

VIRTUAL MEETINGS AND
EPHEMERAL MESSAGES—
THINKING ABOUT
PRESERVATION, DISCOVERY
AND SANCTIONS FOR LOSS

THE PRACTICE RESOURCE CENTER OF THE FLORIDA BAR

FEBRUARY 2, 2021

3:00 – 4:00 PM

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TOPICS FOR TODAY

- Understand the nature of virtual meeting platforms and ephemeral messaging apps
- Appreciate whether virtual meetings or ephemeral messages might be deemed to be business records or subject to a duty to retain
- Recognize how a duty to preserve might arise for virtual meetings or ephemeral messages and whether sanctions might be imposed for a failure to preserve

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 DUTY TO RETAIN

- 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”.

DUTY TO PRESERVE

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 ***.”

DUTY TO PRESERVE

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.”

DUTY TO PRESERVE

Fla. R. Civ. P. 1.280(b)(1):

“Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.”

DUTY TO PRESERVE

Fla. R. Civ. P. 1.280(c):

“Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense that justice requires ***. If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. ***.”

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.”

DUTY TO PRESERVE AND SANCTIONS

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).

DUTY TO PRESERVE AND SANCTIONS

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>

DUTY TO PRESERVE AND SANCTIONS

- *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)

RESOURCES

- G.L. Gottehrer, R.J. Hedges & C.S. Parikh, “Discovery Considerations When Choosing and Using Virtual Meeting Platforms and Ephemeral Apps,” *PLI Chronicle* (Jan. 2021) (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>
- “New Challenges in Discovery: Are Your Employees Using Self-Delete Apps for Business Purposes,” *Knowledge* (McCann Fitzgerald: posted Feb. 4, 2020), <https://www.mccannfitzgerald.com/knowledge/disputes/discovery-challenges-self-delete-apps-business>

- **QUESTIONS?**
- **COMMENTS?**
- **THANK YOU!**