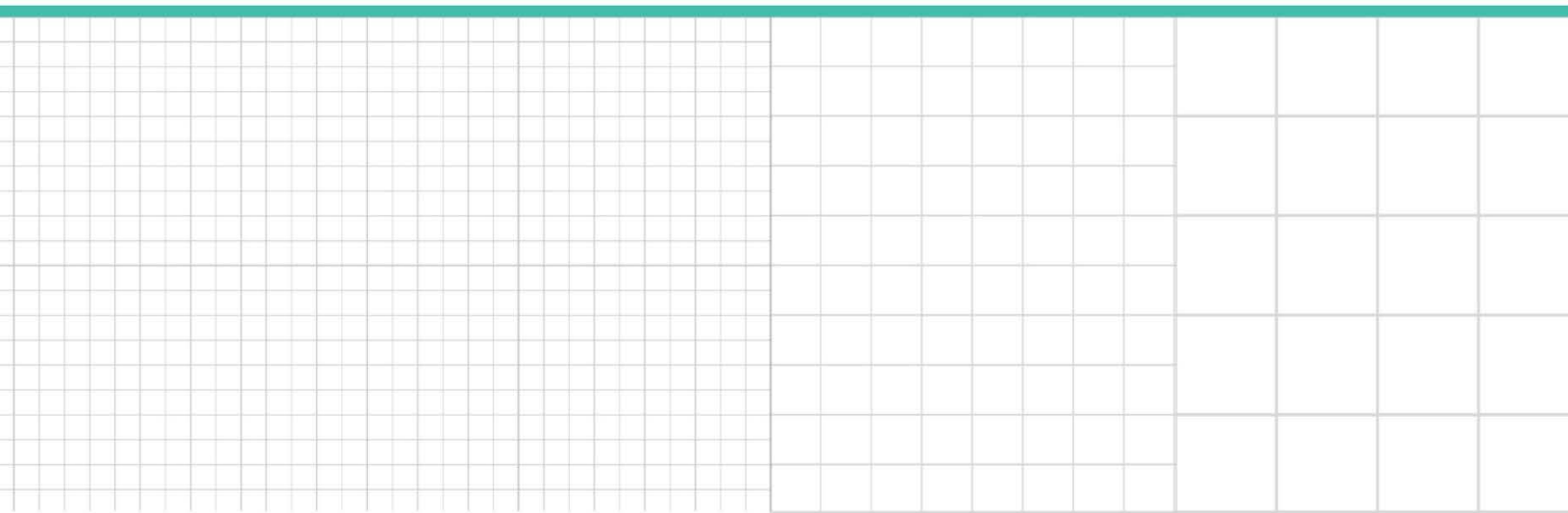


Professional Perspective

Sanctions for the Loss of Ephemeral Messaging

*Ronald J. Hedges, Dentons and Gail L. Gottehrer,
Law Office of Gail Gottehrer*

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Sanctions for the Loss of Ephemeral Messaging

Contributed by [Ronald J. Hedges](#), Dentons and [Gail L. Gottehrer](#), Law Office of Gail Gottehrer

The popularity of ephemeral messaging, evidenced by the widespread use of apps and platforms such as Signal, Snapchat, and Telegram, presents challenges for litigators, litigants, and courts. This article focuses on a key feature of ephemeral messaging, the permanent “loss” (to use the language of Fed. R. Civ. P. 37(e)) of the messages on the devices of both the sender and the recipients of the messages, and presumably everywhere in between. This discussion opens the door to consider whether the loss of ephemeral information is sanctionable under that rule.

The need to clarify the possible litigation-related consequences of ephemeral messaging is manifest today, when people are working remotely due to the pandemic, and using both familiar (i.e. email) and likely less familiar means of digital communication. Some of the latter may create, store, and transmit electronic information relevant to reasonably contemplated or pending litigation and thus fall within the scope of a duty to preserve. What if some of that information “disappears” and sanctions are sought?

Are Ephemeral Messages Actually Ephemeral?

Rule 37(e) is premised on the loss of electronically stored information (“ESI”) that occurs after a duty to preserve has arisen, and where the ESI cannot be restored or replaced. This leads to a preliminary question: Has the ephemeral message been lost in fact?

The 2014 settlement between the Federal Trade Commission and Snapchat is instructive on this point. In its complaint against Snapchat, the FTC [alleged](#) that while marketed as ephemeral, communications sent through the app could actually be saved indefinitely:

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 third-party 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.”

This settlement highlights a question that should be asked prior to, or during, discovery: 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? See *Facebook v. Inc. v. Pepe*, No. 19-SS-1024 (D.C. Ct. App. Apr. 15, 2020) (“As we understand Facebook’s counsel to have clarified at oral argument, a Story that has expired from both the sender’s and the recipient’s platform may still be archived by Instagram within the sender’s account and therefore be producible by Facebook even if it is inaccessible to the sender.”).

The Oscilloscope Analogy

The first decision of which we are aware that addressed disappearing electronic information is the one by U.S. Magistrate Judge James C. Francis IV, in *Convolve, Inc. v. Compaq Computer Corp.*, 223 F.R.D. 162 (S.D.N.Y. 2004). *Convolve* arose out of a patent infringement and trade secret dispute. Decided prior to the 2006 amendments to the Federal Rules of Civil Procedure, *Convolve* considered, among other things, whether a party failed to preserve “intermediate wave forms” on an oscilloscope (a device that draws a graph of an electrical signal and how it changes over time) either by printing screenshots, or by saving the intermediate data to a disk.

Francis found that there was no duty to preserve the wave forms. His analysis is equally applicable to the preservation of ephemeral messaging:

[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. 223 F.R.D. at 177.

The 2006 amendments, and their use of the word “stored,” may have undermined some of Judge Francis’ reasoning. However, his reference to the “heroic efforts” that would have been necessary to preserve the wave forms finds its echo today not as an argument against *preservation* but, rather, as an argument against production under Rule 26(b)(1)’s proportionality principles or as an argument against the imposition of sanctions under Rule 37(e).

2006 Amendments to Federal Rules

The Federal Rules of Civil Procedure saw substantial amendments in 2006, intended to address ESI in civil cases. Indeed, ESI as a phrase was introduced into Rule 34(a)(1). As the Comment to that amendment explained:

Rule 34(a)(1) is expansive and includes any type of information that is stored electronically. A common example often sought in discovery is electronic communications, such as e-mail. The rule covers *** information ‘stored in any medium,’ to encompass future developments in computer technology. Rule 34(a)(1) is intended to be broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and developments.

Under our definition of ephemeral messaging above, it would appear that, at some point before a particular communication “disappears,” it is stored. Not long after the amendments, there was a decision on point.

In *Columbia Pictures, Inc. v. Bunnell*, 245 F.R.D. 443 (C.D. Ca. 2007), the court addressed the question of whether random access memory (“RAM”) held in a computer was “stored” within the meaning of Rule 34(a)(1) and subject to the duty to preserve. The court determined that, although RAM might be held for no more than six hours, it was “stored” and thus subject to preservation. The court rejected the argument that the RAM was “too ephemeral” to be preserved, relying on a Ninth Circuit copyright decision that RAM was a tangible medium.

So, ephemeral messages are “stored” for purposes of preservation. What has case law had to say about the failure to preserve those messages? There are several decisions that address spoliation of ephemeral messages to some degree. Two are discussed below.

Cases Considering Alleged Spoliation

Waymo LLC v. Uber Technologies, LLC

The first case, *Waymo LLC v. Uber Technologies, LLC*, No. C 17-00939 WHA (N.D. Ca. 2018), arose out of the defendants’ alleged misappropriation of plaintiff’s trade secrets. Waymo sought the imposition of sanctions based in part on the fact that Uber had instructed its employees to use ephemeral communications “to minimize its ‘paper trail.’”

The court conducted an analysis under Rule 37(e) without making any findings of fact other than that a duty to preserve existed at the relevant time. Instead, it observed that plaintiff seemed “unwilling or unable to prove its case at trial with qualified witnesses and evidence” and sought to have the court “fill in the gaps with adverse inferences instead.” The court reserved decision on whether Uber had engaged in intentional spoliation until the plaintiff presented its case-in-chief at trial and also reserved decision on whether the jury should be given a permissive or mandatory adverse inference instruction. The case settled during trial.

Herzig v. Arkansas Foundation for Medical Care, Inc.

The second case, *Herzig v. Arkansas Foundation for Medical Care, Inc.*, No. 2:18-CV-02101 (W.D. Ark. 2019), also addressed the imposition of sanctions for the spoliation of ephemeral messages. The defendant alleged that the use of the Signal ephemeral messaging app by the plaintiffs, two former employees of the defendant, constituted spoliation.

In support of its motion for a dismissal or adverse inference on the basis of spoliation, the defendant argued that despite knowing that they were subject to litigation holds, the plaintiffs installed and used the Signal app on their mobile devices in order to intentionally withhold and destroy discoverable evidence. Plaintiffs contended that the defendant had no evidence that the destruction of the communications they exchanged using Signal was in bad faith.

The court found that plaintiffs' Signal communications were likely responsive, and that their decision to withhold and destroy them was intentional and in bad faith. The court based its decision on factors including plaintiffs' "familiarity with information technology, their reluctance to produce responsive communications ... their knowledge that they must retain and produce discoverable evidence, and the necessity of manually configuring Signal to delete text communications." While the court determined that plaintiffs' "intentional, bad-faith spoliation of evidence was an abuse of the judicial process" and sanctionable, it did not have to decide what the appropriate sanction would be, because it granted the defendant's motion for summary judgment and dismissed the case on the merits.

Note that *Herzig* did not base its spoliation analysis on Rule 37(e). Instead, the court conducted a "bad faith" analysis and concluded that some sanction would have been warranted for "abuse of the judicial process" had it not ruled in the defendant's favor on the merits. This sounds like the purported exercise of inherent authority. Whether that avenue is available when ESI is "lost" is questionable because, as was made clear in the Comment to the 2015 Amendment to Rule 37(e), Rule 37(e) was intended to "foreclose[] reliance on inherent authority."

Framework for Analyzing Spoliation

With this history and limited case law in mind, we can create a decision tree to analyze whether and when the loss of ephemeral messages may be sanctionable under Rule 37(e):

- Were the lost messages "stored" within the meaning of Rule 34(a)(1)? (Based on the analysis above, presumably yes, however briefly).
- Were the "lost" messages created after a duty to preserve arose? (If not, and absent an independent statutory or regulatory obligation to retain the messages, the analysis ends).
- Were reasonable steps taken to preserve the messages? (For example, if the ephemeral messaging technology at issue had an "off" switch and those responsible for the technology failed to apply it, they may not have taken reasonable steps, in which case, the analysis ends).
- Can the messages be "restored or replaced through additional discovery?" (If they can be, proceed no further with the sanctions analysis, but the court can consider ordering additional discovery if proportional to the needs of the case).
- Was there prejudice from the loss of the messages? (If so, measures "no greater than necessary [can be imposed] to cure the prejudice," and the analysis ends).
- Were the messages lost through intentional conduct? (If so, the consequences for the spoliating party can be severe, including the imposition of a mandatory adverse inference instruction, dismissal of all or part of the action, or the entry of a default judgment).

Conclusion

This article makes clear that this is a relatively uncharted area of law. Ephemeral messaging is a relatively new means of electronic communication that is often not truly ephemeral. Instead, messages conveyed through these electronic systems are stored, however briefly, on a computer or other device or by an app, either as a default or for a defined time period.

What remains is the need for the development of best practices for the preservation and discovery of ephemeral messages, the extension of information governance principles to these communications, statutory or regulatory clarity about when and if the use of these technologies is permissible, and education about the benefits and risks associated with ephemeral messaging.

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