



Disappearing Act

Lawyers who want to use ephemeral messaging apps for their work must understand the apps' benefits, risks, and limitations, just as they would for any other technology, and ideally, obtain informed consent from their clients before doing so. This article discusses some important considerations when deciding whether to use these technologies.

BY STACIE H. ROSENZWEIG

So-called ephemeral messaging apps – phone and computer programs that offer, among other features, the ability to set conversations to automatically disappear for all parties after a specified period – have been in the news recently.

To be clear, the news coverage has been primarily about the various ways use of a particular app went wrong.¹ There are plenty of ways to use these apps correctly, and many lawyers use these apps for personal communication without any problems. Some programs, such as Signal, offer robust end-to-end encryption and other security features not found in default iOS or Android messaging apps, and the automatic-deletion features may be of secondary importance. Others, like WhatsApp, are in wide use overseas. And some, like Snapchat, are just fun, incorporating a variety of effects and filters so you can send your kids a face-swapped photo of you and your dog (and have it vanish shortly after they open it so it doesn't make it into their soccer team group chat).

But can lawyers ethically use these apps, with automatic deletion enabled, for communication with clients? This is another one of those “yes, but” or perhaps a “no, unless” subjects.

First, a caveat: If you work for, or on behalf of, a government, ephemeral messages (and, more specifically, deletion of messages) may run afoul of public records laws.² While attorney-client privilege and other common-law principles may exempt certain communications from public inspection,³ this does not mean these records aren't records subject to preservation. These apps may be a hard no for lawyers working with public entities.

For those lawyers whose work involves wholly private parties, ephemeral messaging may not be off limits. After all, at the end of

the day, they're messaging apps, and lawyers have been using messaging apps for texting for some time now. Some lawyers still hate text messages and refuse to use them, or stick only to confirming appointments and courtroom numbers, but some clients insist on using them or are only reasonably reachable by text.⁴

The difference here, however, is that most traditional texting apps allow users to delete messages from their own devices but not from any other parties' devices, and some may be recovered even if recently deleted. Ephemeral messaging apps leave no trace of the messages once they disappear.⁵

Lawyers wanting to use ephemeral messaging apps for their work need to understand them, including their benefits, risks, and limitations, just as they would for any other



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technology, and ideally, obtain informed consent from their clients before doing so.⁶ Some important considerations when deciding whether to use these technologies are discussed below.

Gone Might Not Be Gone

Just because the app has deleted the message does not necessarily mean the message is gone for good. Even if the

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messages have been set to automatically disappear after one day, or one hour, there is no guarantee that one party to the messages hasn't kept them in some form. Some apps will notify users if a screenshot is taken of their message or photo, but regardless, there is little stopping someone from using another device, even a photocopier, to capture a communication they want to keep.

You Need the Receipts

A client may have a good reason for wanting to not leave a digital paper trail – they may be trying to leave an abusive partner who has access to their devices or may frequently travel internationally, which can render their electronics more subject to search.⁷ If your client wants to use disappearing message apps for their own privacy, consider a policy that allows you to retain copies through other means.

If a client wants you to delete your copies too, that might be a red flag. The inability to easily retain messages, to me, is the biggest risk of using this technology: when the messages vanish, so does the ability to use these conversations later.

The statute of limitation for legal malpractice is three years⁸; for grievances, six.⁹ That's a long time, and memories

fade. Sure, phone calls and meetings are also ephemeral unless they're recorded,¹⁰ but most lawyers at least take notes of oral conversations. And while the onus is on a plaintiff to prove malpractice or the Office of Lawyer Regulation to prove misconduct, it's a lot harder to defend yourself if you don't have the records.

Moreover, at conclusion of representation, lawyers are obligated to turn over the client's files. Formal Ethics Opinion EF-16-03 indicates that correspondence, including "texts, and other electronic correspondence that has been retained according to the firm's document retention policy," is part of the file and must be surrendered. If you do choose to communicate with your client in this way, even though it may seem obvious, be sure to communicate from the outset that messages (text or otherwise) sent

through these platforms will *not* be retained in the client's file.

PEBKAC and Other Errors

SCR 20:1.6(d) requires lawyers to take reasonable efforts to protect their clients' confidential information, but all the security in the world can be defeated by PEBKAC,¹¹ that is, plain human error. Security is only as strong as the weakest device and the most careless individual in an electronic conversation. You could have end-to-end encryption, multifactor authentication, and all conversations set to disappear within the hour, and all of that falls apart if an unauthorized actor is added to a chat – or, for that matter, if your client leaves their phone unlocked in a gas station bathroom. (You wouldn't do that, right?)

Conclusion

Perhaps, by the time you read this, ephemeral messaging will be out of the news. But it's still likely to be on clients' minds and should remain on lawyers' minds as well. The time to decide whether and when to use ephemeral messaging is before a situation arises in which information disappears or becomes public. **WL**

ENDNOTES

¹Jeffrey Goldberg, *The Trump Administration Accidentally Texted Me Its War Plans*, The Atlantic (March 24, 2025), <https://www.theatlantic.com/politics/archive/2025/03/trump-administration-accidentally-texted-me-its-war-plans/682151/>.

²See, e.g., Wis. Stat. §§ 19.21-.39.

³Wis. Stat. § 19.35(1)(a).

⁴Dean R. Dietrich, *Handling Clients' Text Messages*, 89 Wis. Law. ___ (April 2016), pointed out that SCR 20:1.4 requires lawyers to reasonably maintain communication with clients and some are going to want to use text messaging to communicate.

⁵Whether messages sent through these apps may be recoverable through extraordinary means, or a subpoena, is beyond the scope of this article. For our purposes here, if messages are set to disappear, they are inaccessible to and irretrievable by the sender and the receiver.

⁶See ABA comment 8 to SCR 20:1.1.

⁷U.S. Customs & Border Protection, *Border Search of Electronic Devices at Ports of Entry*, <https://www.cbp.gov/travel/cbp-search-authority/border-search-electronic-devices> (last modified Jan. 7, 2025).

⁸Wis. Stat. § 893.53.

⁹SCR 21.18(1).

¹⁰For guidance on when and whether it is allowable to record client calls, see Formal Opinion EF-24-01.

¹¹"Problem exists between keyboard and chair." **WL**