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# Alice in WeChatland

## Into the Compliance and Discovery Rabbit Hole of Messaging Apps

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# No Longer Just Emails, Texts and Chats

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## How these changes are significant to your business

- eDiscovery and Litigation Implications
- Regulatory Compliance Concerns
- Bring Your Own Device Issues
  - Personal vs Work phones
  - Mobile Device Management
- Work information on multiple cloud platforms
  - Employee iCloud accounts
  - Company/third party Slack channels
  - Messaging apps

# What is out there?

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- **WhatsApp**-Used in Europe, Mexico, etc.

- End to end encryption



- **WeChat**- Used in China



- **Private direct messaging:**

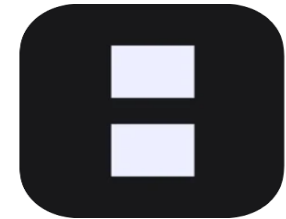
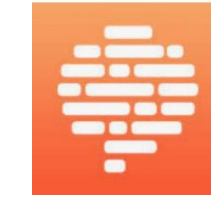
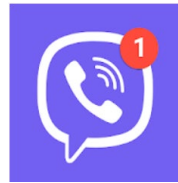
- Slack
- Skype
- Signal
- Telegram, Teamspeak, Reddit



# What is out there?

- **Ephemeral messaging:**

- Snapchat,
- Wickr,
- Dust,
- Confide,
- Sicher,
- Viber, Threema, Signal (again)....



- **Office365 or Google Workspace (G Suite)**

# What is out there... and can we get it?

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- Forensic recovery including of deleted data vary by implementation (platform, OS and app version(s), etc.)
- Distinction of encrypted data
  - In motion
  - At rest
- Distinction of data stored **ON** the device versus **IN** the cloud
  - Raises consent and “authority to access” issues



# Implications of Business Use

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- Benefits to the business
- Risks to the business
- Employer Controls
  - Technical Controls – mobile device management (MDM)
  - Other Controls – BYOD agreements, IT use policies



# Preservation and Collection Issues

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Current Sedona Commentary on Ephemeral Messaging and best practices

- May advance key business objectives.
- Take affirmative steps to minimize risk (including considerations of lit hold obligations for sanctioned and non-sanctioned “consumer” products).

Considerations include:

- How to configure the system?
- Guidance regarding the nature of communications permitted



# Preservation and Collection Issues

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- DOJ has recognized business use of these new applications but requests that companies put controls around “ 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 retentions policies or legal obligations.” US Attorney’s Manual 9-47.120(3)(c) (FCPA 2019)
- No new guidance



# Preservation and Collection Problems

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## Significant collection and review challenges

- Decentralized—personal and business platforms
- Exporting data in reviewable format difficult to review
- Family members may not be preserved (attachments, photos, etc.)
- Chats can be **very** long with slang, emojis, topic changes, etc.



# Privacy Implications and eDiscovery Tensions

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- Use of ephemeral communications facilitates [*privacy*] compliance, but raises US discovery concerns
  - [\*Brooks Sports, Inc. v. Anta \(China\) Co., Ltd.\*](#)



# Privacy Implications and eDiscovery Tensions

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Finally, regarding the WeChat communications, Anta claims that it should not be penalized for the argued legitimate refusal under Chinese law by its employees to allow searches of their WeChat accounts. The Court disagrees. Anta may not avoid penalties for their claimed inability to produce those communications. Anta clearly knowingly allowed its employees to use WeChat for substantive business communications through only their personal accounts and devices. In fact, the sole person identified in Anta's initial disclosures as having knowledge of the facts of the case, Dacheng Peng, refused to allow his WeChat to be search, which the Court finds particularly troubling. Anta should not be able to conveniently use Chinese law to shield production of communications responsive to discovery requests when it could have set up Anta-controlled WeChat accounts for its employees' use which would not have the same issues regarding Chinese privacy laws.

# Considerations

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- Review document retention policies regarding messaging apps
- Create a plan for implementation of litigation hold
  - *Waymo LLC v. Uber Tech., Inc.*, 2018 WL 646701 (N.D. Cal.)
  - *Herzig v. Ark. Found. for Med. Care, Inc.*, 2019 WL 2870106 (W.D. Ark.)
  - *Kixsports, LLC v. Munn*, 2019 NCBC 61
- Make sure auto deletion functions deactivated
- Should ban use of ephemeral apps that can't archive
- If personal device used for business with apps, employee should agree to access and confirm delete tools are not activated

# Considerations

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- Mobile device management can:
  - Allow locking and/or unlocking of devices
  - And also mandate encryption and strong passwords on devices containing sensitive communications
  - Restrict user's ability to factory reset or "wipe" device
  - Restrict ability to exfiltrate data from device, including backups via iTunes or iCloud



# Considerations

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- Need to understand employee usage of apps
- Learn collection issues with devices in advance including retrieval limitations
- Learn employee slang and code
- Consider mobile device management software and functionality



# Final Thoughts

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- Stay up with new messaging apps
- Review usage of apps with employees
- Adapt document retention policies to employee app usage
- Determine business vs. personal device issues
- Be Prepared!



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Any Questions?



# Thank you!

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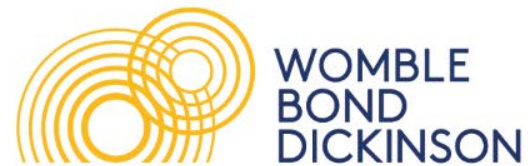
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