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DOJ Messaging App Warnings Undermine Trust In Counsel

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In the last several months, the Antitrust Division of the U.S. Department of Justice has been issuing increasingly ominous warnings to companies and executives about the consequences of not preserving ephemeral messaging and messages sent using collaboration tools.

This is no different than recent Criminal Division policy with one major exception: the DOJ Antitrust Division has gone a step further by threatening to prosecute defense counsel and in-house counsel for obstruction of justice for missteps that led to the deletion of relevant material called for by a grand jury subpoena.

From coast to coast, high-level officials from the DOJ Antitrust Division have been sending that message to counsel, including the following public statements.

Manish Kumar, deputy assistant attorney general for criminal enforcement at the DOJ Antitrust Division, has said:

> The Antitrust Division and the Federal Trade Commission expect that opposing counsel will preserve and produce any and all responsive documents, including data from ephemeral messaging applications designed to hide evidence. Failure to produce such documents may result in obstruction of justice charges.[1]

Leslie Wulff, chief of the San Francisco office of the DOJ Antitrust Division said:

> Make no mistake. Decisions that counsel make here are really important, because missteps can result in further criminal exposure for the employees at the company involved in the conduct, but perhaps even more importantly, can also result in criminal exposure for the attorneys and company counsel.[2]

Wulff has also said:

> We're going to scrutinize every decision along the path that led to the deletion of relevant material, regardless of who made the decision and whether or not they hold a law degree.[3]

Jillian Rogowski, counsel to the assistant attorney general of the DOJ Antitrust Division, has said:

[W]e will not hesitate to bring obstruction charges, and of course, if the client was not properly advised by their attorney or if the attorney was otherwise involved in the deletion of those messages or in allowing those messages to be deleted, then the attorney could also be subject to charges.[4]

In addition to emphasizing the possibility of charging lawyers with obstruction of justice, the Antitrust Division has publicized its recent success in piercing the attorney-client privilege via the crime fraud exception.

Sara Clingan, assistant chief at the Washington Criminal Section of the DOJ Antitrust Division, recently warned that prosecutors "will absolutely" continue to examine the role of attorneys who aid in corporate crime "wittingly or otherwise," and use the crime fraud exception, including by compelling attorneys to testify against clients.[5]

One might be tempted to ask: What on earth is going on? Why is the Antitrust Division threatening to prosecute attorneys when not even their counterparts in the Criminal Division who prosecute organized crime, bribery and national security violations are making such statements?

On one hand, it's understandable that the Antitrust Division would seek to take every step possible to secure critical evidence in its cases.

For years now, ephemeral messaging and messaging platforms have taken over from email as the primary mode of business communication, and companies have needed to adapt and adopt retention policies that keep pace with new forms of communication.[6]

A Signal chat between competitors could be the key evidence of an agreement that the DOJ needs to prove its case. It makes sense that the DOJ would be beyond frustrated to learn that such vital communications were not kept. In theory, an entire investigation could be stymied.

However, this doesn't seem to be the motivation behind the recent warnings, as the DOJ has also noted that if "the evidence exists, we will find it. It may take us longer, it may cost your client more money and we may find it from other sources, but we will find it."[7]

The DOJ explained that it can get the information from other co-conspirators, third parties, and electronic communication providers.

If the DOJ is confident that it can get deleted information from other sources, why take the extraordinary step of threatening to investigate and prosecute defense or in-house counsel? Has there been a recent spate of cases where defense or in-house counsel have been complicit in deleting evidence in antitrust investigations?

Defense counsel in the antitrust and white collar bars, as well as in-house counsel, are highly conscientious about their ethical obligations and take them extremely seriously. It's hard to even conceive of a situation where defense counsel would knowingly advise or allow a client to delete evidence called for by a grand jury subpoena. Why would an attorney risk his or her livelihood, reputation and freedom?

The likely result if a company intentionally deleted evidence is that the company would face increased fines, spoilation jury instructions, sanctions, a potential obstruction of justice sentencing enhancement, or charges.

And while deletion of electronic evidence such as chats is not uncommon, it is usually done inadvertently or by a panicked employee who disregards a preservation notice drafted by counsel and issued by the company. It's simply not in the defense lawyer, in-house counsel, or the company's interests to conspire to intentionally destroy evidence in a criminal investigation.

Moreover, in the event of an internal or external investigation, defense counsel, in-house counsel and companies need access to employees' electronic documents, including chats.

Companies and their counsel can't properly assess the legal risks and consequences without access to all the relevant communications and facts. Without complete information, a company might lose the opportunity to apply for leniency or receive a nonprosecution agreement in a voluntary self-disclosure context.

And as the DOJ points out, that evidence may well exist in another company's files or

third-party database, which leaves counsel and their client exposed and in the proverbial dark if they don't have access to the same information.

Wulff has also recently reiterated that companies should "mak[e] sure that [their] employees aren't using ephemeral messaging."[8]

However, it should be up to the company, not the DOJ, to decide whether its employees may use ephemeral messaging to conduct business.

If a company chooses to use ephemeral messaging, the DOJ has made it clear that the company (and its counsel) must ensure that such messages are preserved and produced in response to any subpoena. For example, companies can require employees to use apps that offer backup features and seek to train and audit employees to make sure auto delete settings are switched off.[9]

While missteps, mistakes or misjudgments will inevitably occur, there are remedies for ill-advised decisions besides a criminal investigation or prosecution of counsel.

If defense counsel makes a misstep that exposes their client to potential criminal liability, either he or she will likely be fired or sued for malpractice or both. This alone should keep attorneys motivated to make the best possible decisions.

Beyond that, if the government believes an attorney has violated his or her ethical duties, the government can file a complaint with the state bar. These more realistic, less drastic options should be sufficient in the vast majority of cases to address the Antitrust Division's concerns about document retention.

An actual case of obstruction by counsel would be so rare that making it the focus of public messaging seems not only like an opportunity cost at the expense of more impactful messaging, but also carries with it potential harm.

Before issuing provocative warnings to attorneys about prosecuting them for obstruction, the Antitrust Division should also consider that such alarming statements could foster a chill in cooperation.

If defense and in-house counsel fear that they may be subject to criminal investigation for what the government perceives as a misstep, they would be wise to show extreme caution before engaging directly with the government in any situation involving the deletion of evidence, perhaps even needing to consult their own counsel.

What's more, if attorneys need to advise clients that the government may try to invade the attorney-client privilege if the client is not truthful, clients may be less inclined to be candid and forthcoming with their counsel.

Trust is a key ingredient in the attorney-client relationship and often takes time to build. Timelines take shape slowly. Motivations are complex, and memories are rarely infallible.

The Antitrust Division is often the ultimate beneficiary of that trust, whether in the form of a leniency application or other forms of cooperation. Therefore, it is counterintuitive that the Antitrust Division would want to weaken the very privilege that can be so important to facilitating their ultimate interest.

The crime fraud exception should not be touted or used as a creative prosecutorial tool, but rather reserved for egregious cases of abuse that justify invading one of the most important, cherished, and solemn privileges in the common law.[10]

Recently, the Antitrust Division has taken encouraging steps to increase engagement and build trust with members of the defense bar, once again offering reverse proffers by staff and pitch meetings with management.[11]

The Antitrust Division has also made the hard and admirable decision **to dismiss** certain cases.

Unfortunately, the recent statements about prosecuting defense and in-house counsel run counter to these positive trust-building efforts and may instead have the opposite effect of undermining the level of trust that exists between prosecutors and the defense bar.

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[1] Press Release, U.S. Dep't of Just., "Justice Department and the FTC Update Guidance that Reinforces Parties' Preservation Obligations for Collaboration Tools and Ephemeral Messaging." (Jan. 26, 2024), (quoting
Manish Kumar, Deputy Ass't Att'y Gen. for Crim. Enforcement, Antitrust Div.), https://www.justice.gov/opa/pr/justice-department-and-ftc-update-guidance-reinforces-parties-preservation-obligations.

[2] Khushita Vasant, "US DOJ official warns of criminal action against companies, lawyers over failure to preserve communications in cartel probes," mlex (Jan. 25, 2024), (quoting Leslie Wulff, Chief, San Francisco Office,
Antitrust Div.),https://content.mlex.com/#/content/1538433/us-doj-official-warns-of-criminal-action-against-companies-lawyers-over-failure-to-preserve-communications-in-cartel-probes?referrer=search_linkclick.

[3] Id.

[4] Khushita Vasant, "Antitrust counsel vulnerable to prosecution for obstruction if clients improperly delete ephemeral messages, DOJ official says," mlex (April 11, 2024) (quoting Jillian Rogowski, Counsel to the Ass't
Att'y Gen., Antitrust Div.), https://content.mlex.com/#/content/1555717/antitrust-counsel-vulnerable-to-, https://content.mlex.com/#/content/1555717/antitrust-counsel-vulnerable-to-prosecution-for-obstruction-if-clients-improperly-delete-ephemeral-messages-doj-official-says?referrer=search_linkclick.

[5] Chris May, "US DOJ will seek to compel testimony from attorneys complicit in corporate crime, official says," mlex (April 10, 2024) (quoting Sara Clingan, Ass't Chief, Washington Crim. Section, Antitrust Div.),,
https://content.mlex.com/#/content/1555426/us-doj-will-seek-to-compel-testimony-from-attorneys-complicit-in-corporate-crime-official-says?referrer=content_seehereview.

[6] See Mark Rosman, Jeff Bank and Byron Tuyay, "Retaining Ephemeral Messages To Prepare For DOJ Scrutiny," Law360 (July 29, 2019),
https://www.law360.com/articles/1182154/retaining-ephemeral-messages-to-prepare-for-doj-scrutiny.

[7] Note 2, supra.

[8] Alex Wilts, "Preserving documents should be early priority for attorneys during antitrust probes, US DOJ official says," mlex (April 23, 2024) (quoting Leslie Wulff, Chief, San Francisco Office, Antitrust Div.), https://content.mlex.com/#/content/1558387/preserving-documents-should-be-early-priority-for-attorneys-during-antitrust-probes-us-doj-official-says?referrer=search_linkclick. See also note 2, supra.

[9] Recently, a U.S. district court judge chided Google for being "negligent" by allowing its employees to decide when to preserve internal chat communications during multiple government investigations. Khushita Vasant and Chris May, "Google rebuked by US judge over 'negligent' chat destruction in federal, state monopoly suit," mlex (May 4, 2024), https://content.mlex.com/#/content/1561048/google-rebuked-by-us-judge-over-negligent-chat-destruction-in-federal-state-monopoly-suit?referrer=email_instantcontentset&paddleid=202&paddleaois=2000. Similarly, the Federal Trade Commission (FTC) filed a motion to compel accusing Amazon and its top executives of intentionally deleting Signal messages and not instructing employees to preserve Signal messages even after receiving a document preservation notice from the FTC. Pls.' Mot. to Compel Produc. of Docs. Related to Spoliation, Federal Trade Commission, et al., v. Amazon.com, Inc., No. 2:23-cv-01495 (W.D. Wash. Apr. 25, 2024), ECF No. 198.

[10] See Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) ("The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law").

[11] Khushita Vasant, "US DOJ will pursue reverse proffers if they lead to resolution of antitrust cases, official says," mlex (April 12, 2024) (quoting Sean Farrell, Chief, New York Office, Antitrust Div.), https://content.mlex.com/#/content/1556129/us-doj-will-pursue-reverse-proffers-if-they-lead-to-resolution-of-antitrust-cases-official-says?referrer=search_linkclick.

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