

THE NORTH CAROLINA STATE BAR

JOURNAL

WINTER
2021



IN THIS ISSUE

An Interview with Our New President *page 5*

“This Message Will Self-Destruct in Five Seconds” *page 8*

Creating Change in the Practice of Law *page 23*

“This Message Will Self-Destruct in Five Seconds.” *Ephemeral Messaging and the NC Rules of Professional Conduct*

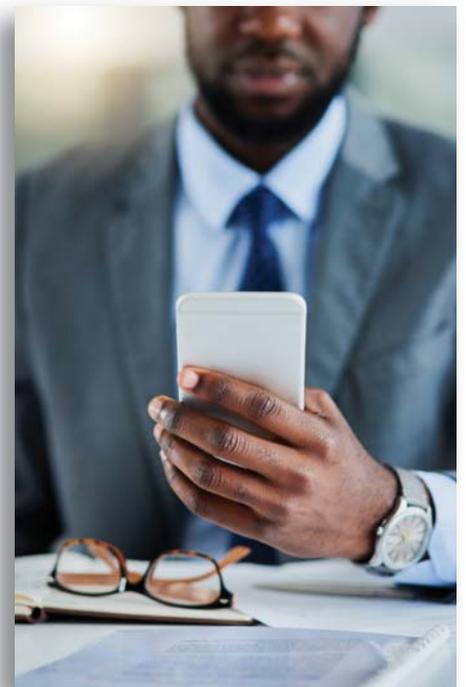
BY JOSHUA T. WALTHALL

What are ephemeral messaging apps? An ephemeral messaging app is a communication platform that allows one user to send to another user an electronic message, not unlike an email or text message, that will automatically disappear directly after the recipient views it. Ephemeral messaging apps “are now widely available on a host of platforms, including enterprise software such as Slack or DingTalk...

...Although each application is slightly different, they all incorporate some type of trigger that automatically deletes messages shortly after viewing and prevents users from editing, copying, forwarding, or printing the messages.”¹ Such apps are lauded by “privacy advocates”² and are becoming increasingly available, especially in the context of litigants and those subject to discovery: “Time limited messaging, after all, can stifle the best laid e-discovery plans or the most thoroughly conducted investigation. And they’re not going away anytime soon. Once only the focus of a handful of messaging apps, ephemeral mes-

sages are now being offered by widely used services like Gmail and Facebook.”³

Typically, messages sent through ephemeral messaging apps are not even captured or saved on a server, though they resemble text messages and emails in other respects. Messages sent and received via an ephemeral messaging app “create the digital facsimile of an in-person meeting or a telephone call by deleting or otherwise destroying a message shortly after it has been read or opened by its recipient(s).”⁴ The apps themselves “are often peer to peer, which eliminates servers in between the sender and recipient



©iStockphoto.com/Adene Sanchez

that could potentially be used to capture the communication. These layers of security make retrieval or reproduction of such messages nearly impossible.”⁵

A server is essentially a central storage system through which a company’s emails travel before being sent to the recipient: “Generally, in a business organization, email systems use a central computer (sometimes the server) to store messages and data and to send them to the appropriate destination. All that is needed

to send messages is a PC, modem, and email connection.”⁶ Emails sent through a regular channel are often captured on a server and, even when deleted from the email recipient’s inbox, can be retrieved by someone searching or accessing the server: “Deleted emails are, in most cases, not irretrievably lost. Deleted emails may remain on a computer hard drive, servers, or retained on back up tapes.”⁷

Think of it this way: if an email is a hard-copy letter, the email recipient’s inbox is her hands, and the server is the waste bin in which she tosses the note after she has read it. Even if she throws the note away, into the bin, the note still exists and can be accessed and read later. To completely eradicate the note, the recipient would need to remove it from the bin and burn it. In much the same way, the recipient of an email cannot eradicate it simply by deleting the email from his inbox; it will still exist on a server and can be searched for, found, and produced in discovery later. Messages sent via ephemeral messaging apps, however, are not kept on a server, so when they disappear, they cannot be accessed again, even by the sender or the recipient.⁸ That, essentially, is what ephemeral messaging apps are: text messages or emails that vanish—from all possible sources—shortly after they are read by the recipient.

Boundaries and Signposts: The North Carolina Rules of Professional Conduct

What, if anything, do the North Carolina Rules of Professional Conduct have to say about ephemeral messaging apps? In truth, not much, at least specifically. This is not surprising: as mentioned, this technology is relatively new. Nonetheless, various aspects of the rules clearly intersect with ephemeral messaging apps and their use in litigation in North Carolina.

Rule 3.4 of the North Carolina Rules of Professional Conduct indicates that, out of “fairness to opposing party and counsel,” a “lawyer shall not unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act.”⁹ Rule 3.4 goes on to note that a lawyer shall not “knowingly disobey or advise a client or any other person to disobey an obligation under the rules of a tribunal, except a lawyer acting in good faith may take appropriate steps to test the validity of such an obligation.”¹⁰ Finally, the Rule

notes that, “in pretrial procedure,” a lawyer is prohibited from “fail[ing] to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party, or fail[ing] to disclose evidence or information that the lawyer knew, or reasonably should have known, was subject to disclosure under applicable law, rules of procedure or evidence, or court opinions.”¹¹

The second official comment to this Rule of Professional Conduct elaborates on the discovery implications of this requirement:

Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed, or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for the purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.¹²

The fifth comment to the Rule highlights “that a lawyer must be reasonably diligent in making inquiry of the client, or third party, about information or documents responsive to discovery requests or disclosure requirements arising from statutory law, rules of procedure, or caselaw.”¹³ The comment then goes on to note that “reasonably” generally means acting as “a reasonably prudent and competent lawyer” and that, “when responding to a discovery request or disclosure requirement, a lawyer must act in good faith.”¹⁴

The fifth comment concludes by noting that a “lawyer should impress upon the client the importance of making a thorough search of the client’s records and responding honestly. If the lawyer has reason to believe that a client

has not been forthcoming, the lawyer may not rely solely upon the client’s assertion that the response is truthful or complete.”¹⁵

Thus, in summation, the following principles drawn from Rule 3.4 of the Rules of Professional Conduct may implicate the use of ephemeral messaging apps in litigation in North Carolina:

1. Lawyers cannot obstruct an opposing party’s access to documents by obfuscating the evidence directly or advising a client to do so.
2. The Rules of Professional Conduct require lawyers to make diligent efforts to obtain and preserve discoverable information and evidence and to comply with discovery directives issued by the courts.
3. It is wrongful for a lawyer to destroy evidence or documents for the purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen.
4. Lawyers have a duty to impress upon clients the importance of being honest, thorough, and forthcoming in producing and preserving records in discovery.

The Ethics Committee of the North Carolina State Bar issued 2014 Formal Ethics Opinion 5 in 2015, and it, too, may provide some possible points of application to the present analysis.¹⁶ The opinion’s second hypothetical raises a relevant situation: A “client’s legal matter will probably be litigated, although a lawsuit has not been filed. May the lawyer instruct the client to remove postings on social media?”¹⁷ While ephemeral messaging apps are not necessarily “social media,” the answer to the inquiry is nonetheless instructive:

A lawyer may not counsel a client or assist a client to engage in conduct the lawyer knows is criminal or fraudulent. Rule 1.2(d). In addition, a lawyer may not unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. Rule 3.4(a). The lawyer, therefore, should examine the law on preservation of information, spoliation of evidence, and obstruction of justice to determine whether removing existing postings would be a violation of the law.¹⁸

The opinion notes that, provided various criteria are satisfied, advising a client to remove or delete postings is not necessarily a violation of the North Carolina Rules of

Professional Conduct: “If removing postings does not constitute spoliation and is not otherwise illegal, or the removal is done in compliance with the rules and law on preservation and spoliation of evidence, the lawyer may instruct the client to remove existing postings on social media.”¹⁹ It is also permissible for the lawyer to “take possession of printed or digital images of the client’s postings made for purposes of preservation.”²⁰

The third hypothetical provides further points of interest to the present discussion: “May the lawyer instruct the client to change the security and privacy settings on social media pages to the highest level of restricted access? Yes, if doing so is not a violation of law or court order.”²¹

Thus, we may conclude the following

Escrow Consulting & Accounting, LLC
Protecting Your Trust Accounts

Are Your Trust Accounts in Accordance with Rule 1.15?

Protect your business by...

- Confirming Monthly and Quarterly Reconciliations Meet NC Bar Rules
- Validating Client Trust Ledgers Are Fully Funded
- Ensuring Compliance with the Accounting Requirements and Making Necessary Ledger Corrections
- Services vary from a one-time review of client prepared reports to ECA reconciling the trust accounts on a monthly basis.



Dawn Cash-Salau
252.531.4241
TrustComplianceNC.com
with 24 years of professional and trust accounting experience

principles from 2014 Formal Ethics Opinion 5:

1. A lawyer may be guilty of violating Rule 3.4 of the North Carolina Rules of Professional Conduct if she advises a client to remove or destroy social media posts or other communications that might have evidentiary value in pending or expected litigation.
2. A lawyer may not be guilty of violating Rule 3.4 of the North Carolina Rules of Professional Conduct if she advises a client to restrict access to or increase security features governing certain posts or other communications, provided it is not in violation of law or court order.

Application: A Hypothetical

Let’s consider how these principles drawn from the Rules of Professional Conduct and the formal ethics opinion may be applied through a hypothetical: Mr. Deets and Newt entered into a business venture together to sell beef cattle to a Montana ranch. Newt took what Mr. Deets believed was more than his fair share of the profits of a recent sale. Mr. Deets hired a locally renowned cattle attorney, Mr. Wilbarger, to represent him in a lawsuit against Newt. Mr. Deets informed Mr. Wilbarger that he was regularly texting with a member of the Montana ranch regarding the sale and the pending lawsuit. Mr. Wilbarger suggested that Mr. Deets stop texting through normal channels and begin texting only through an ephemeral messaging app so that none of the communications could be discovered later. Mr. Wilbarger also instructed Mr. Deets to delete a public social media post wherein Mr. Deets bragged about the money he made from the sale in question. Finally, Mr. Wilbarger suggested that, for all other communications regarding cattle sales, Mr. Deets use a double-encrypted email service to protect the emails from hacking. Eventually, Mr. Wilbarger’s actions drew the ire of the court, which issued an order to show cause, requiring Mr. Wilbarger to show the court why he should not be disciplined for violating the North Carolina Rules of Professional Conduct.

How might a North Carolina court rule regarding an attorney suggesting that Mr. Deets use an ephemeral messaging app and delete relevant social media posts? As mentioned, Rule 3.4 clearly prohibits lawyers from obstructing an opposing party’s access to documents by directly obfuscating the evidence

or advising a client to do so.²² The Rule also requires that lawyers make diligent efforts to obtain and, significantly, to preserve discoverable information and evidence. Accordingly, by advising his client to use an ephemeral messaging app and thus cause the messages to be automatically deleted, a court may find that Mr. Wilbarger did not make appropriate efforts to protect discoverable evidence and, in fact, took deliberate steps to obstruct Newt’s access to those communications in violation of Rule 3.4.²³ Moreover, by advising Mr. Deets to remove or destroy social media posts that had evidentiary value in the pending litigation with Newt, Mr. Wilbarger may have further violated Rule 3.4.²⁴ However, Mr. Wilbarger’s final recommendation to use a double-encrypted email service in order to increase email security is likely not a violation of Rule 3.4 since a lawyer is permitted to advise a client to increase security features governing certain communications, provided it is not in violation of law or court order.²⁵

Conclusion

The societal and cultural concerns of privacy and secrecy—the very concerns ephemeral messaging apps are designed to serve—are legitimate and worth protecting, and ephemeral messaging apps are a brilliant new tool to accomplish as much. But litigants and lawyers in North Carolina must use them appropriately and in accordance with the North Carolina Rules of Professional Conduct, particularly since, as of the date of this article, this is uncharted territory in North Carolina’s courts.²⁶ ■

Joshua Walthall is an attorney at Nelson Mullins where he focuses his practice on representing lawyers, physicians, CPAs, realtors, and other professionals before licensing boards. Prior to joining Nelson Mullins, Josh spent eight years as a prosecutor at the State Bar.

Endnotes

1. William Semins, Daniel Miller, and Hugh McKeegan, *The Compliance Risks Facing Companies That Use Chat Apps*, LAW 360 (June 16, 2020, 4:38 PM), perma.cc/4QW2-T376.
2. Rhys Dipshan, *This Article Will Self-Destruct: Behind Ephemeral Messaging’s In-House Rise*, The Recorder (June 13, 2019), perma.cc/RFZ4-4FD9.
3. Dipshan, *supra*.
4. Semins, *supra*.
5. *Id.*

CONTINUED ON PAGE 22

because *Brown* does not apply to colleges and universities. I found some communications between the attorney general and the governor where the attorney general says we don't have a chance at winning, knowing the Supreme Court the way that it is, but we need to fight anyway. So it's really their brief that struck me and stays with me to this day. And so they petitioned for review, and the Supreme Court denied review.

Q. It is hard to believe that people were taking that position less than 60 years ago. You document a number of very disturbing historical incidents of racism and discrimination throughout the history of UNC, but you also talk about some inspirational leaders that really moved the ball forward and tackled some of those challenges. Of the people you wrote about, who stands out?

A. I would start with President Frank Porter Graham. He was the first president of the consolidated university, which at that time was UNC Chapel Hill, the University of North Carolina State College in Raleigh, and then the Women's College in Greensboro. He was a small man, five foot four. But in so many ways, he was a giant. And I say that because he came in during the Great Depression and he was a strong advocate of academic freedom. I want to read a quote from my book, it's from his inauguration speech. He says, "Along with culture and democracy must go freedom. Without freedom there can be neither true culture, nor real democracy. And without freedom, there can be no university." So I really respected the fact that he was a fierce defender of academic freedom.

A lot of people don't know that he's the one who took the University of North Carolina to national prominence during Jim Crow. He was appointed to a number of committees by President Franklin Delano Roosevelt and then subsequently by President Harry Truman. There were many good things about him. He would loan money to the students, he would let them live in the President's Home. In fact, the trustees got so angry at him they passed a ruling saying the president could not give students money. But the thing that stays with me is that he refused to argue. I mean, as a lawyer that's just difficult to imagine. But it really came to the forefront in the 1950 senate race in North Carolina.

In 1949, North Carolina Senator Melville Broughton died, and Governor Kerr Scott appointed Dr. Frank Porter Graham to finish

up the term. People were devastated that he was leaving the university. He never thought he would ever leave. In the 1950 election, a prominent lawyer, Willis Smith, ran against Graham. Willis Smith was probably the founder and one of the partners of today's law firm Smith Anderson, which is in Raleigh. They had a primary. And then they had to have a second primary. Well, the Willis Smith/Frank Porter Graham 1950 senate race was one of the most vicious and openly racist campaigns in the state's history, and even in the nation's history. Willis Smith came out attacking Graham. First, he said that Graham was a communist. When that didn't seem to go very far with people, he turned and played the race card. Frank Porter Graham believed that desegregation should happen. He was a moderate, thinking that people would come around through education and religion. Once Smith used the race card against him, Graham's campaign staff came to him and said, "You need to go out and you need to attack Willis Smith. You need to be on the offense about this." Well, he told them in definitive terms, I'm not saying anything against any human being. He refused to argue. He lost the primary. He got on the elevator at the Sir Walter Raleigh Hotel, which is where his campaign headquarters were and where Willis Smith's campaign headquarters were, and went downstairs, congratulated Smith, and then never again talked about the senate race. He never said anything negative about Willis Smith. Willis Smith died a year later, while in office. And, at his funeral, on the back row, sitting there quietly, was Dr. Frank Porter Graham.

The other leader who is just as remarkable as President Graham is Dr. James Shepard. I was stunned that, in 1910, he found this plot of land on Fayetteville Street in Durham. It was a trash heap. He had a vision of having a free standing college there for African American students. He built a college and refused to turn away any poor student from 1912 until 1931. He faced serious financial issues, to the point where creditors were going to auction his home and all of his personal belongings. But he remained steadfast. He did not give up. He found benefactors to get the school out of financial trouble. He would go to the legislature to lobby for funds for the school. He was a master diplomat of Jim Crow. And in fact, he and Dr. Frank Porter Graham would correspond often. It always brought me such joy to see a letter from one

to the other. I was struck by Dr. Shepard's determination to fight within the constraints of Jim Crow. However, he was against desegregation because he believed that desegregation would lead to less funding for his school and that his school would eventually be shut down. He also believed—he would say this all the time—that Negro students do their best work at Negro schools. I was struck by his determination in the face of odds that were against him and remained against him. He just continued to fight for those students. ■

Copies of Ms. Kapur's book are available for sale on amazon.com.

Mark Henriques is a partner with Womble Bond Dickinson, where he has practiced for almost 30 years. He serves as co-chair of the firm's COVID-19 Task Force, chairs the firm's Editorial Board, and is the host of the firm's podcast, the In-house Roundhouse. Mark handles complex commercial and construction litigation, with a focus on class actions. He served on the State Bar Council for nine years.

Ephemeral Messaging (cont.)

6. Michael R. Arkfeld, *Structure and Type of Electronic Information*, in Arkfeld on Electronic Discovery and Evidence, § 3.9 (2015).
7. *Id.*
8. Semins, *supra*.
9. N.C. Rules of Prof'l Conduct 3.4.
10. *Id.*
11. *Id.*
12. N.C. Rules of Prof'l Conduct 3.4, Cmt. 2.
13. N.C. Rules of Prof'l Conduct 3.4, Cmt. 5.
14. *Id.*
15. *Id.*
16. N.C. State Bar, 2014 Formal Ethics Op. 5 (2015) (advising a civil litigation client about social media).
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. N.C. Rules of Prof'l Conduct 3.4.
23. *Id.*
24. N.C. State Bar, 2014 Formal Ethics Op. 5 (2015) (advising a civil litigation client about social media).
25. *Id.*
26. This article is an abbreviated version of one published by the author in the Campbell Law Review: *It Was Here a Second Ago: North Carolina Discovery and Ephemeral Messaging Apps*, 43 Campbell L. Rev. (2021).