Ephemeral Messaging Apps in the Workplace: Think Twice Before You Send that Snap!

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Ephemeral Messaging Apps (“EMAs”) are a subset of Messaging Apps that allow users to cause messages (words or media) to disappear on the recipient’s device after a short duration. The duration of the message’s existence is set by the sender. Messages can last for seconds or days, unless the receiver of the message takes a “screenshot” of the message before it disappears.

Snapchat is by and far the most popular EMA. Those who know it, love it – and use it frequently. But if you’re thinking about using EMAs in the workplace, you might want to hold off. Here’s why.

When litigation is reasonably anticipated or ongoing, a party is generally obligated to suspend its routine document-retention-and-destruction policy and promptly place a litigation hold. During litigation, a party may seek to discover electronically
stored information (“ESI”) that is relevant to a claim or defense. Pursuant to the Federal Rules of Civil Procedure, ESI must be produced in a form “in which it is ordinarily maintained or in a reasonably usable form.” Fed.R.Civ.P. 34(2)(E)(ii).

But how can a party reasonably comply with the rules governing ESI discovery and preservation and avoid sanctions if the information is, by its very nature, temporary? Fed.R.Civ.P. 26(b)(2)(b) provides that “[a] party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.” Note also that the 7th Circuit’s Electronic Discovery Pilot Program provides that “ephemeral data” is among the categories of ESI that “generally are not discoverable in most cases.” Of course, “most cases” does not mean all cases and the court may still order production of EMA data. See Doe v. Purdue, et al., NO.: 2:17-CV-33-JPK (N.D. Ind. July 2, 2021) for one such case: https://app.ediscoveryassistant.com/case_law/34896-doe-v-purdue. In Purdue, a civil rights case, Plaintiff was sanctioned for misrepresenting to the Court that his Snapchat account contained no substantive data and for deleting 11 snaps that he had saved previously as “memories” within the Snapchat application.

Morals of the story: understand how EMAs work; when responding to discovery, determine whether there is relevant data saved within an EMA application; and when propounding discovery, remember to ask about EMAs if applicable to your case.

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