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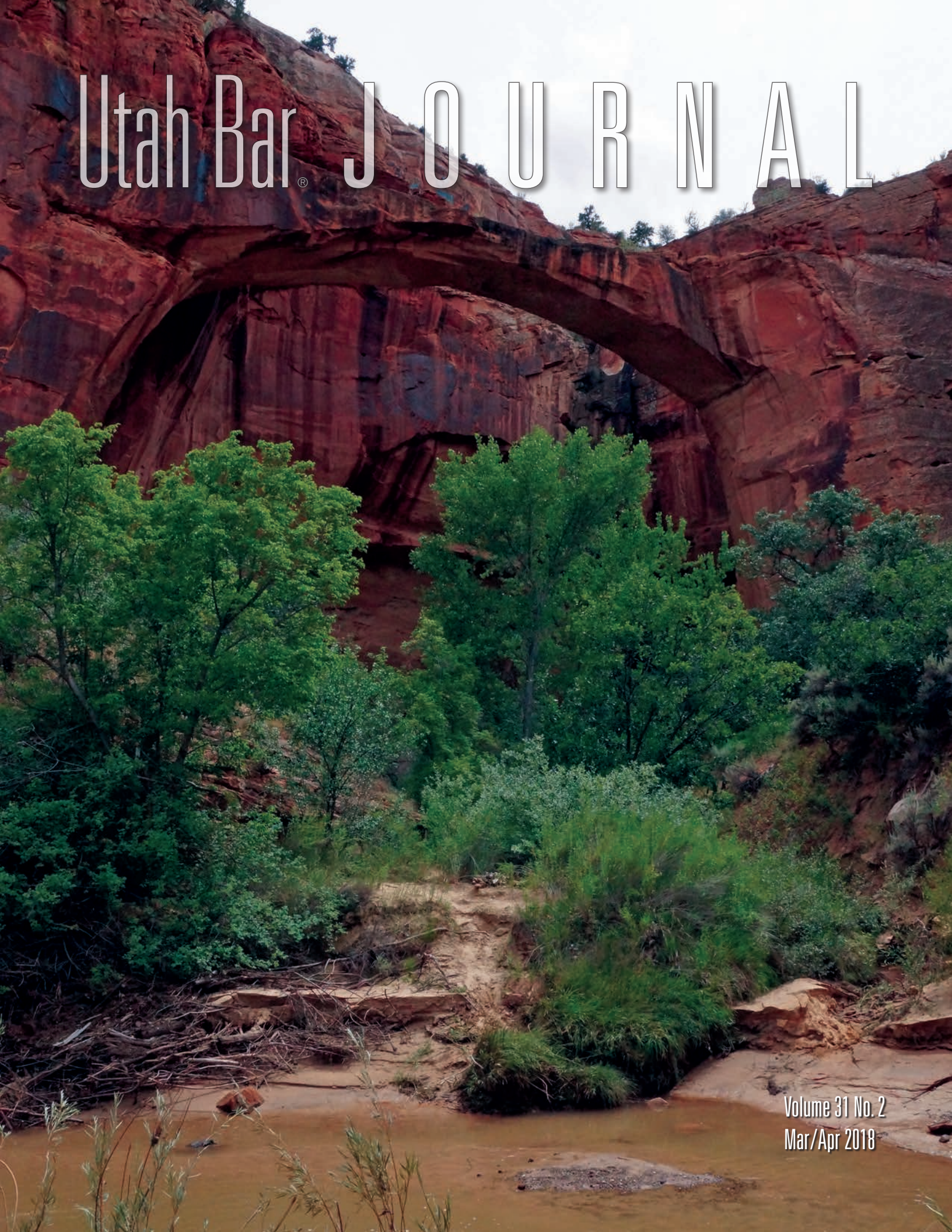

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A New Frontier in eDiscovery Ethics: Self-Destructing Messaging Applications

by Philip J. Favro and Keith A. Call

One of the most watched lawsuits in recent memory involved a key ethical issue of which lawyers should be aware: the dangers of using self-destructing messaging applications.

In *Waymo v. Uber*, tech titans Google (Waymo) and Uber waged an epic battle over the future of self-driving vehicle technology. Waymo (Google's autonomous vehicle unit) claimed Uber stole its self-driving vehicle technology in order to develop its own fleet of autonomous vehicles.

Discovery in *Waymo* was contentious, with Waymo accusing Uber on multiple occasions of destroying information relating to the alleged trade secret theft. In response to allegations that Uber used self-destructing (or ephemeral) messages to eliminate relevant evidence, the court issued a discovery sanction against Uber. Waymo was allowed to present evidence and argument to the jury that Uber used self-destructing messages to deliberately conceal evidence that it had stolen trade secrets. In turn, Uber was permitted to present evidence and argument regarding the legitimate business uses of ephemeral messaging. *See Waymo LLC v. Uber Technologies, Inc.*, No. C 17-00939 WHA, 2018 WL 646701 (N.D. Cal. Jan. 30, 2018).

Four days into the trial, the parties settled the case, with Waymo taking a $245 million investment stake in Uber. While the jury ultimately heard little testimony about self-destructing messages, the discovery lessons from *Waymo* have far-reaching application.

Self-Destructing Messages

One of the practical lessons from *Waymo* is the need for lawyers to understand the nature of self-destructing messaging applications and the ethical and legal perils they present.

Self-destructing messages enable users to share and then delete content within a particular amount of time (ranging from minutes to days) after receiving the message. Different applications offer a menu of competing features. They include the ability to control distribution of messages (to a small group versus a community of users), message encryption, private messaging capability, prevention of screenshots, untraceable messages, and removal of messages from others' devices. Common self-destructing messaging applications include Wickr and Telegram (the apps Uber used), along with Snapchat and Confide.

Technology companies market self-destructing messaging apps to businesses and consumers as the digital equivalent of a water cooler discussion or a phone call. With enhanced security features, they provide a medium to discuss confidential topics without fear of interception or replication. They also reduce the amount of digital clutter that plagues so many IT systems.

And yet, because exchanged content disappears, the use of these messages may circumvent regulatory retention requirements and corporate information retention programs. They may also deprive adversaries of relevant evidence in litigation. This is

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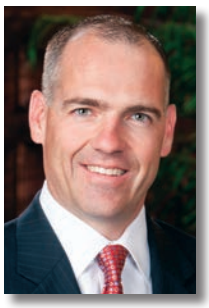

particularly the case with apps like Confide, which obliterates message content as soon as the user closes the message. Indeed, the fact that a communication even transpired, *i.e.*, the date of the message and the parties who exchanged it, is apparently eliminated. Speculation was rife in *Waymo* that this was why Uber turned to Wickr and Telegram: to forever conceal any discussion of alleged trade secret theft.

Ethical and Legal Implications

Parties have a duty to preserve relevant information when the threat of litigation arises. The Tenth Circuit has ruled that the duty to preserve ripens when a litigant knows or should know litigation is "imminent." *First Am. Title Ins. Co. v. Nw. Title Ins. Agency*, No. 2:15-cv-00229, 2016 WL 4548398, at *2 (D. Utah Aug. 31, 2016) (citing *Burlington N. & Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1032 (10th Cir. 2007)). Outside of the Tenth Circuit, counsel should be aware that the duty to preserve attaches when litigation is reasonably anticipated or foreseeable. FED. R. CIV. P. 37(e) advisory committee note (2015 amendments); *CAT3, LLC v. Black Lineage, Inc.*, 164 F.Supp.3d 488, 496 (S.D.N.Y. 2016) ("[C]ase law…uniformly holds that a duty to preserve information arises when litigation is reasonably anticipated.").

A lawyer should explain the preservation obligation to the client and help the client satisfy that duty. As one court stated, "Attorneys have a duty to effectively communicate a 'litigation hold' that is tailored to the client and the particular lawsuit, so the client will understand exactly what actions to take or forebear, and so that the client will actually take the steps necessary to preserve evidence." *HM Elecs., Inc. v. R.F. Techs., Inc.*, No. 12-cv-2884-BAS-MDD, 2015 U.S. Dist. LEXIS 104100, 2015 WL 4714908, at *21 (S.D. Cal. Aug. 7, 2015), vacated in part by *HM Elecs., Inc. v. R.F. Techs.*, 171 F. Supp. 3d 1020 (S.D. Cal. 2016). Many other cases have imposed on *lawyers* the duty to implement and oversee litigation holds to assure that preservation occurs.

As an officer of the court, a lawyer must exercise candor and fairness, and may not make false statements to a tribunal. UTAH R. PROF. COND. 3.3(a)(1). More specifically, a lawyer may not "unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having evidentiary value. A lawyer shall not counsel or assist another person to do any such act." *Id.* R. 3.4(a).

Self-destructing messages have the potential to deprive adversaries and the court of relevant evidence. Does that make their use inherently unlawful or unethical? Clearly not. But because these apps present new legal frontiers and could create an appearance of impropriety, lawyers should educate themselves and proceed with caution.

At least two things seem clear. First, clients should not use self-destructing messages to communicate regarding matters relevant to existing, imminent, or reasonably foreseeable litigation. A "best practice" is to make sure clients understand this and stop using these messages at the appropriate time. Second, lawyers should not advise clients to use self-destructing messages in order to hide information after a preservation duty arises. In an analogous situation, the Virginia State Bar suspended a lawyer for five years for advising a client to delete Facebook posts and de-activate his Facebook account after litigation started. *In re Murray*, Nos. 11-070-088405 and 11-070-088422 (Va. State Bar Disc. Bd. July 27, 2013), *available at* http://www.vsb.org/docs/Murray-092513.pdf. This could well apply, by extension, to the use of self-destructing messages.

In litigation matters, lawyers should ask clients about their use of self-destructing messages. Indeed, the lawyer's duty to implement and oversee effective litigation holds may include the duty to inquire about self-destructing messages.

Is it okay for clients to use self-destructing messages outside of litigation? Maybe. They can certainly be effective means of communicating information – especially confidential materials – while at the same time reducing electronic clutter. But clients should understand that the use of self-destructing messages could have a strong appearance of impropriety, *i.e.*, that they had something to hide. That is certainly something Uber experienced with the *Waymo* litigation.

Conclusion

Lawyers are ethically obligated to stay abreast of the risks and benefits of relevant technology. UTAH R. PROF. COND. 1.1 cmt. [8]. Self-destructing messages present yet another developing technology that lawyers should understand in order to provide good advice and avoid legal and ethical pitfalls.

Every case is different. This article should not be construed to state enforceable legal standards or to provide guidance for any particular case. The views expressed in this article are solely those of the authors.