

Redaction Failures: How to (Properly) Shield Confidential Information in Public Filings

FACEBOOK, INC. v. DUGUID ET AL.
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

No. 19-511. Argued December 8, 2020—Decided April 1, 2021.

The Telephone Consumer Protection Act of 1991 (TCPA) proscribes abusive telemarketing practices by, among other things, restricting certain communications made with an automatic telephone dialing system (ATDS). The TCPA defines such a system as equipment with the capacity both "to store or produce telephone numbers to be called, using a random or sequential number generator," and to dial those numbers. 47 U.S.C. §227(a)(1). Petitioner Facebook, Inc., maintains a social media platform that, as a security feature, allows users to elect to receive text messages when someone attempts to log in to the user's account from a new device or browser. Facebook sent such texts to Noah Duguid, alerting him to login activity on a Facebook account linked to his telephone number, but Duguid never created that account (or any account on Facebook). Duguid tried without success to stop the unwanted messages, and eventually brought a putative class action against Facebook. He alleged that Facebook violated the TCPA by maintaining a database that stored phone numbers and programming its equipment to send automated text messages. Facebook countered that the TCPA does not apply because the technology it used to text Duguid did not use a "random or sequential number generator." The Ninth Circuit disagreed, holding that §227(a)(1) applies to a notification system like Facebook's that has the capacity to dial automatically stored numbers.

Held. To qualify as an ATDS under the TCPA, a device must have the capacity either to store a telephone number using a random or sequential number generator, or to produce a telephone number using a random or sequential number generator.
Pp. 4-12.

Matthew Murrell, CIPP/US, CIPM
Faculty, Beck Center for Research,
Writing, & Appellate Advocacy
UNIVERSITY OF TEXAS SCHOOL OF LAW
matthew.murrell@law.utexas.edu

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Today's Goal

By the end of this CLE, you should be able to answer three questions:

- Why do I need to know how to redact information?
- What happens if I don't redact information properly?
- How do I redact information properly?

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Why redact?

3

Why redact?

You may be required to redact by law.

- The “default” status of most publicly filed documents is public, not private or sealed.
- A law, regulation, or court order may require you to keep certain information confidential.
 - Witness, victim, or party identities (e.g., confidential informant, minor)
 - Confidential personal information (e.g., SSN, medical information)
 - Trade secret or other confidential business information (e.g., financials, source code)
- Such information may need to be redacted in public-facing filings

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Why redact?

**It's your
ethical duty.**

- ABA R1.1 / Tex. R1.01 – Duty of Competence
 - Comment 8 – “. . . a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology”
- ABA R1.6 – Confidentiality of Information
 - 1.6(c) - “A lawyers shall make reasonable efforts to prevent inadvertent or unauthorized disclosure of . . . information relating to the representation of a client.”
 - Tex. R.1.05 - “. . . shall not knowingly reveal confidential information”

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**What happens if I
don't know how
to redact?**

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