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Second Tuesdays with Redgrave Webinar Series

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Ephemeral Messaging

Navigating risk amid increasing adoption

Speakers

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Agenda

- What is ephemeral messaging?
- Case law
- Risk mitigation
- Technology considerations

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What is Ephemeral Messaging?

Ephemeral Messaging

- Automated deletion of messages
- On sender's *and* recipient's devices
- Within specified time period

Traditional Messaging

- Sender can set deletion on own device
- Sender cannot set deletion on recipient's device

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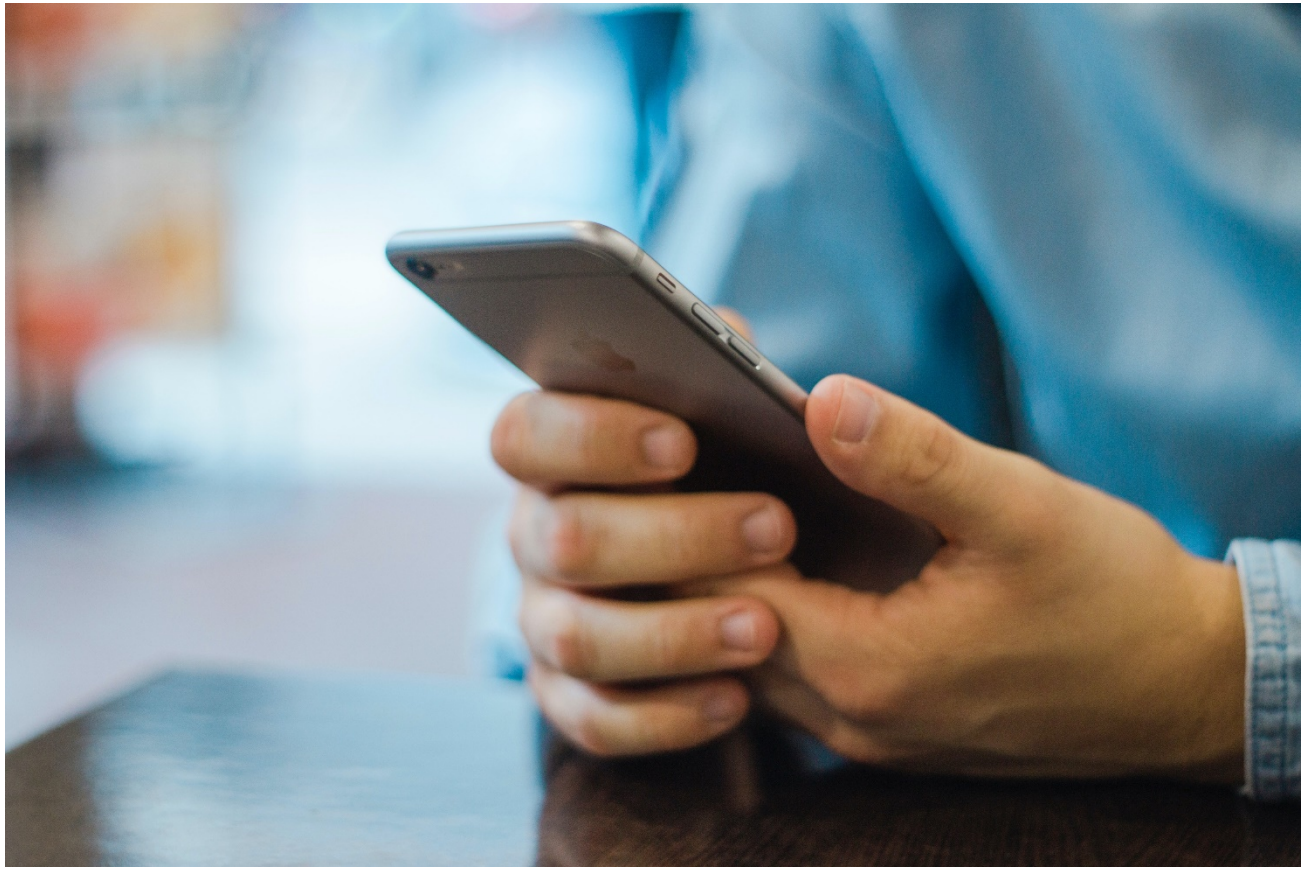
Ephemeral Messaging Functionalities

- Configure time period for destruction
- Encryption
- Prevention of screen shots
- Consumer vs. enterprise apps



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Benefits of Ephemeral Messaging

- Confidentiality
- Privacy
- Data security
- Data minimization
- Enforcement of retention periods
- eDiscovery cost reduction

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Risks of Ephemeral Messaging

- Compliance risks
  - Detection of improper conduct
  - Adherence to retention schedules
  - Regulatory retention requirements
  - DOJ cooperation credit
  - Statute of frauds

- Reputational risk
- Litigation risk (duty to preserve)
- Technology risk (really ephemeral?)

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DOJ: FCPA Corporate Enforcement Policy

2017 Initial Policy

- Required companies to prohibit employees from “using software that generates but does not appropriately retain business records or communications.”
- Failure to follow could result in disqualification from receiving full credit for cooperation with an FCPA investigation.

2019 Policy Revision

- No longer states that DOJ expects companies to prohibit employees from using such software.
- Instead requires companies to ”implement[ ] appropriate guidance and controls on the use of personal communications and ephemeral messaging platforms that undermine the company’s ability to appropriately retain business records or communications or otherwise comply with the company’s document retention policies or legal obligations”

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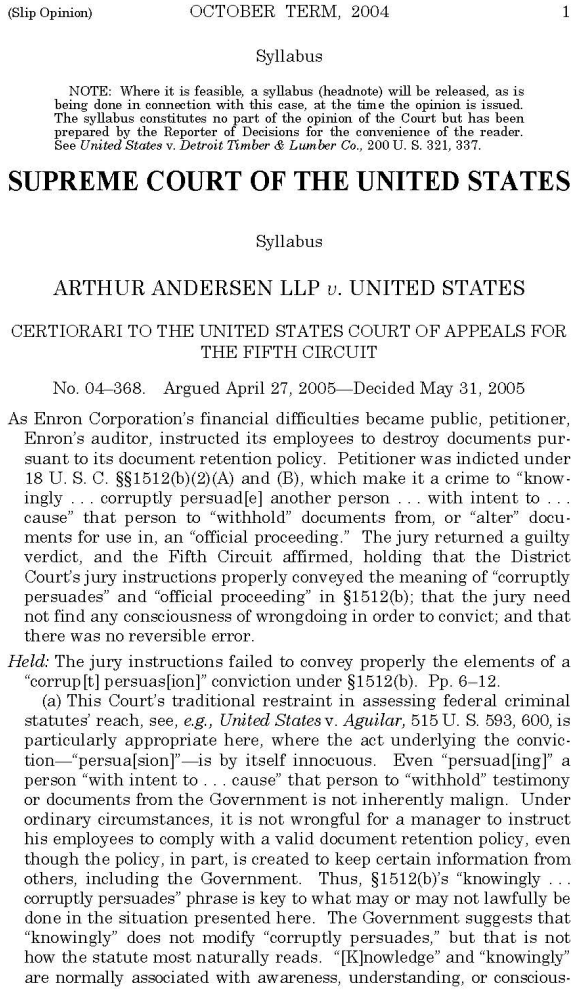
Case Law: Defensible Disposition

Arthur Andersen v. United States, 544 U.S. 696, 704 (2005).

"It is, of course, not wrongful for a manager to instruct his employees to comply with a valid document retention policy under ordinary circumstances."



(Slip Opinion) OCTOBER TERM, 2004 1

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

ARTHUR ANDERSEN LLP *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 04–368. Argued April 27, 2005—Decided May 31, 2005

As Enron Corporation's financial difficulties became public, petitioner, Enron's auditor, instructed its employees to destroy documents pursuant to its document retention policy. Petitioner was indicted under 18 U. S. C. §§1512(b)(2)(A) and (B), which make it a crime to "knowingly . . . corruptly persuad[e] another person . . . with intent to . . . cause" that person to "withhold" documents from, or "alter" documents for use in, an "official proceeding." The jury returned a guilty verdict, and the Fifth Circuit affirmed, holding that the District Court's jury instructions properly conveyed the meaning of "corruptly persuades" and "official proceeding" in §1512(b); that the jury need not find any consciousness of wrongdoing in order to convict; and that there was no reversible error.

Held: The jury instructions failed to convey properly the elements of a "corrup[t] persuas[ion]" conviction under §1512(b). Pp. 6–12.

(a) This Court's traditional restraint in assessing federal criminal statutes' reach, see, *e.g., United States* v. *Aguilar,* 515 U. S. 593, 600, is particularly appropriate here, where the act underlying the conviction—"persua[sion]"—is by itself innocuous. Even "persuad[ing]" a person "with intent to . . . cause" that person to "withhold" testimony or documents from the Government is not inherently malign. Under ordinary circumstances, it is not wrongful for a manager to instruct his employees to comply with a valid document retention policy, even though the policy, in part, is created to keep certain information from others, including the Government. Thus, §1512(b)'s "knowingly . . . corruptly persuades" phrase is key to what may or may not lawfully be done in the situation presented here. The Government suggests that "knowingly" does not modify "corruptly persuades," but that is not how the statute most naturally reads. "[K]nowledge" and "knowingly" are normally associated with awareness, understanding, or conscious-

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Case Law: Email Autodelete Periods

Viramontesv. US Bancorp,
2011 WL 291077
(N.D. Ill. Jan. 27, 2011)

Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.,
244 F.R.D. 614
(D. Colo. 2007)

No bad faith where emails destroyed pursuant to 90-day email retention policies (before litigation was anticipated).

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Case Law: Email Autodelete Periods

Kemode v. Univ. of Mississippi Med. Ctr.,
2011 WL 2619096
(S.D. Miss. July 1, 2011)

No sanctions under Rule 37 where emails destroyed pursuant to 60-day retention policy before duty to preserve arose.

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Case Law: Email Autodelete Periods

Broccoli v Echostar Commns.,
229 F.R.D. 506
(D. Md. 2005)

"[U]nder normal circumstances, such a policy [of 21-day retention of emails] may be a risky but arguably defensible business practice undeserving of sanctions."

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Case Law: Chat Rooms

Louis Vuitton v. Dooney & Bourke, Inc.,
2006 WL 3851151
(SDNY 2006)

No obligation to affirmatively install system to capture and store customer chat messages, where the existing chat room technology didn't have that feature (chats also were outside relevant time period).

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Case Law: Text Messages

Federico v. Lincoln Military Housing, LLC,
2014 WL 7447937
(E.D. Va. 2014)

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Individual plaintiffs' routine, good-faith deletion of text messages from phone devices did not result in sanctions, particularly as they were unsophisticated regarding litigation and not on notice that defendants would seek their texts even if they reasonably anticipated litigation.

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Case Law: Text Messages After Duty To Preserve

In re Pradaxa Prod. Liab. Litig.,
2013 WL 6486921
(S.D. Ill. Dec. 9, 2013),

partially rescinded on other grounds,
745 F.2d 216 (7th Cir. 2014)

Sanctions where defendant failed to suspend autodelete on salespersons' text messages on mobile devices equipped with MDM after duty to preserve was triggered.

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Case Law: IMs

7th Cir. Pilot Program:

Convolve Inc. v. Compaq Computer Corp.,
223 F.R.D. 162, 177
(SDNY 2004)

Companies should not be expected to modify IM systems to log or journal messages solely for litigation purposes.

Noting in dicta that IMs can be either ephemeral or like email, depending on the system. Also finding that companies should not be required to undertake "heroic efforts" to preserve ephemeral data in the normal course of business.

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Case Law: IMs

H.J. Heinz Co. v. Starr Surplus Lines Ins. Co.,
2015 WL 12791338
(W.D. Pa. Jul. 28, 2015)

Motion to compel denied where company's system did not retain IMs and users testified they did not use IMs to conduct substantive business.

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Case Law: IMs

Andalam v. Trizetto Group, Inc.,
2013 WL 6076082
(D. Colo. Nov. 19, 2013)

No sanctions where user did not activate archiving on company's IM system, and therefore did not retain IMs in the regular course of business, and plaintiff failed to establish that any relevant IMs would have existed even if retained.

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Case Law: Ephemeral Messaging

Herzig v. Arkansas Foundation for Medical Care, Inc.,
2019 WL 2870106
(W.D. Ark. July 3, 2019)

After being ordered to produce text messages, plaintiffs shifted to ephemeral messaging. Court found they used app to nefariously conceal relevant communications.

No sanction, but only because court simultaneously granted motion for summary judgment.

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Case Law: Ephemeral Messaging

Waymo v. Uber,
2018 WL 646701
(N.D. Cal. Jan. 30, 2018)

Court found Uber's use of ephemeral messaging was a possible explanation of why Waymo had failed to find more evidence of trade secret misappropriation.

Permitted Waymo to present evidence of Uber's use of ephemeral messaging to the jury. Also permitted Uber to present evidence that its use of ephemeral messaging was legitimate, including pointing to Waymo's own use of ephemeral messaging.

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Mitigating Risks of Ephemeral Messaging

Develop written policy regarding ephemeral messaging that:

- Identifies legitimate business needs for ephemeral messaging;
- Addresses the benefits and risks of the ephemeral messaging;
- Identifies risk-mitigation strategies that the organization has implemented; and
- Is consistent with the organization's information-retention policies.

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Mitigating Risks of Ephemeral Messaging

Develop an internal compliance program regarding ephemeral messaging:

- Provide “appropriate guidance and controls” regarding ephemeral messaging per revised DOJ policy;
- Know how ephemeral messaging is being used in your company;
- Include proper use of ephemeral messaging into annual mandatory training;
- Ensure that document retention and preservation policies account for ephemeral messaging; and
- Consider enterprise ephemeral messaging technology that provides for monitoring, logging/archiving/backup, and/or can limit to internal use.

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Mitigating Risks of Ephemeral Messaging

Address ephemeral messaging in use policy for mobile devices:

- Have a robust mobile device use policy;
- Address the use of unapproved ephemeral messaging tools; and
- Address permitted and unpermitted uses of approved ephemeral messaging tools.

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Mitigating Risks of Ephemeral Messaging

Address preservation obligations:

- Have preservation capability in enterprise ephemeral messaging tools;
- Be able to preserve legal hold custodians' existing or archived ephemeral messages after duty to preserve arises; and/or
- Suspend custodians' ability to use ephemeral messaging after duty to preserve arises.

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Technology Considerations

- Make no assumptions
- Investigate the functionalities
- Conduct independent research
- Test and verify
- Be aware of “shadow IT” and consumer apps
- Identify the true costs and burdens
- Reassess regularly

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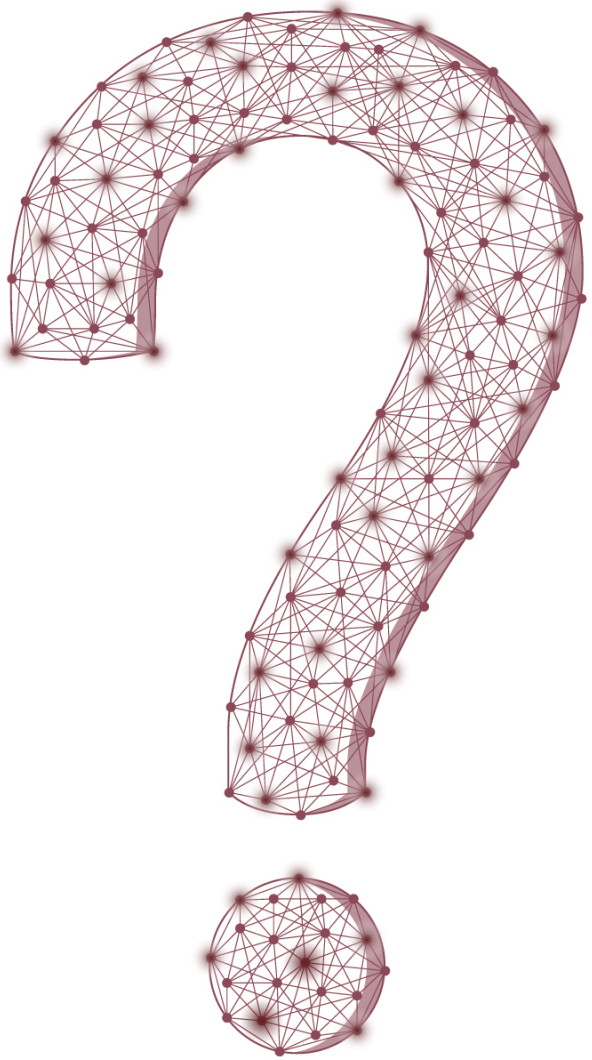

QUESTIONS?