

PRESIDENT'S MESSAGE

Time Flies By When You're Having Fun. Even in Trying Times.

By Lisa G. Whittaker, Employment, Compliance, and Litigation Counsel, EXPRESS, LLC



When I sat down to draft my final message as the OWBA President, I was overcome with a mixture of emotions. I felt a sense of pride, but also sadness that my time was coming to an end. As we all know, time flies when you're having fun, and the 2019-2020 Board did just that! We had accomplished so much in just 10 short months and were putting the final touches on our two signature events when life as we all knew it was forever changed.

In light of recommendations and orders from Governor Dewine, the CDC, and the WHO regarding COVID-19, the Executive Committees of the OWBA and OWBF made the decision to postpone our two signature spring events – Leading with Style Cincinnati and the OWBA-OWBF Annual Meeting and Conference. While we were disappointed that the events were not able to come to fruition this spring, we believed that everyone's health and well-being were of utmost importance. Leading with Style Cincinnati is now scheduled to take place on Thursday, August 6, at The Transept in Cincinnati, and the Annual Meeting and Conference will be a 1-day event on Friday, August 28, at the Nationwide Hotel and

Conference Center in Lewis Center near Columbus. We hope that your schedule will permit you to join us at both gatherings!

The swearing-in of the 2020-2021 OWBA and OWBF Board of Trustees was scheduled to take place at the Annual Meeting Luncheon, but since we cannot meet in-person, we are conducting a virtual swearing-in of our Officers on May 1. A listing of the 2020-2021 Officers can be found on page 15 in the newsletter. We are grateful for their commitment to serve the OWBA and OWBF over the next year!

The quarantine is the perfect opportunity to reminisce about what has been going on the last five months! The Board and committees put together timely relevant programming in collaboration with key partners in the community. One of the events that sparks the most joy for me was the Public Private Sectors Connect CLE.

The 2019 Public-Private Sectors Connect CLE was hosted on November 21 at Porter Wright Morris & Arthur in Columbus and live-streamed to Porter Wright offices in Cincinnati, Dayton and Cleveland. Over 70 Ohio attorneys tuned in to hear from two incredible panels about pay equity. The first panel moderated by Lindsay Ford Ellis, OhioHealth, focused on identifying the pay

equity issue. Joining Lindsay in the discussion were Kelley Griesmer, The Women's Fund of Central Ohio; Barb Smoot, WELD; Heather Brod, OSU College of Medicine; and Christie Angel, YWCA. The second panel focused on balancing the pay scales. Attendees heard from Meredith Rockwell, The Ohio Attorney General's Office; President Pro Tem Elizabeth Brown, Columbus City Council; and Daphne Kackloudis, Equitas as they explored ideas and initiatives to balance the scales in a conversation lead by Deb Boiarsky, Porter Wright Morris & Arthur.

We also honored Ohio's newest women attorneys at the Southwest Ohio New Admittee Reception on December 3 at Grainworks Brewery. The event was sponsored by Faruki PLL, Taft and Dinsmore & Shohl LLP and brought together over 30 southwest Ohio legal professionals.

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What's That Smell?

By Catherine Strauss, Ice Miller LLP



We've all been there - you walk into an elevator or walk by a coworker, and all you can smell is the person's cologne or perfume. Or you walk into a room with a diffuser or plug-in that is intentionally trying to flush 'good' fragrance into a room? How about perfumed toiletries, air fresheners, soaps and cleaning products that infiltrate the workplace? It is inconvenient, a nuisance.

Are there health effects of fragrance chemicals? Certainly with the public's awareness on chemicals and health, it's not surprising that attention and concern are moving toward fragrance chemicals.

But what if it is more than focused attention? What if an employee says a fragrance impacts their asthma or flares up their allergies? Does an employer have a legal obligation to accommodate an employee who claims fragrance sensitivity? The answer might be yes.

Allergies or sensitivity to fragrance chemicals can be a disability under the American with Disabilities Act (ADA). Fragrance chemicals can interfere with the major life activity of breathing, cause migraine headaches or skin reactions. The city of Detroit, for example, faced such an issue, when the City's human resources refused an employee's request for an accommodation without engaging in any interactive process. The employee successfully won her legal challenge based on the employer's utter failure to engage in any discussion or process to determine if a reasonable accommodation existed.

So what is required when an employee informs you of a medical condition relating to fragrance chemicals? Learn more, talk to the employee, consider the employee's request on how to solve it, consider whether reasonable accommodations exist and be creative in your problem-solving. This is the interactive process. And it is a case-by-case inquiry.

Of course, this is complicated by the fact that an accommodation solution might affect others in the work environment besides the person requesting the accommodation. Let's say two co-workers share neighboring cubes, and one's perfume or desktop diffuser negatively impacts the other's allergies. You can move the physical locations of co-workers, ask the perfume-wearer to stop wearing perfume, prohibit the diffuser, alter work schedules, create a fragrance-free zone or floor, allow fresh air breaks, establish optional calling in to meetings with many employees, or permit remote working.

Broader considerations include the implementation of a fragrance policy or notice requesting that all employees refrain from wearing or using scented products at work. Another consideration is to limit the use of fragrance IN the workplace - such as to prohibit the use of diffusers, plug-ins, scented candles and aerosol sprays. This is not the same as a

100% fragrance-free environment, which would be nearly impossible to enforce. Implementing such a policy should be consistent with the development and roll-out of any other employer policy and can be included in the employee handbook.

In conclusion, if an employee raises such an issue, take it seriously, inquire and discuss options with the employee. Alternatively, consider implementing a fragrance-free policy now which could start with the elimination of fragrance such as diffusers or plug-ins without yet addressing personal use of fragrance. If you would like to discuss this or similar issues, please contact Catherine Strauss, a partner in Ice Miller's Labor and Employment practice. ■



Leadership.

Thank you to the women in law who have paved the way for others.

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100 Years of Constitutional Voting Rights for Women: The Lake County Connection

By Judge Mary Jane Trapp, Ohio Court of Appeals, Eleventh Appellate District



“To change society, you must change government, and voting is the only way.” – Frances Jennings Casement (1840-1928), Founder of the Painesville Equal

Rights Association and President of the Ohio Woman Suffrage Association.

Senate Resolution 12, Jan. 10, 1878, 45th Congress, 2nd session

Sec. 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Sec. 2. The Congress shall have power to enforce this article by appropriate legislation.

The Nineteenth Amendment to the United States Constitution was passed by Congress on June 4, 1919, and ratified on August 18, 1920, thus securing a woman’s right to vote as a constitutional right. As America celebrates this centennial, the American Bar Association has joined the celebration, announcing its annual Law Day theme – “Your Vote, Your Voice, Our Democracy: The 19th Amendment at 100.”

Locally, Lake Erie College has embarked on a year-long research project focusing on the contributions of the institution’s graduates to the suffrage movement.ⁱ The scholarship of the Lake Erie College professors and my own research about Justice Florence E. Allen prompted me to

discover more about the history of the women’s suffrage movement and Lake County’s ties to the suffrage movement.

While advocacy and debate over women’s rights to vote and hold political office extend back into the early days of the republic (women in colonial New Jersey were able to vote from 1787 to 1807), the trailhead of the path to ratification of the Nineteenth Amendment began at the Seneca Falls, New York Woman’s Rights Convention in July of 1848.ⁱⁱ

As University of Akron Law Professor Tracy A. Thomas explains in her forthcoming March 2020 article for the *Stanford Journal of Civil Rights and Civil Liberties* (which I highly recommend for an in-depth analysis of the forces behind the movement), the “nearly-century long movement for suffrage, however, was never, just about the vote. It originated as part of a comprehensive plan for women’s equality as proclaimed at Seneca Falls in the women’s Declaration of Sentiments. [Elizabeth Cady] Stanton, the intellectual driver of the first women’s rights movement, conceptualized the vote as only one of the needed rights of women to access the political process. The elective franchise was a key piece of reform, to gain women access to the right to make the laws that governed them, but it was never the sole goal.”ⁱⁱⁱ

Ms. Stanton, who later would join forces with Susan B. Anthony to form the National Woman Suffrage Association (NWSA), presented her Declaration of Sentiments, delineating eighteen civil rights denied to women in four areas,

which she described as “a fourfold bondage”: state, family, industry, and church.

Having been educated at a female seminary and trained in the law by her father, Daniel Cady, a legislator and judge, who had Elizabeth ride circuit with him as his law clerk, she advanced the argument that women had the “inalienable right to the elective franchise.”^v Ms. Stanton “criticized this denial of ‘the first right of a citizen’ that compelled women to ‘submit to laws, in the formation of which she had no voice,’ and which left her ‘without representation in the halls of legislation’ thereby oppressing women on all sides.”^{vi} The Declaration of Sentiments is a well-crafted legal argument - “a broad ‘equality text’ seeking women’s rights of political and legal status as well as an emancipatory text proclaiming freedom from oppressive religious and social customs and restraints.”

The intervening Civil War, followed by Reconstruction and the debates surrounding the passage of the Fourteenth and Fifteenth Amendments, both delayed and divided those fighting for women’s suffrage and equality. Ms. Stanton and Ms. Anthony continued to push for more systemic reform through their advocacy for a federal constitutional amendment securing the vote for women, while Lucy Stone, educated at both Mount Holyoke Seminary and Oberlin College, and her husband, Henry Blackwell, formed the American Woman Suffrage

Association (AWSA).

AWSA was focused first on “Negro” suffrage and then women’s suffrage, with some of the other reforms first articulated in the Declaration of Sentiments relegated to a lower priority.

After the ratification of the Fourteenth Amendment in 1868, Ms. Stanton’s legal acumen pivoted her organization to argue that the “privileges and immunities” protected for all citizens by Article IV of the United States Constitution granted women the right to vote. Armed with this legal argument and a new NWSA platform called the “New Departure,” Susan B. Anthony actually voted in 1872, but she was arrested and convicted for her crime of voting.

The United States Supreme Court’s decision in *Minor v. Happersett* then drove a stake through the heart of the New Departure, declaring that while women were “national citizens, entitled to the protection of the privileges and immunities clause, voting was not a federal right of citizenship, but rather was determined by each individual state.”

This led to the rise of grassroot women’s suffrage organizations in the states, with Wyoming becoming the first state to grant women suffrage in 1869. One woman from Painesville, Ohio, who had travelled to the Wyoming Territory and witnessed the work of Ms. Stanton and Ms. Anthony would return to Painesville, bringing the message of women’s suffrage and equal rights to Lake County.

Lake County played a critical role in the suffrage movement. The leadership of its prominent citizens in advancing and supporting

women’s higher education was a key catalyst.

Lake Erie College began as the Willoughby Female Seminary. It was founded in 1847 and modeled after the Mount Holyoke Female Seminary in South Hadley, Massachusetts, which later became the first women’s college in America, and my alma mater, Mount Holyoke College. At the request of the trustees, one of which was Lake County Common Pleas Court Judge Ruben Hitchcock, Mount Holyoke’s founder, Mary Lyon, sent Roxena Tenney to Willoughby to establish the seminary and its curriculum. After a fire destroyed the seminary, Painesville businessmen founded the Lake Erie Female Seminary in Painesville. Principal Lydia Sessions was Lake Erie’s first president, and the original teachers were six women from Mount Holyoke.

One Lake Erie alumna, Frances Jennings Casement, buoyed by her Wyoming experiences, later became a leader of the women’s suffrage movement at the local, state, and national level. She had travelled to the Wyoming Territory to spend time with her husband, Jack Casement, a railroad builder and territorial representative, and worked closely with Ms. Anthony and Ms. Stanton for women’s rights in the territory.

She brought Susan B. Anthony to her home in Painesville and organized a speaking tour for her, which included stops at Lake Erie College, the Painesville Methodist Church, where almost 1,000 people



attended, and the Union Chapel in Newbury, Ohio.

Frances Jennings Casement was born in Painesville and founded the Painesville Equal Rights Association in 1883. Despite having a fear of public speaking, she used her gift for grassroots organizing and fundraising and grew the Equal Rights Association beyond Painesville.

Unlike other local suffrage groups, her organization reached out to both the NWSA and AWSA for ideas and organizing techniques.

She tripled the membership and established chapters in Mentor and Kirtland by holding “parlor talks” in members’ homes. She wrote “there



Frances Jennings Casement circa 1860s.

is a real need for a society in which women could come together and talk of the questions of the day and inform themselves upon those questions and do what they might for the education of themselves and their sisters....the time will soon come when men and women will stand as equals and have an equal voice in the government of our nation.”

These talks were advertised in the society page of the *Painesville Telegraph* as educational gatherings to listen to lectures about a prominent resident’s travels to Europe or Asia. After listening to the lectures, which Ms. Casement reportedly described as being “deadly dull,” she would then pivot the discussion to women’s suffrage, sometimes utilizing an article from the *Woman’s Journal* as a starting point for discussion and debate.

She organized public rallies and delivered a lengthy speech to the Farmer’s Institute in Lake County entitled “Why Farmers’ Wives and All Other Women Should Have the Ballot,” in which she observed, “if women are fit to rule in monarchies, it is difficult to say why they are not qualified to vote in a republic.” During a rally at the Lake County Courthouse, she advocated for legislation allowing women to control their earnings or dowries and maintain custody of their children after a divorce.

Ms. Casement became involved in the Ohio Woman Suffrage Association (OWSA), serving as



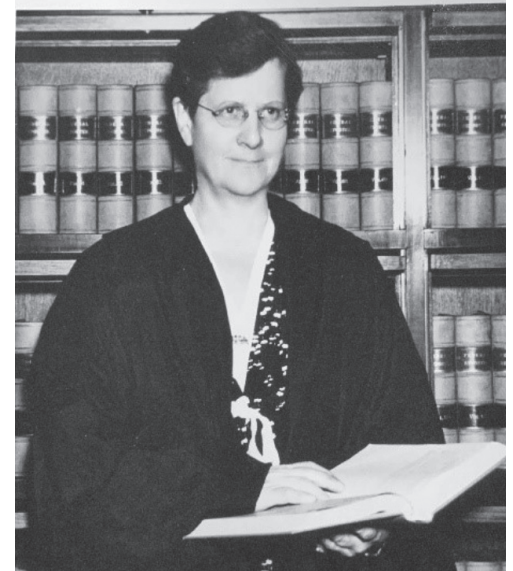
its president from 1885 to 1888. When invited to speak at the AWSA Convention in Chicago in 1884, she called for unity between the rival suffrage organizations, which became a reality six years later when the NWSA and AWSA merged into one organization.

After leaving her position as president of the OWSA, she continued her involvement in women’s and social justice issues until her death in 1928.

Critically, her association with a sister suffrage organization, the Western Reserve Club of Cleveland, paved the way for another suffragist and woman of “firsts,” Florence Ellinwood Allen, an attorney from Ashtabula County who became the first woman assistant prosecutor in Cuyahoga County and the first woman trial court judge, state supreme court justice, and federal circuit court judge in the United States.

To learn more about the pioneering women in Northeast Ohio who defied convention and secured the vote for women, I recommend to you my recent article about Justice Allen in the *Cleveland Metropolitan Bar Journal*, “A Woman of Firsts - Justice Florence Ellinwood Allen.”

What Stanton, Anthony, Casement, and Allen all championed was the



Justice Florence Ellinwood Allen

integrity of the individual. Justice Allen believed that the law was created for the people, writing “we abolished the idea that there should be a distinction between men in securing human rights, and in place of that idea we raised the new conception that, regardless of wealth or influence or race or condition, men and women should stand equal before the law, and the same yardstick of justice and equity should be applied to every situation.”

We stand on the shoulders of these remarkable women, and we must never forget the thirty-three women of the National Woman’s Party who were arrested when they picketed outside the White House, held in the Occoquan Workhouse, and beaten, force-fed, and tortured by their guards on the “Night of Terror,” November 15, 1917. Their convictions were overturned the next year. The publicity about their treatment became the tipping point for Congressional action. To honor these women, we must all take a moment during the centennial celebration to recall their sacrifices and then make sure we take our daughters, granddaughters, and nieces to vote. ■



Legal Education Lawsuit Highlights Issues of Gender Bias in Legal Profession

By Allison Mittendorf, Ohio Northern University College of Law



Recently, a lawsuit filed against the University of Texas at Austin alleged what many women in the legal profession have known, gender bias remains a significant

problem with regards to career advancement and compensation. That lawsuit, filed by UT Law Professor Linda Mullenix, alleges that over three years Professor Mullenix was paid over \$130,000 less than a male counterpart and that she was retaliated against when she complained about the inequality in pay. Unfortunately, these Prove-it-Again and Tightrope biases are common among women, particularly women of color, in the legal profession.

The Prove-it-Again bias is present when women have to outperform their male colleagues, or repeatedly show their competence at a task, in order to receive the same recognition and respect. The Tightrope mentality refers to the pressure women feel to behave in certain “feminine” ways, and the potential backlash they may face for acting in ways that are viewed as “masculine.” Highlighting this Prove-it-Again mentality within the UT suit, Professor Mullenix alleges that despite teaching similar courses, having more experience, earning higher student evaluations, and having more publications than a male colleague, she was paid far less and rewarded far less in merit pay increases. Further, Mullenix’s suit claims she experienced the Tightrope bias when she was pressured to retire

and called “difficult” and a “poison” when she spoke out against the unequal pay conditions.

Professor Mullenix’s experiences with the Prove-it-Again and Tightrope mentalities mirror the experiences of women lawyers in general. In *You Can’t Change What You Can’t See*, a study released by the ABA in 2018, women of color in the legal profession reported experiencing the Prove-it-Again bias at a rate 35 percentage points higher than their white male counterparts. The rate for white women was 25 percentage points higher than that of their white male counterparts. White women reported experiencing the Tightrope mentality at a rate 44 percentage points higher than white male lawyers, and the rate among women of color was an astounding 50 percentage points higher.⁸

These biases tend to be implicit, but are applied in ways that perpetuate the underlying stereotypes and their effects. Most notably, affecting opportunities for women to advance in the workplace and receive compensation equal to that of their male counterparts. Researcher Joan C. Williams has identified and explained this in an “office housework” paradigm. Office housework refers to tasks that are necessary in any office - cleaning up, arranging meetings, serving on or running committees, dealing with difficult employees or clients. These tasks are operational, often time-consuming, but not valued for promotion or career advancement decisions. Glamour work, on the other hand, refers to tasks that drive

revenue, get one noticed by bosses, and therefore propel one’s career. In the *You Can’t Change What You Can’t See* ABA study, white women lawyers reported that they were asked to do office housework tasks at a rate 21 percentage points higher than white male lawyers. The rate among women of color was 18 percentage points higher.

The UT suit alleges this office housework/glamour work paradigm as well. For example, Professor Mullenix claims that she is consistently placed on “do-nothing” committees and does not receive merit raises that reward her office housework tasks such as attending alumni events, writing clerkship recommendations, and leading faculty recruitment efforts. On the other hand, despite repeated requests, Professor Mullenix claims that she has been denied glamour work, such as serving in important administrative or committee roles and being awarded teaching awards.

So, what can be done? First, lawyers must recognize the implicit biases that exist in the day-to-day work environment. Second, law firms must take steps to remedy the effects of those biases. That means developing and implementing systems that assign work fairly and recognizing and rewarding non-traditional criteria in promotion and pay decisions. Finally, women need to call out instances of Prove-it-Again or Tightrope bias when they experience it, and their colleagues need to support them.

(Continued on page 13)

Ephemeral Messaging: Balancing the Benefits and Risk

Ephemeral messaging can offer useful functionality for organizations, including the ability to automate the disposition of content and assert more control over corporate information in employee communications. However, it also raises potential business, legal, and reputational risks. Before incorporating ephemeral messaging technology into a corporate network, organizations and their counsel should carefully evaluate the benefits and explore risk mitigation strategies.

By Philip Farvo, Driven, Inc. (Originally published in the June/July 2019 issue of *Practical Law*)



The proliferating use of mobile messaging applications (apps) has generated significant attention in recent years. Ephemeral messaging, in particular, has grown in popularity

because it enables users to automate the destruction of content shared with others. This technology offers organizations a more secure medium for confidential communications and an attractive option to potentially strengthen aspects of their information governance programs.

However, the unique features of ephemeral messaging also pose significant risks that counsel should not underestimate. From the challenges of battling negative perceptions of how this technology is being used to the issues that can arise when dealing with government regulators, litigation adversaries, and courts, ephemeral messaging may arguably create more problems than solutions for some organizations. Before adopting ephemeral messaging, organizations and their counsel must first examine its merits and make an informed choice about its use within the corporate environment. Indeed, employing ephemeral messaging technology without careful consideration could be fatal to organizations in certain regulated industries.

Against this backdrop, this article:

- Explains the key features of, and variations among, ephemeral messaging apps.
- Explores the potential benefits and risks of ephemeral messaging for business users.
- Offers risk mitigation strategies to help organizations effectively implement ephemeral messaging technology.

EPHEMERAL MESSAGING FUNCTIONALITY

Although some traditional messaging apps and email accounts can be individually configured to include automated destruction functionality, they generally do not have all the same features offered by ephemeral messaging apps. Moreover, ephemeral messaging apps do not offer a uniform set of features or functionality.

COMPARISON TO TRADITIONAL MESSAGING APPS

Ephemeral messaging enables users to exchange content and automatically discard that content from all devices (that is, both the sender's device and the recipient's device) within a period of time after a message is sent. These automated destruction features are typically more robust than those offered by traditional messaging apps, which limit the automated destruction functionality to messages on the

user's own mobile device after a specified time period or when certain customized criteria are met.

For example, iMessage, the native messaging app for devices sold by Apple, Inc., enables the automated destruction of a message 30 days or one year after a user sends or receives the message. However, the automated destruction of an iMessage text does not impact messages sent or received on the devices of other parties to the communication, who unilaterally control the disposition of the content on their own devices.

VARIATION AMONG EPHEMERAL MESSAGING APPS

Ephemeral messaging apps (such as Confide, Telegram, and Wickr) generally allow a user to delete messages from both the user's own device and the devices of those who either sent or received the messages. The user's ability to customize message destruction settings varies, though, from one app to the next. For example:

- Some apps like Confide instantaneously destroy all content upon closing the message.
- Other apps like Wickr provide the user with enhanced control over the disposition of messages by allowing the user to:
 - set a time period (ranging from seconds to months) to retain

the information before it is discarded; and

- modify retention and destruction periods by sender or recipient.

Some apps also offer additional features, such as message encryption and prevention of screenshots, that enable users to better protect the confidentiality of their messages. The number of features may vary based on whether a user employs a consumer-grade tool or an enterprise version of the technology.

BENEFITS OF EPHEMERAL MESSAGING

Ephemeral messaging enables an organization to:

- Safeguard confidential communications and sensitive content.
- Decrease the amount of data that it stores and facilitate compliance with data minimization requirements.
- Strengthen information retention policies and objectives.
- Increase the efficiency of the discovery process in litigation.

CONFIDENTIALITY

Ephemeral messaging developers often emphasize the confidentiality their technology affords over traditional messaging apps. Specifically, they spotlight how their apps:

- Facilitate communication without retaining a record of every digital exchange. Promoted as the digital equivalent of a water cooler discussion or a phone call, ephemeral messaging's automated destruction functionality allows users to communicate without concern that the content will be retained on users' devices indefinitely.
- Protect against data security risks. Developers highlight the tools'

encryption of data that is at rest in the app, as well as data that is in transit between a sender and a recipient within the app. These measures are designed to provide users with a secure medium to discuss confidential topics while reducing the potential that content may be intercepted or replicated by cyber criminals or government regulators (see below *Scrutiny from Government Regulators*).

DATA MINIMIZATION

Ephemeral messaging may help organizations lower their data breach risks and address their obligations under various data protection laws by decreasing the amount of data they store. To satisfy data minimization requirements, organizations must closely examine the types and amounts of personal information they collect, use, and retain. The European Union (EU) General Data Protection Regulation (GDPR) (Regulation (EU) 2016/679) is the most prominent of the laws addressing data minimization.

The GDPR generally requires that data controllers and processors minimize the personal information they maintain regarding consumers, employees, or others in the EU (GDPR, Article 5.1(c)). This mandate requires organizations to examine computer systems and upgrade to enhanced technologies that facilitate data minimization within the corporate network (GDPR, Article 25.1). In this regard, ephemeral messaging technologies — which curb the proliferation of communications stored on the corporate network — may be viewed as a means of compliance with the GDPR's data minimization directive.

INFORMATION RETENTION

Organizations can employ enterprise-grade ephemeral messaging tools to

help implement their information retention programs. Specifically, an organization can use these tools to:

- Customize retention periods. Ephemeral messaging tools can schedule the automated destruction of messages to coincide with the time the retention program has established for maintaining communications.
- Disable message destruction by individual employees. Some enterprise-grade tools have a central archiving functionality that organizations can use to routinely (and automatically) preserve message content on a user-specific basis.

DISCOVERY

Ephemeral messaging may facilitate the efficiency of the discovery process in litigation. By reducing the number of messages maintained on employee devices, organizations can also decrease the amount of information that must be imaged or otherwise collected. This can potentially expedite the preservation and collection process and reduce discovery costs.

RISKS OF EPHEMERAL MESSAGING

While ephemeral messaging technology offers significant upside for business users, organizations should recognize that using these apps also presents several risks, including:

- The appearance of impropriety.
 - Scrutiny from government regulators.
 - The potential failure to satisfy common law preservation obligations.
 - Possible tension with an organization's overall information governance strategy
 - Technological limitations and security issues.
- Before implementing an ephemeral

messaging program, organizations and their counsel should evaluate the nature and extent of these risks, which are more pronounced in certain regulated industries and for organizations with cross-border operations.

APPEARANCE OF IMPROPRIETY

Organizations must consider the common perception that ephemeral messaging is used for nefarious purposes. Because ephemeral messaging apps automate the destruction of messages, many perceive – rightly or wrongly – that users employ the technology to hide evidence of wrongdoing.

Indeed, the mere use of ephemeral messaging could arguably create an appearance of impropriety. This is evident from news coverage of the apparently unauthorized use of ephemeral messaging by politicians, government employees, and law enforcement officials in recent years. For example, former Missouri governor Eric Greitens faced controversy over his use of Confide for government business. Additionally, the City of Long Beach, California suspended the use of the app TigerText after stories surfaced that police officers were communicating through the app to prevent discovery of their discussions.

Organizations that use ephemeral messaging tools for legitimate business purposes could still face skepticism or backlash from various groups, including:

- Government regulators or adverse parties and judges in litigation, who may assert that ephemeral messaging apps were used to conceal evidence of wrongdoing
- Investors (in the case of publicly traded companies), who may believe the use of ephemeral messaging apps could damage the

corporate brand or otherwise lower the value of their investment.

SCRUTINY FROM GOVERNMENT REGULATORS

Even the most measured approach to ephemeral messaging may not alleviate concerns held by government regulators, such as the Securities and Exchange Commission (SEC) and the Department of Justice (DOJ).

SEC

The SEC recommends that investment advisers not use ephemeral messaging if they wish to comply with the “books and records rule” in the Investment Advisers Act of 1940. This rule requires investment advisers to make and keep certain books and records related to their investment advisory business (17 C.F.R. § 275.204-2).

The SEC’s National Office of Compliance Inspections and Examinations (OCIE) recently published a risk alert stating that advisers should “[s]pecifically prohibit[] business use of apps and other technologies that can be readily misused by allowing an employee to send messages or otherwise communicate anonymously, allowing for automatic destruction of messages, or prohibiting third-party viewing or back-up” (OCIE Risk Alert, Observations from Investment Adviser Examinations Relating to Electronic Messaging (Dec. 14, 2018), available at sec.gov).

This prohibition on ephemeral messaging is not surprising given the overall recordkeeping mandate under the Securities Exchange Act of 1934. That directive requires a broker or dealer to keep communications “relating to its business as such” for at least three years (17 C.F.R. § 240.17a-4(b)(4)). The Financial Industry Regulatory Authority (FINRA) has clarified that the recordkeeping rule specifically

applies to text messaging apps and chat services (FINRA Regulatory Notice 17-18, Social Media and Digital Communications: Guidance on Social Networking Websites and Business Communications (Apr. 2017), available at finra.org). Although FINRA’s guidance does not specifically refer to ephemeral messaging, organizations should probably avoid adopting an ephemeral messaging program given this clear regulatory opposition.

DOJ

The DOJ has also expressed skepticism toward ephemeral messaging. In 2017, the DOJ’s Foreign Corrupt Practices Act (FCPA) enforcement division published guidance indicating that organizations being investigated for FCPA violations could obtain cooperation credit only if they forbade their employees from using ephemeral messaging (DOJ, US Attorneys’ Manual Insert 9-47.120 – FCPA Corporate Enforcement Policy (Nov. 29, 2017), available at justice.gov).

However, in the face of criticism from affected organizations using ephemeral messaging for legitimate business purposes, the DOJ modified its FCPA corporate enforcement policy in March 2019. Organizations may now use ephemeral messaging as long as they have safeguards that ensure communications and other documents are retained pursuant to a corporate information retention policy or applicable legal requirements (DOJ, Justice Manual 9-47.120(3)(c) – FCPA Corporate Enforcement Policy, available at justice.gov).

By acknowledging that organizations may use ephemeral messaging in connection with an information retention program, the DOJ’s revised policy:

- Appears to strike a reasonable balance between the DOJ’s

investigation needs and reasonable corporate imperatives for information governance (though some attorneys have questioned whether the revised policy has made a difference in practice).

- Is more consistent with US case law, which recognizes that organizations may implement neutral retention policies to eliminate documents that are not subject to a preservation obligation (see, for example, *Arthur Andersen LLP v. United States*, 544 U.S. 696, 704 (2005); *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1322 (Fed. Cir. 2011) (approving corporate retention policies that are adopted for “good housekeeping” purposes)). Indeed, the US Supreme Court has conceded that corporate retention policies adopted for legitimate purposes may be valid even if they are designed to keep documents from the government (*Arthur Anderson*, 544 U.S. at 704).

FAILURE TO SATISFY PRESERVATION OBLIGATIONS

Organizations have a common law obligation to preserve relevant evidence when litigation is pending or reasonably anticipated (2015 Advisory Committee’s Note to FRCP 37(e)). This directive generally requires organizations to suspend ordinary retention practices that might otherwise eliminate relevant documents. The failure to do so may result in sanctions (FRCP 37(e); see *Paisley Park Enters., Inc. v. Boxill*, 2019 WL 1036058, at *4, *7-8 (D. Minn. Mar. 5, 2019) (imposing sanctions for evidence destruction that resulted when the defendants failed to disable the auto-delete function affecting retention of text messages on their mobile phones)).

Organizations that use ephemeral messaging face the risk of potential destruction of information that might

otherwise be used as evidence in litigation. Although some ephemeral messaging apps allow users to modify their settings and keep relevant messages, thereby satisfying the duty to preserve, many do not. For example, Confide instantaneously deletes content, including any record that a communication even transpired (such as the date of the message and the parties who exchanged it).

The recent decision in *Waymo LLC v. Uber Technologies, Inc.* demonstrates how ephemeral messaging can deprive adversaries of relevant evidence in litigation. Waymo involved a high-stakes trade secret dispute over autonomous vehicle technology. Waymo accused Uber of using Wickr and Telegram to eliminate relevant evidence before it could be preserved and produced in discovery. Despite extensive testimony and other evidence regarding Uber’s use of ephemeral messaging, the court did not find that Uber used the technology to intentionally destroy relevant information. Nevertheless, the court allowed Waymo to present evidence and argument to the jury that Uber’s use of ephemeral messaging created “gaps in Waymo’s proof that Uber misappropriated trade secrets.” In turn, Uber was permitted to present evidence and argument regarding its legitimate business use of ephemeral messaging. (2018 WL 646701, at *3, *18, *21 (N.D. Cal. Jan. 30, 2018).)

TENSION WITH INFORMATION GOVERNANCE STRATEGY

Information governance is premised on the transparency of the information that an organization generates, receives, and maintains. This can stand at odds with the automated destruction and confidentiality features of ephemeral messaging. Key functions of an information governance program include:

- Mapping the organization’s data.
- Monitoring the organization’s information systems.
- Conducting audits to ensure compliance with policies and procedures relating to the use of information.
- Implementing legal holds to address discovery demands for information in response to litigation and investigations.

Unless ephemeral messaging is deployed under the aegis of a robust information governance program, it could create perilous conditions in the corporate environment. The risks are particularly acute where employees use unapproved or forbidden consumer-grade tools. Some potential risks include:

- Failing to detect corruption.
- Facilitating the misappropriation of confidential or sensitive information.
- Undermining information retention policies and other compliance initiatives.

TECHNOLOGICAL LIMITATIONS AND SECURITY ISSUES

Organizations should evaluate whether an app’s technology features actually live up to the claims reflected in the developer’s marketing literature. While the developer may tout the ephemeral nature of its messages, not every technology is as robust as its promotional materials suggest (see, for example, Electronic Frontier Foundation, *Between You, Me, and Google: Problems with Gmail’s “Confidential Mode”* (July 20, 2018) (describing various limitations of Gmail’s Confidential Mode ephemeral technology), available at eff.org).

The cautionary tale of the popular app Snapchat is particularly instructive on this issue. Snapchat previously touted certain ephemerality features of its messaging technology by:

- Claiming that messages transmitted through its app (including those with images and video) would “disappear forever” after a certain time period.
- Highlighting the ability of its technology to prevent screenshots by message recipients.

Both of these claims turned out to be false, leading to a Federal Trade Commission (FTC) complaint and a settlement of the FTC charges (see Press Release, *Snapchat Settles FTC Charges That Promises of Disappearing Messages Were False* (May 8, 2014), available at ftc.gov).

While the Snapchat debacle involved consumers, its lessons are equally applicable in the corporate context. Not every ephemeral messaging technology will include the confidentiality, automated destruction, and customization features that companies likely need to satisfy their business objectives. Nor is every technology enterprise grade. Carefully reviewing a technology’s offerings is advisable before acquisition and deployment in the organization.

RISK MITIGATION STRATEGIES

To minimize the various risks associated with ephemeral messaging, organizations and their counsel should carefully review and take steps to enhance their information governance policies and practices, and examine the particular technology they seek to use. For example, an organization should:

- Develop a written policy that delineates the organization’s use case for ephemeral messaging. To deal with skepticism or backlash from regulators, judges, or others who may distrust the use of ephemeral messaging, an organization should have a written policy that:

- Sets out the organization’s legitimate business needs for the ephemeral messaging tools;
- Addresses the benefits and risks of the ephemeral messaging technology;
- Identifies risk mitigation strategies that the organization has implemented; and
- Supports and is consistent with the organization’s existing information-related policies and procedures.

- Design an internal compliance program tailored to the organization’s ephemeral messaging platforms and use. An organization can help ease regulators’ concerns and demonstrate the reasonable use of ephemeral messaging by developing an internal compliance program. Such a program will ideally be a top-down, neutral process that is well-integrated with the organization’s information governance program. Coupling that process with an ephemeral messaging technology that offers a central archiving feature will only serve to bolster the efficacy of the compliance program. These measures are probably essential for organizations hoping to satisfy the DOJ’s cooperation credit requirements for FCPA violations. They may also be helpful if the organization’s ephemeral messaging use is challenged in litigation (see Phillip M. Adams & Assocs., L.L.C. v. Dell, Inc., 621 F. Supp. 2d 1173, 1193-94 (D. Utah 2009) (discussing the importance of substantiating the reasonableness of a corporate information retention policy)).
- Implement a mobile device use policy that specifically addresses ephemeral messaging. Regardless of whether an organization issues computers and mobile devices to

employees or has a “bring your own device” (BYOD) environment, the organization should ensure it incorporates into its information governance program a robust mobile device use policy that addresses the use of unapproved or consumer-grade ephemeral messaging tools. Additionally, the organization should:

- conduct employee training and policy audits; and
 - actively enforce the policy and discipline employees for noncompliance.
- Be aware of the preservation limitations of certain ephemeral messaging tools. To avoid a discovery sanction or the protracted motion practice that plagued Uber in the Waymo litigation, an organization should ensure the ephemeral messaging technology it implements has legal hold functionality. That functionality should allow the organization to simultaneously:
 - place custodians of relevant information on hold; and
 - continue to automate the destruction of other non-relevant communications. ■

Phil is a trusted advisor to organizations and law firms on issues relating to discovery and information governance. He is a nationally recognized thought leader and legal scholar, having published numerous articles in leading industry publications and academic journals. Phil actively contributes to Working Group 1 of The Sedona Conference, where he serves as a member of the Steering Committee. He has approximately 20 years of discovery experience and previously advised clients regarding complex business disputes and discovery issues in his former litigation practice.

Pres Message

(Cont'd from page 1)

We ignited long-term relationships and provided mentorship to the new admittees. We look forward to helping each of these young women navigate this new chapter in their careers.

On February 21-22, we hosted our first ever Statewide “Stomping Out Hunger” Service Event. The OWBA has always been passionate about giving back to the communities where we live and work. OWBA, in conjunction with local bar associations, participated in the statewide service event in Cincinnati, Dayton, Columbus, Cleveland, Toledo and Akron. It was a wonderful opportunity to volunteer at local food banks and make our footprint to stomp out hunger in Ohio.

We also had a wonderful time at the Government Sub-Committee Ladies’ Night Out event. The Government Sub-Committee, created to address the unique interests of women in the public sector, Co-Chairs Corinna Efke and Renata Staff, The Ohio Attorney General’s Office, hosted a Ladies’ Night Out on February 6 at Milestone 229. The evening was filled with women working in government networking with one another, sharing their special career interest and building relationships.

Thank you for taking the walk down memory lane with me. I challenge you to be intentional about how you view this tough time in our lives. Focus on the many blessings! Stay safe, stay healthy, and I look forward to seeing you all soon! ■

Gender Bias *(From page 7)*

Notably, it is important for legal organizations to realize that diversity and anti-bias efforts must not only focus on hiring. As the UT suit shows, the Prove-it-Again and Tightrope gender biases affect job satisfaction, productivity, compensation, and ultimately turnover rates among women in the legal profession. Efforts must be made to assign both office housework and glamour work fairly, and promotion and compensation decisions must be made on a broader basis.

Allison Mittendorf is the Director of Legal Research and Writing at Ohio Northern University College of Law, where she teaches Legal Analysis, Legal Research & Writing, and Legal Problem Solving & Analysis. She also serves as a Title IX Investigator for ONU. Ms. Mittendorf currently serves as the 3rd District Trustee for the OWBA.

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Remembering Nancy Sabol, 1962-2020



Nancy Sabol served as District 3 Trustee on the Ohio Women's Bar Associations Board of Trustees from 2015-2019. Through her years of service, she helped tremendously in recruiting and retaining OWBA members, advancing OWBA's mission and vision, and supporting women in the law, especially through her service at The Ohio Northern University. The Ohio Women's Bar Association and Ohio Women's Bar Foundation are deeply saddened to hear of Nancy's passing, and our thoughts and prayers go out to her family and friends. The following is the obituary for Nancy Sabol, which was published in The Columbus Dispatch on April 30, 2020.

Nancy Paine Sabol, 57, of Marysville and formerly of Kenton, passed away Saturday, April 25, 2020 at her residence after a brief battle with cancer with her family by her side. Nancy was a loving wife, mother, sister, and aunt. Born May 1, 1962 in Avon, Ohio, she was the daughter of the late Keith and Audrey (Velcker) Paine. She was also preceded in death by her step-father, Michael Rockas. Nancy was the Director of Academic Support and Associate Professor of Law at the Ohio Northern University Pettit

Nancy Paine Sabol, 57, of Marysville and formerly of Kenton, passed away Saturday, April 25, 2020 at her residence after a brief battle with cancer with her family by her side."

College of Law. Nancy also served as Title IX Coordinator for the University. Prior to joining ONU in 2001, Nancy practiced labor and employment law at Jones Day in Columbus, Ohio. Nancy was a wonderful and loving mother. She enjoyed reading, running, traveling and was an avid Bruce Springsteen fan. She loved seeing different parts of the world and traveled to 17 countries, as well as numerous trips to Disney World with the family. Nancy also enjoyed spending time with her 4 nieces and nephews and 9 great-nieces and nephews. Nancy loved working with students throughout their law school careers, including preparing them for the Bar Exam following graduation. She delighted in seeing her students succeed and was always there to support them in any capacity. She was a member of the Trinity Lutheran Church and the Ohio Women's Bar

Association. Nancy is survived by her husband of 35 years, Don Sabol; a son, Daniel Sabol of Columbus; a daughter, Anne Sabol of Miami, FL; a sister, Barbara (Terry) Krebs of Avon Lake, OH; and a brother, Greg (Sandy) Paine of Arizona. In keeping with the current health guidelines, there will be no services held at this time. A Celebration of Life service will be held at Trinity Lutheran Church when restrictions are lifted and will be announced at a later date. Arrangements are being handled for the family by Wilson Funeral Home, Mannasmith Chapel, Marysville. Condolences may be sent to the family at www.wilsonfuneralhomesinc.com. In lieu of flowers, the family asks that donations be directed to Wilson Funeral Home, as the family is working to establish a scholarship in her name for future ONU law students. ■



Nancy Sabol pictured with OWBA Board Members and the 2016 Annual Meeting Keynote Speaker Paulette Brown

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We appreciate their leadership and commitment to serve the OWBA and OWBF over the next year.*

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