MESSAGING APPS

DON'T LET THE DISAPPEARING ACT CATCH YOU BY SURPRISE IN DISCOVERY

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Slack. Jabber. Google Hangouts. Wickr. Confide. Messaging apps are no longer the future of eDiscovery, they are the present. Although these chat-style software programs and mobile messaging apps provide convenience for day-to-day business, they can present significant challenges in litigation. A party who is in litigation, or who reasonably anticipates being in litigation, is obligated to preserve relevant electronic evidence. But what does that mean for a business that utilizes an enterprise-wide chat function or other forms of messaging? Are employees permitted to use "disappearing" ephemeral messaging apps to communicate after a litigation hold is in place? Can they only use systems that can be configured to prevent a message from being completely deleted? By and large, these questions remain unanswered, but understanding the rules framework will lead us toward some of these answers—and is the first step to preventing the data disappearing act from catching you by surprise.

ARE MESSAGING APPS SUBJECT TO DISCOVERY?

In litigation, a party is entitled to discover electronically stored information ("ESI") that is relevant to a claim or defense and proportional to the needs of the case, considering the burden to the party producing it and the value of the information. There is still some debate about whether certain types of "disappearing" messages fall into this scope of discovery because some apps are designed specifically to prevent the messages from being stored. Even so, if a particular messaging app "journals" chats or otherwise logs them, chances are high they will be considered ESI and subject to discovery.

Early case assessment involves searching for the ESI that exists in many different places. Because litigators typically focus on email and other documents, it can be easy to overlook chat messages as a source of potential discovery. As you begin your initial case investigation, remember to ask key witnesses if they use chat-style applications. Likewise, ask opposing counsel about chat and other ephemeral messages during the court-mandated discovery conference. Failing to do so could mean losing an important source of relevant information.

Assuming your company or your client uses a messaging platform, what happens next? You will want to ask at least three critical questions: (1) Are the chat messages likely to contain information relevant to the case?; (2) Are they fixed in some medium that will allow them to be preserved and collected?; and (3) How burdensome will preservation and collection be?

IF I HAVE MESSAGES, DO I HAVE TO PRESERVE AND PRODUCE THEM?

Chat messages present unique preservation challenges. You will therefore need to find out very early in your investigation how your particular platform works. For example, does it "journal" or save a copy of all messages and, if so, for how long? Some systems delete virtually instantaneously, while others allow perpetual preservation. Can

the preservation function be turned on or off and, if so, was it functioning during the relevant time period? Finally, does the software allow individual users to store their own "chat history" and if so, did they? For example, GSuite's Google Hangouts offers users the ability for individual users to store their personal chat history in their Gmail account, but also permits GSuite administrators to turn the function off.[1]

Without understanding how these platforms work, it may look like messages have "disappeared," when copies are stored elsewhere. It is therefore important to talk to the administering IT department or service provider to understand the particular program and determine whether relevant messages have been preserved.

After you have determined that relevant text messages were created and kept, the next step is to consider whether it will be unduly burdensome to collect and produce them. Under the Federal Rules of Civil Procedure, you may have at least two objections to producing chat or similar messages, even if you know they exist and believe they might be relevant. The scope of discovery is limited by proportionality factors, including the amount in controversy in the case, the importance of the discovery in resolving the issue, and whether the burden or expense of the proposed discovery outweighs its likely benefit.[2] In addition, a party is generally not required to produce ESI that it identifies as "not reasonably accessible" due to undue burden or cost.[3] You may not be required to produce the messages if you can establish that the collection and production of text messages would cause an undue burden – either because the information will have relatively little value or because collecting them would be incredibly expensive, or both.

For example, messages that can only be recovered by a forensic expert (e.g., because they are "deleted" or saved only in "unallocated" space on a computer hard drive) may be too expensive to collect if they have limited value in the case. Collection may also require expensive company-wide preservation on systems that cannot be controlled on a user-by-user basis. In this case, the courts may find that a wide sweep is unduly burdensome depending on the circumstances.

It is important to be prepared to articulate, with specificity, the burden you anticipate. Your argument should not simply assume all messages are always difficult to preserve and produce. In fact, some commonly used platforms offer eDiscovery capabilities for preservation of chat messages. One such platform is Office 365, which claims its eDiscovery capabilities include the ability to export preserved chat messages in Excel and other formats.[4]

CAN I KEEP USING "DISAPPEARING" MESSAGES?

A growing number of messaging applications (such as Snapchat, Threema, and Confide), by design, do not keep messages in a fixed form. Often referred to as "ephemeral messaging apps" or "EMAs," these products typically offer encrypted, self-destructing messages that give users privacy and an opportunity to "chat off the record." But what happens when a litigation hold is in place? May an individual or company use, or continue to use, these confidential apps to discuss matters relevant to the case, knowing the messages may be lost forever?

Ephemeral data is typically defined as "data that exists for a very brief, temporary period and is transitory in nature, such as data stored in RAM."[5] A number of thought leaders have suggested that certain types of ESI, such as "ephemeral" data, are presumptively "not reasonably accessible" and need not be produced in litigation.[6] The 7th Circuit's Electronic Discovery Pilot Program, for example, lists several categories of ESI, including "ephemeral data" that are generally not discoverable in most cases.[7] Yet, some courts have held that other forms of automatically "deleted" data (including overwritten server logs and Random Access Memory) are not necessarily off-limits in discovery.[8]

These cases did not address the new ephemeral messaging apps so there is an argument that those apps are qualitatively different, and thus, not subject to preservation. If two people send messages to one another on Threema, for example, knowing that the messages will be immediately and permanently destroyed after they are sent, is that substantively different than a face-to-face conversation that is not subject to production? Much like an oral conversation, those messages can be explored in deposition with all of the limitations inherent in backward-looking questioning. But if the data was essentially never "stored" should it be subject to production?

A recent case involving Uber and a subsidiary of Google's parent company began addressing these questions, but didn't fully resolve them. In *Waymo LLC. Uber Technologies, Inc.*,[9] Waymo accused Uber of misappropriating trade secrets concerning self-driving vehicles. Among a number of discovery disputes, Waymo claimed that Uber's use of an EMA called Wickr while litigation was pending was spoliation of evidence. Regrettably, the court did not resolve the question of whether use of an EMA is permissible after a litigation hold is in place. The court did, however, note that Uber's use of ephemeral communications "is also relevant as a possible explanation for why Waymo has failed to turn up more evidence of [trade secret] misappropriation" and ordered that Waymo would be permitted to present evidence and argument about Uber's use of EMAs. Uber would likewise be able to present evidence that use of the EMA showed no wrongdoing. Although the Court did not prohibit the post-litigation use of EMAs, it certainly signaled that parties do so at their own risk.

GET THE ANSWERS BY ENGAGING THE RIGHT TEAM.

As more corporations and individuals employ these platforms and collaborative tools, we will see them more often at issue in litigation. To navigate this frequently changing landscape, it will be critical to engage competent counsel and technical assistance to ensure compliance with discovery obligations.

1 https://support.google.com/a/answer/34169?hl=en
2 Fed.R.Civ.P. 26(b)(1).
3 Fed.R.Civ.P. 26(b)(2)(b).
4 https://docs.microsoft.com/en-us/MicrosoftTeams/security-compliance-overview#ediscovery; https://docs.microsoft.com/en-us/microsoftteams/ediscovery-investigation.
5 The Sedona Conference, Sedona Conference Glossary: E-Discovery and Digital Information Management (4th Ed.) (2014) (available at https://thesedonaconference.org).
6 Fed.R.Civ.P. 26(b)(2)(b).
7 https://www.discoverypilot.com/
8 *Columbia Pictures, Indus. v. Bunnell*, No. CV 06-1093FMCJCX, 2007 WL 2080419 (C.D. Cal.); *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518-19 (9th Cir. 1993).
9 No. C 17-00939 WHA, 2018 WL 646701, *21 (N.D. Cal).

As the firm's eDiscovery partner, Joy Woller is an ESI specialist. She addresses complex discovery issues and counsels her clients regarding eDiscovery resources and best practices. Joy represents clients in commercial disputes, intellectual property litigation, and in trademark disputes before the U.S. Patent and Trademark Office.

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