

Virtual Meetings and Ephemeral Messages – Thinking About Preservation, Discovery and Loss

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The information in these slides and this presentation is not legal advice and should not be considered legal advice.

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TOPICS FOR TODAY

- What virtual meeting platforms are
- When recordings of virtual meetings may be considered business records, or otherwise within the possession, custody, or control of a party
- When “content” of virtual meetings might be discoverable
- What ephemeral communications are
- The preservation and discovery issues that the use of ephemeral communications by lawyers may raise, especially for clients in regulated industries
- Requests for, objections to, and production of this data in discovery

RESOURCES

R.J. Hedges & G.L. Gottehrer, "Sanctions for the Loss of Ephemeral Messaging," *Bloomberg Law* (June 2020) (in materials)

K.J. Withers, "'Ephemeral Data' and the Duty to Preserve Discoverable Electronically Stored Information," *37 U. of Baltimore L. Rev.* 349 (2008),
<https://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?httpsredir=1&article=1829&context=ublr>

RESOURCES

The Sedona Conference, "The Sedona Conference Commentary on Ephemeral Messaging," *22 Sedona Conf. J.* 435 (Final Post-Public-Comment Version: July, 2021),
[6_Ephemeral_Messaging_0.pdf \(thesedonaconference.org\)](#)

A.J. Tadler, *et al.*, *The Sedona Conference "Jumpstart Outline"* (Mar. 2016 Version), [Microsoft Word - 10 Jumpstart Outline - Tadler et al Final Gen Use \(thesedonaconference.org\)](#)

VIRTUAL MEETING PLATFORMS

“Virtual meeting software is applications and other digital platforms that let you bring people together over the internet. Usually, these apps include a form of video conferencing, as well as tools like chat, reactions and screen sharing. Examples include Zoom, Webex, Google Meet, Lifesize and Jami.”

<https://teambuilding.com/blog/virtual-meeting-software#:~:text=Virtual%20meeting%20software%20comprises%20applications%20and%20digital%20platforms,building%20activities%2C%20games%2C%20or%20events%20for%20remote%20teams.>

BUSINESS RECORDS AND POSSESSION, CUSTODY, OR CONTROL

A “record” is reliable documentary evidence of a business process related to an organization’s business purpose.

This definition is much narrower than that of “document” for purposes of litigation.

“Document” may be broader than “record” and subject to preservation and production. See, e.g., *Benefield v. MStreet Entertainment, LLC*, No. 3:13-cv-1000 (M.D. Tenn. Feb. 1, 2016) (addressing duty to preserve text messages of key management and employees of defendant).

Management of “non-records” can be complicated given an organization’s fear of collection and possible spoliation of all types of electronic information, whether or not “stored”.

BUSINESS RECORDS AND POSSESSION, CUSTODY, OR CONTROL

Fed. R. Civ. P. 34(a)(1):

“A party may serve on any other party a request within the scope of Rule 26(b): to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control ***.”

BUSINESS RECORDS AND POSSESSION, CUSTODY, OR CONTROL

Fed. R. Civ. P. 26(b)(1):

“Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.”

DISCOVERY OF “CONTENT”

Regardless of their purported “disappearing” nature, do relevant and discoverable communications exist somewhere within the possession, custody, or control of a party or of a nonparty subject to compulsory process? Here are questions to ask:

Is content relevant to a claim or defense?

Is it nonprivileged?

Is it proportional to the needs of the case?

Does the party have possession, custody, or control of it?

Or is a subpoena needed to get it?

EPHEMERAL COMMUNICATIONS

Settlement between the FTC and Snapchat:

“Touting the ‘ephemeral’ nature of ‘snaps,’ the term used to describe photo and video messages sent via the app, Snapchat marketed the app’s central feature as the user’s ability to send snaps that would ‘disappear forever’ after the sender-designated time period expired. Despite Snapchat’s claims, the complaint describes several simple ways that recipients could save snaps indefinitely.

Consumers can, for example, use third-party apps to log into the Snapchat service, according to the complaint. Because the service’s deletion feature only functions in the official Snapchat app, recipients can use these widely available third-party apps to view and save snaps indefinitely. Indeed, such thirdparty apps have been downloaded millions of times. Despite a security researcher warning the company about this possibility, the complaint alleges, Snapchat continued to misrepresent that the sender controls how long a recipient can view a snap.”

<https://www.ftc.gov/news-events/press-releases/2014/05/snapchat-settles-ftc-charges-promises-disappearing-messages-were>

EPHEMERAL COMMUNICATIONS

The oscilloscope analogy of *Convolve, Inc. v. Compaq Computer Corp.*, 223 F.R.D. 162 (S.D.N.Y. 2004):

“[T]he preservation of the wave forms in a tangible state would have required heroic efforts far beyond those consistent with [the party's] regular course of business. To be sure, as part of a litigation hold, a company may be required to cease deleting e-mails, and so disrupt its normal document destruction protocol. But e-mails, at least, normally have some semi-permanent existence. *** By contrast, the data at issue here are ephemeral. They exist only until the tuning engineer makes the next adjustment, and then the document changes. No business purpose ever dictated that they be retained, even briefly. Therefore, absent the violation of a preservation order, which is not alleged here, no sanctions are warranted.”

EPHEMERAL COMMUNICATIONS

2006 Amendment to *Fed. R. Civ. P.* 34(a)(1) introduced the phrase, “electronically stored information” or ESI.

Is ephemeral information “stored” within the meaning of the rule?

Yes: *Columbia Pictures, Inc. v. Bunnell*, 245 F.R.D. 443 (C.D. Ca. 2007).

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EPHERMERAL COMMUNICATIONS

Is this “stored?”

“When disappearing messages is turned on, new messages sent to a chat will disappear after 7 days, helping the conversation feel lighter and more private. In a one-to-one chat, either person can turn disappearing messages on or off. In groups, admins will have the control,” *Introducing disappearing messages on WhatsApp* (WhatsApp Blog: Nov. 5, 2020), <https://blog.whatsapp.com/introducing-disappearing-messages-on-whatsapp>

PRESERVATION AND DISCOVERY IN USE OF EPHEMERAL COMMUNICATIONS BY LAWYERS

Fed. R. Civ. P. 26(b)(5)(A)

Fed. R. Civ. P. 26(b)(5)(B)

Fed. R. Evid. 502

REQUESTS FOR AND OBJECTIONS TO DISCOVERY IN GENERAL

- *Waymo LLC v. Uber Technologies, LLC*, No. C 17-00939 (N.D. Ca. 2018)
- *Herzig v. Arkansas Foundation for Medical Care, Inc.*, No. 2:18-CV-02101 (W.D. Ark. 2018)

QUESTIONS?
COMMENTS?
THANK YOU!