

in the news

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This Article Will Self-Destruct: Your Employee's Use
of These ESI-Destroying Apps Could Subject You to
Sanctions**In This Issue:**

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The duty to preserve relevant evidence is well established in both the legal community and business world. The obligation is broad in scope and requires action to prevent possible loss of evidence. Many corporate litigants have been subject to severe sanctions for the failure to preserve "ESI" or electronically stored information. Courts have made it clear that the destruction of evidence (spoliation), even if not willful, **may lead to sanctions**. While courts may award sanctions like the imposition of legal fees, in many instances courts **have issued adverse jury instructions**, effectively destroying a party's case or defense. Moreover, it can be assumed that juries or judges will likely distrust a party who has destroyed evidence. But what if relevant ESI destroys itself?

Can You Keep a Secret? There's an App for That.

Apps like Snapchat bring this question into sharp focus. Snapchat allows users to send photos and videos to friends through their phone. These images or videos supposedly self-destruct (both on the recipient's phone and on Snapchat's servers) less than 10 seconds after viewing. In May 2014, Snapchat users were sending 700 million photos and videos per day. Last fall, Snapchat rebuffed a \$3 billion acquisition offer from Facebook.

After the invention of Snapchat, other apps have been developed that tout the same self-destructing technology. For instance, an app called Confide touts its use for "off-the-record" business discussions. Confide was developed by a former AOL executive who came up with the idea after being asked via e-mail to give a reference on a former employee. Confide is aimed at



professionals who want to message each other about job references, co-workers, or other subjects that might land someone in trouble if later discovered in a lawsuit. Like Snapchat, messages sent via Confide disappear once read and Confide does not possess a retrievable copy of the message nor can it read the messages its users sent. This means that neither Confide nor a litigant could produce these messages even though they may relate to relevant discoverable information pursuant to the [Federal Rule of Civil Procedure 26 \(b\)\(1\)](#).

Do Snapchat or Confide Produce “Documents” in the Eyes of the Law? What about Evidence?

There are no specific laws in the United States that prohibit auto-destruct messaging and the laws that are implicated were not written with apps such as Snapchat or Confide in mind. Civil discovery rules are based on the idea that most evidence is in the form of a preservable “document,” electronic or otherwise. While attorneys may try to expand the definition of a “document” in a definition section to discovery requests, they can do nothing about a document destroying itself. Furthermore, there are no rules in place that govern how parties may communicate or whether the use of self-destructing messages is permissible.

These new apps raise a number of legal concerns relating to the potential spoliation of evidence. Ordinarily, to show that spoliation merits an adverse inference instruction to the jury, the party seeking the sanction of the instruction **must show**: (1) the party from whom discovery is sought had a duty to preserve the information, (2) the party is culpable in the loss or destruction of the information, and (3) district court can conclude that the lost or destroyed information would have helped the movant.

Implications on Securities Fraud and Employment Issues

Employers must consider the practical effect of auto-deletion apps like Confide in conjunction with recordkeeping obligations set forth in federal regulations and interpretative

guidance from the EEOC concerning federal anti-discrimination laws such as the Age Discrimination in Employment Act, Title VII, Americans with Disabilities Act, and the Genetic Information Non-Discrimination Act, among others. These recordkeeping regulations and guidance, as well as similar authority regarding a variety of state laws, impose upon employers the obligation to retain records concerning certain personnel actions, including records pertaining to hiring and other personnel decisions. The use of auto-deletion apps may create scenarios in which employees effectively are creating and quickly destroying records that otherwise the company is required to maintain.

Moreover, in employment litigation, the use of auto-deletion apps by key witnesses could be portrayed as suspicious (at best) and deliberately intended to destroy damaging evidence (at worst). Bearing in mind the burden on the complaining party, the question becomes whether a court might allow an adverse jury instruction if the complaining party can show the other party was intentionally using a device like Confide to hide potential evidence. Sending messages through a system that the user knows automatically deletes the message is not likely to excuse noncompliance with legal obligations to preserve documents.

Another concern is the use of these apps by employees of companies subject to Sarbanes-Oxley or Securities and Exchange Commission regulations, for example, where use may violate record retention obligations. Sending messages through devices that automatically delete might not excuse noncompliance with obligations to preserve relevant non-privileged communication. For example, companies subject

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to SEC rules **are required** to retain records relevant to audits and reviews. A few months ago, FINRA fined Barclays \$3.75 million for its failure to retain certain emails and electronic messages for a period of at least 10 years. FINRA stated in a press release that “[f]ederal securities laws and FINRA rules require that business-related electronic records be kept in non-rewritable, non-erasable format to prevent alteration.”

Snapchat or similar apps could have additional implications if they are used for insider trading or trade secret information. FINRA Rule 17a-4 requires registered broker-dealers to retain correspondence for three years, including text messages. Simply, if employees of companies subject to the FINRA rules are discussing financial records, they should be maintained.

Take These Apps into Consideration When It Comes to Your Legal Strategy

Finally, with the wide-spread availability of these apps, counsel in litigation should consider asking witnesses if they ever used such self-destructing apps. The fact a person used a message destroying app about a particular subject could impact that party’s credibility, damage a company’s reputation for allowing such use to occur and lead to bad publicity. It would be wise for an attorney to mention these devices in a legal hold letter, suggest that parties not use them in relation to litigation, anticipated litigation or a governmental investigation and advise that no one in certain industries should use these devices.



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* Law360, March 2014

** *The American Lawyer* 2013 and 2014 reports

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