted that Google was free to set up an internal chat service with any retention period of its choosing and to allow its employees to use the system for any purpose. But he explained that the key question was whether Google “honored the evidence preservation duties it was abundantly familiar with from countless prior cases.”

Judge Donato concluded that “Google fell strikingly short” of its document preservation obligations, including several “troubling” aspects. First, notwithstanding the “unqualified obligation” to take “affirmative steps to preserve evidence related to the issues presented by the action,” 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 [Google] Chats or its decision not to pause the 24-hour default deletion.” In addition, Google did not reveal the Google Chat practices to Plaintiffs until October 2021, many months after Plaintiffs first asked about them. Google’s initial defense was that it had no “ability to change default settings for individual custodians with respect to the chat history setting,” but evidence established that this representation was not truthful.

Judge Donato explained that another troubling aspect of Google’s conduct was the “intentionality manifested at every level within Google to hide the ball with respect to [Google] Chat.” He noted the evidence that both individual custodians and “Google as an enterprise” had the capacity to preserve all Google Chat communications but failed to do so, and he contrasted this with Google’s policies for email retention, where individual custodians cannot override the automated preservation of their emails. *Id.* at *9. Judge Donato noted the “obvious danger” of putting the preservation decision in the hands of custodians, who could not be expected to understand the issues in this litigation, while “intentionally deciding not to check up on employee decisions to ensure that relevant evidence was being preserved.” Judge Donato likened this to a “don’t ask, don’t tell” policy for Google Chat preservation, at the expense of its preservation duties.

Consequently, Judge Donato concluded that Google did not take reasonable steps to preserve ESI, that the deleted Google Chat evidence could not be restored or replaced through additional discovery, and that the preservation failures were intentional. And while a prejudice finding under Rule 37(e)(1) was not strictly necessary because he already found intent, Judge Donato found that “relevant, substantive business communications were made on [Google] Chat that plaintiffs will never see, to the potential detriment of their case.” He rejected Google’s argument that the prejudice was limited because the discovery from a number of custodians was limited by agreement among the parties, finding that such agreements “were made while Plaintiffs were completely in the dark about Google’s practices.”

Finally, Judge Donato addressed the appropriate remedy, noting that “[p]roportionality is the governing concept here.” He referred to the Committee Notes, which advise courts to “exercise caution,” and stated that “[t]he remedy should fit the wrong.” *Id.* at 18. He declined to issue terminating sanctions, stating that “[t]his antitrust case will not be decided on the basis of lost Chat communications.” *Id.* at *10. He ordered Google to cover Plaintiffs’ reasonable attorneys’ fees and costs in bringing the Rule 37 motion but concluded that a determination of the appropriate non-monetary sanction would require further

proceedings after the close of fact discovery when the “state of play of the evidence” was clear.