Court Sends a Strong "Signal": Defendants Sanctioned Over Their Failure to Preserve Ephemeral Communications and Surreptitious Use of Encrypted Email

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"The Individual Defendants' systematic efforts to conceal and destroy evidence are deeply troubling and have cast a pall over this action." These are some of the harsh words used by the Honorable Dominic W. Lanza, District Judge for the United States District Court for the District of Arizona, in *Federal Trade Commission v. Noland*, in lambasting the defendants for their deliberate deletion of cellphone messages sent via the Signal app and their suspension/clearing of email messages sent through ProtonMail (an encrypted email platform).

One day after individual defendant James Noland became aware that the FTC was investigating him and his business Success by Health (SBH), he required the other individual defendants – who are all part of SBH's leadership team – to start using a pair of encryption communications platforms: the Signal app for their cellphones and ProtonMail for email messaging relating to SBH's business. After doing so, the individual defendants stopped using their previous messaging platforms for work-related communications and turned on Signal's auto-delete function.

After the FTC filed the action, it obtained a restraining order appointing a receiver to assume control over SBH and required the individual defendants to produce their electronic communications and turn over the mobile devices used to operate the business. In his deposition, Noland failed to disclose the Signal and ProtonMail accounts in response to direct questioning about the existence of any encrypted communications platforms and similarly failed to disclose that he had used his ProtonMail account to provide third-party witnesses with what amounted to be a script to follow when drafting declarations in support of the defendants' defense. To

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make matters worse, immediately prior to turning their cellphones in for imaging, the individual defendants deleted their Signal app, resulting in the inability of forensic specialists to recover the Signal communications. Additionally, the defendants suspended or cleared their ProtonMail accounts. This prompted the FTC to file a motion for sanctions seeking an adverse inference against the individual defendants pursuant to Rule 37(e)(2) based upon the intentional spoliation of evidence.

Judge Lanza found the defendants' motion opposition positions specious and incredible. They asserted that they had switched to Signal in May 2019 to avoid hacking and eavesdropping efforts of a former SBH associate and that Noland's failure to disclose the use of Signal and ProtonMail was due to being cut off at his deposition by FTC counsel before he could provide that information. Finding these explanations meritless, the court determined that the FTC had easily "carried its burden" under Rule 37(e)(2) of showing that the individual defendants acted with the requisite intent to deprive the FTC of the information contained in the Signal and ProtonMail communications.

In determining the propriety of sanctions, the court initially undertook the step-by-step analysis required by Rule 37(e) that we have discussed in numerous prior posts. Judge Lanza had little difficulty determining that: (1) electronically stored information (ESI) was lost or destroyed through the deletion of the Signal apps and messages; (2) the ESI should have been preserved in anticipation of the litigation; (3) the defendants failed to take reasonable steps to preserve the ESI; and (4) the lost ESI was not replaceable as the forensic expert could not recover the Signal data and numerous SBH employees reported that they did not have any ProtonMail or Signal communications with the individual defendants on their devices.

The gating issues for Rule 37(e) relief having been met, the court turned to the potential sanctions available under the rule. As a starting point, the court distinguished the inquiry under Rule 37(e)(2) – which focuses on whether the non-movant acted with the intent to deprive another party of the information's use in the litigation, to allow for more serious sanctions – with Rule 37(e)(1),

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which requires the court only find prejudice to the party deprived of the information to allow for remedial measures.

Judge Lanza held that the FTC had easily "carried its burden" of showing that the individual defendants acted with the intent to deprive the FTC of the information contained in the Signal and ProtonMail messages. As in prior "intent to deprive" decisions, the timing of the defendants' conduct was a critical factor. The court noted that these apps were installed only one day after Noland discovered that the FTC was investigating him, a suspicious fact compounded by Noland's failure to disclose the existence of the Signal or ProtonMail accounts in his deposition. The "*piece de resistance,*" Judge Lanza held, was the coordinated deletion of the Signal app from the individual defendants' phones just before they were turned over for imaging. Thus, the court granted the FTC's request for an adverse inference that the spoliated evidence is presumed to be unfavorable to the individual defendants.

The *Noland* decision presents a textbook example of what a litigant should *not* do when the duty to preserve ESI arises, particularly with ephemeral messaging apps that by their very nature are short-lived, making retrieval of such messages very difficult, if not impossible. The decision particularly highlights the need to understand the potential risks associated with auto-delete technologies and encryption methods available with apps such as Signal and ProtonMail. This case should also serve as a cautionary tale to practitioners that clients not change their messaging platforms once litigation is reasonably foreseeable (and certainly not after it has commenced) and turn off any auto-delete functions. Finally, *Noland* highlights the obvious importance of anticipating inquiries on these subjects with witnesses before their testimony. Practitioners are now generally well-versed in the various sources of discoverable material and the means by which relevant evidence might be lost, intentionally or otherwise. The use of ephemeral communication platforms only heightens the attention to these issues. Deposition questioning in these areas should be anticipated and prepared for.

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