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Texts Are Not a Preservation Plan

Today's episode is the latest example of why just telling your client to keep data on their mobile device — and specifically text messages — is never going to be sufficient to actually make sure they are preserved.

Welcome back to the Meet and Confer podcast — and today we're talking about the latest decision in the Peddada v. Catholic Health Initiatives Colorado. This is a decision out of the District of Colorado from an order entered January 6, 2026 by Magistrate Judge Maritza Dominguez Braswell.

I'm your host, Kelly Twigger, the CEO of Minerva 26 and a discovery strategist and practicing attorney for almost 30 years. I created the Case of the Week series almost five years ago because discovery isn't just a phase of litigation. It's the strategy layer that underlies the entire case. It's where credibility gets built or destroyed, where sanctions live, and where the outcomes get shaped long before anybody stands at a podium making an argument.

I pick cases like the decision we're going to cover today because they show you—in real time—how courts think about ESI when things go sideways. That allows you to leverage that thinking in advance for your matters. Unlike any other area of the law, the case law on discovery issues is evolving DAILY, where most substantive areas maybe see one or two or no decisions a year that might impact how you advise your clients and argue the motions. Discovery has seen more than 5,000 decisions annually for the last four years. Take that into account.

Let's dive into this week's decision.

FACTS

All right, what are the facts here?

The plaintiff here worked as a radiation oncologist for the defendant. The defendant terminated him in May 2022. Just over a year later, in July of 2023, the plaintiff brought this suit alleging violations with the American Disabilities Act, the Rehabilitation Act, wrongful discharge, unjust enrichment, and civil conspiracy, and seeking to recover

several million dollars in damages. So a whole host of theories, lots of different factual allegations.

Just under a year later, the parties agreed to an ESI order. That ESI order is going to be linked in your transcript and in your show notes. You'll also be able to review it within Minerva 26. That order, which the plaintiff again agreed to, called for the preservation of all text messages from January 1, 2021 through the date of the ESI order in July of 2024. As always, the timeline is critical in discovery issues.

Fast forward to early 2025, when the defendant alleged that the plaintiff had not produced all of his text messages with his wife or with his brother, specifically from the critical time period in the case of late 2021 to mid-2022 — the time before and immediately after his termination.

Initially, the plaintiff didn't object to the defendant's motion, but gave kind of a wishy-washy response along the lines of — I've produced all the text messages and I'm really not sure what else you want from me. However, he did commit to producing responsive text messages again on that motion. At that point, the Court entered its first discovery order, just one of many, that required the plaintiff to:

> conduct a thorough review of his cellular device and produce all responsive text messages even if such message strings have been produced by third parties [meaning the wife and husband]. Plaintiff is cautioned that any discrepancies or irregularities in the comparison of text strings could potentially form the basis for a follow-up request. Thus, Plaintiff's review should be thorough and utilize the necessary technology to ensure a complete production of responsive texts.

Shortly after that order, it became clear from a comparison of text messages from the brother and the wife's productions to those from the plaintiff, exactly as the Court suspected there would be, that there were text messages completely missing from the plaintiff's phone, meaning that something had happened to the plaintiff's messages that his wife and brother's messages specifically made very clear.

The Court then issued a second order following that comparison, requiring the plaintiff to have its vendor explain the gap in messages from the wife's phone, provide options for restoring the information, or confirming that an additional production would be made. But the vendor really had no answers. Literally. He told the Court he was unable to confirm or deny the possibility or deletion or even say for certain why the text messages were gone. Yikes. Not exactly what I would want to file with a court.

That prompted a third order from Magistrate Judge Braswell in which she ordered plaintiff and his experts to directly answer the question whether it was possible that text messages between plaintiff and his brother or plaintiff and his wife had been deleted for the relevant time gaps.

The Judge also required the expert to state what tools, methods, or processes that the expert had used to draw his conclusion that the text messages were not deleted, if they weren't. And if they were deleted, she wanted him to include what tools could determine that, whether he could figure it out, and whether the deleted messages could be retrieved. Essentially, what the Court wanted to know was whether, using existing technology, we can find out whether the texts were deleted, when, and whether they were retrievable.

The expert responded to the Court saying that it was possible that the text messages were deleted, that it was highly unlikely that a full extraction of the phone would uncover any deleted messages, and that an extraction couldn't be done anyway because the version of iOS on plaintiff's phone didn't support it. The expert also confirmed that plaintiff's phone was set to auto-save all messages, meaning if some action had not been taken to delete them or there wasn't some other technological problem with the phone, they should have still been there.

I'm not a forensic expert and I don't even play one on TV, but I can say, after working with so many over the last almost 30 years, that there are a whole lot of problems with this statement that I would delve into as defense counsel. The first one being that if a tool didn't support the updated operating system, is there another tool that does? The key here is the text messages. Clearly, plaintiffs went to some lengths to make sure that you aren't going to get them. Don't you want to try and go to all the lengths to make sure that you can?

In any event, the Court found that no one could say whether plaintiff deliberately deleted the text messages from his phone.

ANALYSIS

So we move to the legal analysis of a very murky set of facts.

In beginning that analysis, Magistrate Judge Braswell dives into the analysis of Federal Rule of Evidence 37(e) for sanctions for failure to preserve and the two options before the Court: section (e)(1), which requires only prejudice, and section (e)(2), requiring the intent to deprive.

The Court looked first at whether the texts were truly missing, an obvious prerequisite to Rule 37. You can't have sanctions when there's no missing data. It was clear from comparing the messages from the brother to the plaintiff that there were missing messages. And the wife testified that she and her husband were probably texting then — It seems very obvious to the Court and to all of us that you would text your wife about your frustrations with your job, particularly if you're about to lose it. The Court here even goes so far as to say that it would have to "ignore common sense" to believe that the plaintiff and his wife didn't exchange a single text around when he was fired, especially when there are texts that show them discussing the stress of work and related issues both before and after the key time period.

Next up under the Rule 37 analysis is whether the duty to preserve had arisen. And that's not really a question here — the Court points to multiple facts that suggest the plaintiff was well aware of his obligations, not to mention that the law imposes a duty to preserve AND that the parties agreed to an ESI protocol that required preserving all text messages.

Next up is the intent to deprive under section (e)(2), and Magistrate Judge Braswell looked to the Ninth Circuit's holding in Jones v. Riot Hospitality, which we've covered here on Case of the Week in Episode 135. The Riot Hospital decision found that circumstantial evidence was sufficient to establish that plaintiff had intentionally destroyed text messages when the plaintiff could not explain why some messages were missing in a given time period. Applying Riot Hospital to the facts of this case, the Judge found that the most obvious explanation was that the messages were deleted, and plaintiff acknowledged that as a reasonable conclusion.

Then Magistrate Judge Braswell touched on exactly what occurred to me as I was reading her decision — so I love this part — if the plaintiff had deleted the messages before litigation began and before consulting his attorney, because he believed they were irrelevant, or just because he did, he could have said so from the very beginning. He could have been upfront about that in the process. But because he was not, and instead the Court had to go through multiple motions on the issue, the Court took that into account and it weighed against him. No good comes from that, and it certainly didn't here.

Having found that the plaintiff communicated with his wife and his brother in texts that were relevant and that he intentionally deleted them, the Court then moved to the appropriate sanction. And this is a twist that you're going to want to hear.

Magistrate Judge Braswell doesn't agree that she can't dismiss the case — Rule 37(e)(2) absolutely gives her the authority. But she declines to, instead, finding that the exclusion of certain evidence or an adverse inference instruction is likely a sufficient sanction.

There's not a lot of detail factually on why she makes that determination. And I wish there was more, quite frankly, for us to be able to evaluate.

I've addressed what I consider to be the somewhat toothless nature of both of these sanctions multiple times here on Case of the Week. Both sanctions allow the spoliating party to get all the way to trial before facing any potential consequences — and since less than 1% of cases go to trial, rolling the dice and spoliating the worst of the factual evidence these days isn't a bad bet.

The twist here is that Judge Braswell doesn't even enter either of those sanctions, excluding evidence or an adverse inference — instead, she found that it is the district judge's purview to do so after summary judgment.

She also found that the potential for any costs or fees on the sanctions motion was the purview of the district judge.

I find that troubling, and here's why. More than 80% of the decisions on the discovery of ESI at the federal level are being made by magistrate judges. I ran that number from our Minerva26 database of almost 50,000 cases. If litigants are now going to be required to go to the district court to get a full ruling, that is costs and steps, and the impact to the matter is as if there is no spoliation at all, at least as it proceeds. Now think about that. In this given situation, is there an objection that the defendant can file to the magistrate's orders here to send this up to the district court for not entering a sanction? It didn't really look like it to me, but I'm interested to see what happens procedurally in the case.

The potential that we are all encouraging bad behavior in the ESI because all you'll get is a potential slap on the wrist down the road is tremendous. We already have the problem that courts are unwilling to dismiss claims, instead offering adverse inference instructions that only come to pass if the parties go all the way to trial. Now, those are only ordered if done by a district judge here after ruling on summary judgment. I understand the thought process, but my question is this — at what point are we actually going to hold litigants responsible or accountable for preservation of their ESI? This is a case where the plaintiff is suing for millions of dollars and intentionally deleted incriminating text messages. Yet his punishment is to wait for the district judge to

decide a sanction after the parties expend tremendous resources and time on summary judgment. If the judge even decides to do that, he may wait for trial. Is that really what the Federal Rules Committee intended with these amendments? This is a conversation I would really love to have.

TAKEAWAYS

All right, what are our takeaways from this case today?

There are several key takeaways, in addition to my musings, which I've already given you.

First, when you're making arguments on specific issues in discovery about ESI, you're going to have to go outside your jurisdiction to look for case law. This is the one area of the law where judges routinely cite cases from other jurisdictions. I've been saying it for more than a decade now — but there is no one jurisdiction that has addressed all of the issues in the discovery of ESI and they are so factually specific, that going beyond your jurisdiction is KEY. You just have to to be able to find the cases that can bear on the situation in front of you, especially as the technology continues to evolve and we continue to see new issues. That's a key part of why we curate all of the discovery decisions in Minerva 26 and tag them all by issue so you can find them fast in cases like this one. Note that Magistrate Judge Braswell here relied on the Riot Hospital case from the Ninth Circuit. While we're close to the Ninth Circuit here in Colorado, we are actually in the 10th Circuit. So technically, the Riot Hospital case is not precedent. That doesn't matter in discovery anymore.

The next takeaway is more specific to the sanctions issue. If you want to be able to convince a court to find intentional spoliation, you'll have to create a factual record that makes it impossible for the court to reach any other conclusion. That's what the defendant did here. We've seen many other decisions on Case of the Week where the parties don't make that record and the court won't do it for you. So have all of your ducks in a row going in.

Finally, as counsel, you have to identify all of the issues with your evidence as soon as humanly possible when you have a matter. Here, if counsel had known what messages were missing from plaintiff, there may have been an opportunity to get ahead of the issue before all the money and time spent on the sanctions issue. If those messages were gone before the ESI protocol was signed, that matters. If they were gone when counsel was first retained, that matters. If they disappeared during discovery, well, it

probably went as well for counsel as it could have. And they are lucky the judge didn't pull them in here.

If decisions like this one today help you stay on top of how to make informed practical decisions and discovery strategy, then you're going to want to sign up to receive our annual case law report released each February and just in time for the annual University of Florida eDiscovery Conference. That report is going to issue on February 24th and it breaks down statistics of case law from 2025, discusses the topics and trends that we saw over the year, and foreshadows what is to come in 2026. It lines up perfectly with our case law panel that opens the University of Florida Conference on February 25th. So I invite you all to register and attend. The University of Florida Conference is VIRTUAL and FREE, so join me there too, and I'll add the link in the show notes.

All right, that's our Case of the Week segment for today—and if you take nothing else with you, take this: “Tell your clients to preserve their texts” is not a preservation plan. If the case has any human drama—termination, retaliation, stress at work—your client is texting somebody about it. And if you don't get in front of that early, you are building spoliation risk into your case, whether you intend to or not.

This decision is also a reminder that courts can—and will—get to intent through the totality of the facts, even when no one can point to a single smoking-gun forensic artifact. But here's the part you really need to watch: the magistrate judge didn't impose the most meaningful sanctions at all. She kicked the real consequences to the district judge after summary judgment, which means, as of today, the practical impact is still unknown—and that should bother you. Bothers me. Because if sanctions only materialize at the end of the road after the parties spend money and do the work, we're not deterring spoliation—we're just pricing it into litigation.

That's why we built Minerva 26—the discovery strategy platform that connects case law rules and real-world workflows—so that teams can turn rulings like this one into a defensible action plan. Identify the mobile data early, review it early, preserve it early—and you're still on the defense side when you need those texts. Move fast and get an order before they're gone.

If this episode was helpful, please do me a favor, share it with a colleague who still treats text messages like informal evidence and post it on LinkedIn with your biggest takeaway—because the fastest way to level up discovery strategy is to normalize these conversations among counsel. And if you haven't already, please subscribe to the Meet and Confer podcast so you don't miss what happens next—because the district judge's ruling is where we'll find out what “intent” really costs.

Thanks for listening. We'll be back next time with another Case of the Week.