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Why Signal Is the Most Dangerous Source of ESI You Need to Understand

Meet and Confer · Kelly Twigger · 🎧 Listen · 📄 Case in Minerva26: *In re World Wrestling Entertainment, Inc. Merger Litigation* · No. 2023-1166-JTL · Signed/Filed May 27, 2026 · Vice Chancellor J. Travis Laster · Delaware Court of Chancery

Rule 37(e) and Sanctions Basics

Welcome back to the Meet and Confer podcast and our Case of the Week segment. My name is Kelly Twigger. I am the Principal at ESI Attorneys and the CEO at Minerva26, where we take the learnings from our work at ESI and put them into a platform for everyone else to leverage in terms of eDiscovery knowledge.

On our Case of the Week series, if you're a regular, you know that each week I choose a decision and talk to you about what it means for your practice and how to take the tips from the court's analysis and decision and plug them into what you're doing on a daily basis as it pertains to discovery. Because discovery is a constantly evolving, constantly moving set of obligations.

Our goal here on the Case of the Week is to try to help you issue-spot on a regular basis what's happening with the case law. And today's decision is no exception there, particularly on the sanctions notions. So we're coming up on six years of doing the Case of the Week, nearly 200 episodes. This is episode 194. And there's really one thing that has tracked throughout the entire time we've been doing Case of the Week since 2020, and that is Rule 37(e). That's the rule that governs what happens when ESI gets lost that should have been preserved, or otherwise known as the failure to preserve.

That rule was rewritten in 2015, splitting preservation failure into two tracks: curative measures when a party is merely prejudiced, and much harsher sanctions when a party acted with intent, or, as we're going to see today in Delaware, recklessness. Everything since 2015 has been courts figuring out what those words actually mean, prejudice and intent, one case at a time. And we've been watching what happens in real time here on Case of the Week. We're going to talk today about some of the previous episodes that we've looked at and how they factor into the Court's decision today.

Now, this week's decision is a good example of why tracking the case law matters. It pulls together a Delaware Chancery ruling from this year and three federal cases that we've covered on this show already. And it shows how differently federal courts and the Delaware Chancery Court actually get to a sanctions ruling for the same kind of conduct, and how those sanctions vary. Now, understanding that pattern is what lets you make better, more informed arguments, whichever forum you're in. So if you're making these arguments, this is the episode that you'll want to revisit.

The Facts

WWE Merger Claims and Signal Use

Now, this week's decision is from *In re World Wrestling Entertainment, Inc. Merger Litigation*. This ruling, issued May 27, 2026, is about timing, one of the themes that comes up here again and again on our Case of the Week series: timing of when the duty to preserve arose, when the legal hold went out, and when the data was destroyed within the facts of the case.

It's a decision out of, as I mentioned, WWE's merger litigation with UFC to form TKO, and it turns on the timing of when five executives changed their phone settings, measured against the timing of exactly what was happening in the deal at that moment.

Let's talk a bit about the facts here. The underlying dispute is stockholder litigation over WWE's 2023 merger with Endeavor's UFC business to form TKO. The plaintiffs, who are led by an Ohio labor union pension fund, allege that WWE's controlling stockholder, Vince McMahon, well known in the WWE world, steered the deal to Endeavor's CEO, his longtime friend Ari Emanuel, because Emanuel offered him a continued role at the new company as well as help with a federal investigation into McMahon's alleged sexual misconduct. McMahon, of course, denied all of the allegations.

Here are the key facts for the discovery motion. Starting in the summer of 2022, McMahon, WWE President Nick Khan, Chief of Staff Brad Blum, Chief Content Officer Paul Levesque, and Stephanie McMahon communicated about the merger deal using Signal, which is an encrypted messaging app that can be set to auto-delete. We've talked about Signal multiple times here on Case of the Week, so it should be on your radar as a key source of ESI, especially where there is potential nefarious conduct. Lots of people tend to use Signal to try and hide their communications.

Now, the individuals' use of Signal here was not incidental. One of them was later quoted describing why he'd used Signal, and he said he'd always been told that Signal was good for business because no one can trace you, comparing it to the encrypted email service Proton Mail.

Any participant in a Signal chat can turn on auto-deletion, also called disappearing messages, for every participant in a chat. That means that when one party to a chat turns on the ephemeral messaging, the disappearing messaging settings, the messages disappear for everyone in the chat at that determined time. And timing is everything, because when someone decides to shorten the window for disappearing messages, meaning you can set it to an hour, eight hours, one day, that window determines what disappears for everyone else in that chat as well.

Legal Holds and Auto-Delete Changes

Now, in this case, two formal litigation holds were in place in the merger litigation before most of the deletions happened. The first one was issued on June 21, 2022, and it addressed the misconduct allegations against McMahon specifically, and it named instant messages and text messaging by name, in language that was very clear and very well written. I want to point this language out to you specifically, because you'll want to come back to it as you're drafting legal holds and make sure that you're including these types of messaging platforms in those holds.

Now, this is quoted language directly from the Court. The misconduct hold, which was the first hold, specified that the recipients must "suspend any procedures which you control that could delete, destroy, or alter any documents or ESI, including emails, PowerPoint slides, presentations, spreadsheets, electronic documents, hard copy documents or other materials that may be relevant to the Matter." The legal hold specifically referred to instant messages and text messaging. The legal hold later reiterated that "you must take all reasonable steps necessary to prevent the destruction or deletion of documents." The legal hold further emphasized that "[i]f your settings for emails, text messages or otherwise include automatic deletion protocols, it is your responsibility to ensure that Relevant Documents, including relevant emails and text messages, are preserved."

Now that's the entire quoted section from the Court that contains quotes from the actual legal hold.

The second hold was issued on January 19, 2023, and that addressed the strategic review and sale process for the merger. Both told recipients, in bolded text, to suspend anything with automatic deletion protocols and to take reasonable steps to prevent the destruction of documents. So, legal hold from a lawyer's perspective: check. check plus.

Now, starting in early August 2022, about one month after the first legal hold went out, the Signal users that I mentioned earlier began manually shortening their auto-delete windows on chats with McMahon, first to one hour, then to eight hours, then to one day, and back down again, repeatedly, timed to line up with the deal's key milestones. Khan did it the same day that the DOJ sent WWE a request for information. Stephanie did it the day McMahon, Khan, Stephanie, and Emanuel first discussed a potential transaction over lunch. The Court found that timing was not incidental, and that the deletions correlated directly with the events at issue in the case.

This is where the timeline of messages compared to the chronology of what's happening in the case is so critical for counsel to be able to put together.

Device Seizure and Forensic Findings

Now, there's also a federal thread running underneath all of this merger litigation, and it explains why this evidence about the deleted Signal messages surfaced so late in the case. Federal authorities seized McMahon's phone and iPad in mid-2023, as part of a separate criminal investigation into the misconduct allegations against him. Those devices were not returned until September 2025, so just about a year ago. And remember, this decision came out in May 2026, so a few months ago.

Once they came back, McMahon's own counsel conducted a forensic analysis of the returned devices. And the Court's opinion specifically calls out McMahon's counsel for what it describes as particularly commendable work gathering, preserving, and producing evidence in the merger investigation under difficult circumstances. Counsel identified exactly when each Signal chat was created, who was in it, and whether its retention settings had been changed. But what that forensic work could not do was recover the actual content of the messages, because they were already gone.

Now, plaintiffs moved for spoliation sanctions in the spring of 2026, after email exchanges between counsel surfaced the defendants' Signal use and the retention changes. The motion asked the Court to presume a set of facts about McMahon's and Khan's motivations, given the missing messages. Now that's key, what the plaintiffs asked for.

Now, at a May 2026 hearing on that motion, McMahon's team argued that there was no real gap in the record, because of records already produced. Counsel called him a prolific texter and pointed to more than 22,000 messages that had been produced across other platforms. Counsel for the other individual defendants argued that the merger was negotiated the old-fashioned way, in person, over dinners, phone calls, not primarily through an encrypted app. Plaintiffs' counsel countered that they did not have to prove intent to get relief under Delaware's rule, only recklessness. And that is the standard that the Court went on to apply.

Now, this decision comes from Vice Chancellor J. Travis Laster, who also wrote the decision in another case in January 2024 called *Goldstein v. Denner*. And the *Denner* decision gave Delaware its modern framework for ESI spoliation under Court of Chancery Rule 37(e), the language of which is the same as the federal rule 37(e). In *Denner*, a hedge fund principal and two colleagues lost their text messages under explanations that the Court did not find credible. One blamed a phone upgrade, one blamed a phone that fell in a pool, one had a 30-day auto-delete setting running the whole time. And Vice Chancellor Laster found that the conduct was at least reckless, shifted the burden of proof, and awarded fees. Again, that's in *Denner*. This week's case takes that exact framework and applies it to a much higher-profile fact pattern, decided by the same judge less than two and a half years later, this time dealing with Signal.

Let's talk for a minute about Signal, because how the app works matters for how you advise clients, and you need to understand its functionality. Some apps, like Snapchat, not at issue here, are natively ephemeral. The app does not store a persistent version of the message to preserve in the first place. Once the recipient views a message on Snapchat, it's gone in a matter of seconds and it is not recoverable. Signal is not natively ephemeral. Signal's native application keeps every message by default, but it allows a user to take an affirmative action to make changes to allow messages to start disappearing, or become ephemeral. The executives here in the WWE case understood that distinction, and turned on that ephemeral messaging functionality to use it deliberately on chats that they already had a duty to preserve under the legal holds.

Now let's contrast Signal to a corporate-managed source of ESI like Teams messages. A few episodes back, we covered *Valcrum v. Dexter Axle*, which was a case about Microsoft Teams messages. Now, those messages live on the employer's own infrastructure. IT controls that data, IT can search it and can produce it, even when nobody wants to hand it over. Signal is the opposite. It sits on somebody's personally owned phone, has no employer-side copy sitting in a corporate mailbox or a Teams tenant that counsel can go pull. If the individual who owns the device deletes it, there is nothing left for a company to search, and no enterprise administrator who can hand it over.

And that really is the practical takeaway here. Platforms that IT can manage need regular audits, but a personally owned device running an app like Signal isn't something that IT can audit at all. Counsel has to suspect the app is in use and specifically ask for the phone, which is exactly what happened here, through a federal investigation, once the federal seizure and forensic review finally surfaced it.

Delaware Rule 37(e) Applied Step by Step

So, how did the Court come out here? Well, the Court of Chancery walks through Rule 37(e) with the same four questions that federal courts ask under Federal Rule of Civil Procedure 37(e). Did a duty to preserve exist? Was the evidence, the ESI, actually lost? Was the loss caused by a failure to take reasonable steps? And was there prejudice? The Court answered yes to all four of them here.

On the duty to preserve, the defendants argued that the misconduct hold only covered misconduct-related documents, not the merger, so no duty to preserve deal-related Signal chats existed until the second hold in January 2023. The Court rejected that argument on two separate grounds. The misconduct allegations and the merger were factually intertwined from the beginning, according to the Court, so the first hold actually reached communications touching both. And separately, the Court found that a common-law duty to preserve arose before either hold was issued, by August 31, 2022, because sophisticated parties negotiating an M&A transaction in the shadow of a live misconduct investigation should reasonably anticipate litigation before any formal hold goes out. So there was no question that the duty to preserve existed.

Now, the second step, loss of the Signal ESI, was not contested. The Signal Users admitted that the messages were gone and could not be recovered from any other source. So that point was established easily.

On reasonable steps, the Court also found that the Signal Users did not merely fail to take reasonable steps under the hold, but that they took affirmative steps in the wrong direction, by repeatedly shortening retention windows on individual chats after receiving explicit instructions to do the opposite. The Court found that the executives' behavior was reckless.

The Court also found that the timing of the deletions, mapped against the deal timeline, was itself circumstantial evidence that what was destroyed mattered, for purposes of prejudice. That created the required prejudice under Rule 37(e). The burden then shifted to the defendants to prove the lost messages were not relevant, and the Court found that the defendants couldn't carry their burden.

Recklessness Defined and Remedies Imposed

Now, it does help to understand where recklessness actually sits on the spectrum that courts use here. Ordinary negligence is a failure to exercise reasonable care. Gross negligence is an extreme departure from that, but it still doesn't require the actor to know they're taking a risk. Recklessness adds to that awareness: a conscious disregard of a known risk. So you're adding awareness to gross negligence. Intent to deprive, which is the highest bar, requires the party to have meant to destroy the evidence specifically to keep the other side from using it.

The Signal Users' conduct here, repeatedly changing settings on specific chats immediately after receiving two written holds telling them not to, was enough for the Court to find that they consciously disregarded a known risk. That's recklessness, not mere carelessness, and it's a real finding, not just a label.

Now, because the Court found the Signal Users acted at least recklessly, it imposed two remedies. First, it presumed a limited, specific set of facts to be true about McMahon's and Khan's motivations and conduct, rather than deeming those facts established outright. And second, it raised the standard the defendants must meet to rebut those presumed facts, from a preponderance of the evidence to clear and convincing evidence. The defendants can still put on a full case at trial. They just have to do it against a significant headwind, that higher requirement, that they created themselves.

Federal Standard v. Delaware

So let's contrast this holding in Delaware Chancery Court to what we've seen in federal court. Rule 37(e)(2) in federal court requires intent to get to the dispositive remedies, versus the prejudice standard of (e)(1), and the standards are different. Where federal courts require intent, Delaware only requires recklessness. So what is the difference?

Now, several federal courts have found that a body of circumstantial facts specific enough that no innocent explanation survives is sufficient for intent, with circumstances much less intentional than those in the case before us.

Let's start with the clearest statement of that standard itself in federal court. The Eleventh Circuit's 2023 decision in *Skanska USA Civil Southeast v. Bagelheads* was a construction case, not a Signal case. Skanska's own barges broke loose during Hurricane Sally and damaged the Pensacola Bay Bridge. But it's the circuit's most thorough published treatment of what Federal Rule of Civil Procedure 37(e)(2)'s intent to deprive actually requires. And the Court said so itself, calling it the first time that circuit had clearly worked through the question.

Five of Skanska's custodians lost their cell phones in five different ways. Two phones were wiped under the departure procedure the moment their owners left. One became inaccessible after being disabled. One was allegedly tossed overboard. And one had its text messages deleted under disputed circumstances. Skanska argued that a bad-faith finding requires some single affirmative act, not a pattern of passive failures. But the Eleventh Circuit rejected that squarely, holding that intent to deprive is the equivalent of the circuit's older bad-faith standard, and that a pattern of unexplained losses sitting on top of an active litigation hold can establish it without any single admission or affirmative act.

It reviewed the district court's bad-faith finding only for clear error, and it said plainly that if it were deciding the question fresh, it would have been a close call, because the facts were also consistent with ordinary gross negligence. But under the deferential standard, and given that Skanska could offer no other explanation for what happened to those five phones, the district court's finding stood.

Now, that last point matters for how you use this case. It does represent a real ceiling on how far circumstantial evidence can carry a federal intent finding. Circumstantial evidence may not always guarantee a finding of intent, but when you contrast the facts in *Skanska* versus the facts in WWE, it's pretty clear that the facts in WWE are markedly more intentional than the facts in *Skanska*. And it resulted in a finding under (e)(2) in federal court, where it did not result in one in the Delaware Chancery Court.

107 on the Case of the Week covered this district court's original 2021 sanctions order in this same litigation, in *Skanska*. And the Eleventh Circuit's decision is the Court's fuller, later construction of the same rule. It's worth treating as the more authoritative statement of where the Court actually landed, because it's a circuit decision, and we don't have very many of those in the discovery world. And we also talked about that one on the UF eDiscovery case law panel when that one came out.

Now, put Signal specifically next to that framework. In *FTC v. Noland*, which we covered on episode 40 of the Case of the Week, the defendant installed Signal the day after learning that he was under FTC investigation, and had messages deleted from four phones right before a forensic exam. That fact pattern raised far more suspicion than *Skanska's* did. In *Skanska*, the causes of loss were varied and passive. In *Noland*, there was a single, sharp pivot to an ephemeral app, timed exactly to an investigation, followed by deletion, and no innocent story fit both of the timing facts together. And the Court found intent to deprive based on that timing alone. The facts in *Noland* are directly analogous to the facts here in WWE, because of the timing, use of the app, etc.

In another case, *Hunters Capital v. City of Seattle*, the intent finding also landed on the defendant's side, and it looked a lot like *Skanska*. The City of Seattle was sued over its handling of the Capitol Hill Occupied Protest, and thousands of text messages went missing from City-owned phones belonging to multiple officials, including the mayor, the police chief, the fire chief, and were lost in different ways after the City had already received preservation letters naming them. The Court found that the City acted with actual intent to deprive under Rule 37(e)(2), built the same way that *Skanska* built it: not one admission, but a pattern of losses across multiple custodians that no innocent explanation covered, once the City was on notice and failed to act.

Now, these cases all demonstrate the difference between the federal standard and the one applied by the Chancery Court here. Also relevant is that the plaintiffs in WWE didn't ask the Court to find intent. They only argued recklessness. And in federal court, they could have asked for intent. Federal courts do not need a smoking gun. They need a pattern, built fact by fact, specific enough to close off every innocent explanation, the way that *Skanska*, *Noland*, and *Hunters Capital* built each one.

Now, it's important to note that the federal rule's text has never included recklessness as an alternative path to intent. Federal Rule of Civil Procedure 37(e)(2) says only intent to deprive. What the 2015 amendment did was close off a different route that some courts had been using to reach the same harsh sanctions without that finding. Before 2015, the Second Circuit's *Residential Funding Corp. v. DeGeorge Financial Corp.* allowed an adverse inference on a showing of ordinary or gross negligence, no intent required. The Advisory Committee Notes to the 2015 amendment rejected that case by name, stating that the rule rejects cases such as *Residential Funding* that authorize the giving of adverse inference instructions on a finding of negligence or gross negligence. That matters for how you argue this case in practice. You shouldn't rely on *Residential Funding* anymore. The rule's own Committee Notes say by name that it is no longer the standard in federal court.

So federally, the fight was never about whether recklessness alone would do. It was about closing off negligence and gross negligence as backdoor routes to the same sanctions issued under Rule 37(e)(2). Delaware's Court of Chancery rule is built differently. It names recklessly directly in its own rule text as an alternative to intent. That is not Delaware keeping something federal courts lost. It's Delaware's rule affirmatively including a lower, alternative standard to federal Rule 37(e)(2)'s text that it never contained in the first place. Under that Delaware standard, the Signal Users' own conduct, repeatedly changing auto-delete settings on specific chats after two explicit written holds, was enough on its own, without the circumstantial pattern work a federal court would have needed to do to reach intent. Nevertheless, those are not the sanctions that were awarded. Recklessness was the standard that was applied.

Now, this case never went to trial. The parties reached a settlement in principle on the last business day before trial was set to begin, and the full figure, $147.5 million, became public in court filings this August. As of this recording, the settlement stipulation has been submitted but is not fully approved, and the Court still has to hold a fairness hearing before it is final.

Takeaways

Let's talk about the takeaways from this decision for you to focus on.

- Know your forum and your judge. The standard actually changes. Delaware's Court of Chancery Rule 37(e) names recklessness directly in its own text as an alternative to intent. Federal Rule 37(e)(2) never has. It says intent to deprive, full stop. And the 2015 amendment's real fight was closing off negligence and gross negligence as backdoor routes to the same sanctions, not recklessness. Same technology, same kind of conduct, a meaningfully lower bar to clear in Delaware Chancery Court than in federal court, for a reason that's about the rule's actual text, not just how strictly courts have chosen to read it. Do not assume that the standard travels with you across forums. And if you're building a spoliation argument in federal court, build it the way *Skanska*, *Noland*, and *Hunters Capital* all did: fact by fact, circumstantially, closing off every innocent explanation, rather than looking for a single smoking gun that will probably never exist.
- This is *Goldstein v. Denner's* framework that Vice Chancellor Laster built, doing exactly what it was built to do. He's not improvising here. He's applying the same four-part structure and the same recklessness threshold he articulated in *Denner*, where implausible explanations for lost text messages did not survive scrutiny. What *Denner* teaches you is that Delaware Chancery has a settled, repeatable playbook for ESI spoliation now. What this case teaches you is that the playbook applies with just as much force to sophisticated corporate defendants with well-resourced counsel as it did to an individual hedge fund principal.
- If your custodians are communicating about the matter on their own devices, or an app the company doesn't control, your hold has to say so specifically, and you have to verify compliance directly with that person, because there is no institutional safety net behind them.
- A legal hold is not self-executing. Circulating the notice is the beginning of the obligation, not the end of it. Somebody has to follow up and confirm that auto-delete settings, on every application a custodian actually uses, have been checked and suspended. You've got to look at the phones, you've got to see if Signal and other messaging applications are on there, and you've got to look at those settings. The

Court was clear that individuals cannot claim ignorance after receiving a hold. They have an obligation to find out what compliance requires. If your hold process stops at delivery, this case is your warning that it needs to include auditing and verification.
- And finally, you need to understand how Signal works, and specifically talk to your clients about using it and the ephemeral messaging settings. Whether they use it, the settings they change, what messages do and do not exist, all of that is discoverable. Err on the side of making sure you tell them, and then tell them you'll follow up on the phone. It's an uncomfortable conversation, no question. But it's a privileged discussion. It can be a death knell to a case, and we are seeing it more and more in discovery disputes.

Minerva26 Resources and Closing

This decision, *Goldstein v. Denner*, *Valcrum v. Dexter Axle*, and the three other federal cases that we walked through, are all tagged and searchable on Minerva26 under Instant Messaging and Mobile Device, with sub-filtering by platform, so you can pull every Signal-specific ruling on its own. Our users leverage those issue tags to drive them directly to the rulings that matter on those issues.

If you'd like to take a look at how the platform can help you, please feel free to reach out to us at support@minerva26.com, and we'll set something up.

That's our Case of the Week for this week. If this was useful, please share it with your colleagues. Keeping up with the technology and the constantly moving target of meeting our discovery obligations is difficult, and we need all the help we can get.

I'll see you next time. Thanks. Have a great week.