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Evidence Preservation, Spoliation, and Advanced Investigation Using
Social Media and Technology

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Introduction

Digital information now permeates nearly every aspect of modern litigation. Emails, text messages, cloud-based documents, social media activity, and system metadata can play a central role in determining liability, defenses, and damages. They may even help uncover fraudulent claims. For lawyers handling the litigation and the in-house counsel supervising them, the challenge is not only understanding what information exists, but ensuring that it is investigated ethically, preserved defensibly, and managed in a way that minimizes spoliation risk.

This paper provides a practical overview of three interrelated obligations in the digital age: investigation, preservation, and spoliation. It focuses on federal litigation standards and professional responsibility considerations.

Investigation: Leveraging Technology and Social Media Ethically and Responsibly

A. Early Digital Investigation and Case Assessment

Early investigation is foundational to effective litigation management. Understanding the relevant facts, custodians, systems, and data sources allows counsel to make informed decisions about strategy, scope, and cost. Federal discovery rules contemplate early engagement with electronically stored information (“ESI”), particularly through the Rule 26(f) conference process, which requires parties to discuss ESI issues at the outset of litigation.

Technology-assisted investigation tools—such as communication mapping, metadata review, and early case assessment platforms—can help identify key documents, timelines, and actors before discovery obligations crystallize. For in-house counsel, early investigation also supports accurate risk assessment and budgeting.

B. Social Media as an Investigative Tool

Social media content is now a routine source of potentially relevant evidence. Public posts, photographs, videos, comments, and user interactions may bear directly on issues such as notice, intent, credibility, or damages. Federal courts consistently treat social media content as ordinary ESI, subject to the same relevance and proportionality standards as other electronic evidence.

Because social media content is dynamic and easily altered or deleted, early identification and capture of relevant material is often critical. Counsel should ensure that investigative findings are preserved in a defensible manner, including retention of metadata where feasible.

C. Ethical Constraints on Online Investigation

The following ethics rules from the ABA Model Rules of Professional Conduct bear on investigation through social media and similar technology:

Competence and Technology.

ABA Model Rule 1.1 requires competent representation. Comment 8 to Rule 1.1 makes clear that competence includes understanding the benefits and risks associated with relevant technology. In the investigative context, this means lawyers must understand how social media platforms function, including privacy settings, notifications, and data retention issues.

Truthfulness and Prohibition on Deception.

Model Rule 4.1 prohibits false statements of material fact, and Model Rule 8.4 prohibits conduct involving dishonesty, fraud, deceit, or misrepresentation. These rules prohibit lawyers from using deception—such as false profiles or impersonation—to gain access to restricted social media content.

Supervision of Investigators and Vendors.

Under Model Rule 5.3, lawyers are responsible for ensuring that non-lawyer assistants, including private investigators or e-discovery vendors, comply with professional obligations. Counsel must supervise third parties conducting online investigations and ensure that their methods are ethically permissible.

Guidance from ABA Ethics Opinions.

ABA Formal Opinion 466 confirms that lawyers may passively review publicly available social media content, even if the review generates an automatic notification, but may not seek private access through requests or deceptive means. While the opinion addresses juror research, its reasoning is applicable to social media investigation more generally.

II. Preservation: Defining and Meeting the Duty to Preserve

A. When the Duty to Preserve Arises

The duty to preserve evidence arises when litigation is pending or reasonably foreseeable. Federal courts have consistently held that this duty can attach before a complaint is filed. Once triggered, a party must take reasonable steps to preserve relevant evidence, including ESI.

The duty to preserve is grounded in federal common law and is enforced through Federal Rule of Civil Procedure 37(e) when ESI is lost. Fed. R. Civ. P. 37(e), advisory committee's notes to 2015 amendments; *see, e.g., DR Distributors, LLC v. 21 Century Smoking, Inc.*, 513 F. Supp. 3d 839, 977 (N.D. Ill. 2021). For in-house counsel, the key risk point is delay—failing to recognize when potential claims or disputes make litigation reasonably foreseeable.

The committee notes on the 2015 revision to Rule 37(e) describe the key considerations in evaluating preservation obligations under the Federal Rules of Civil Procedure:

In applying the rule, a court may need to decide whether and when a duty to preserve arose. Courts should consider the extent to which a party was on notice that litigation was likely and that the information would be relevant. A variety of events may alert a party to the prospect of litigation. Often these events provide only limited information about that prospective litigation, however, so that the scope of information that should be preserved may remain uncertain. It is important not to be blinded to this reality by hindsight arising from familiarity with an action as it is actually filed.

Although the rule focuses on the common-law obligation to preserve in the anticipation or conduct of litigation, courts may sometimes consider whether there was an independent requirement that the lost information be preserved. Such requirements arise from many sources -- statutes, administrative regulations, an order in another case, or a party's own information-retention protocols. The court should be sensitive, however, to the fact that such independent preservation requirements may be addressed to

a wide variety of concerns unrelated to the current litigation. The fact that a party had an independent obligation to preserve information does not necessarily mean that it had such a duty with respect to the litigation, and the fact that the party failed to observe some other preservation obligation does not itself prove that its efforts to preserve were not reasonable with respect to a particular case.

...

The rule applies only if the information was lost because the party failed to take reasonable steps to preserve the information. Due to the ever-increasing volume of electronically stored information and the multitude of devices that generate such information, perfection in preserving all relevant electronically stored information is often impossible. As under the current rule, the routine, good-faith operation of an electronic information system would be a relevant factor for the court to consider in evaluating whether a party failed to take reasonable steps to preserve lost information, although the prospect of litigation may call for reasonable steps to preserve information by intervening in that routine operation. This rule recognizes that “reasonable steps” to preserve suffice; it does not call for perfection. The court should be sensitive to the party's sophistication with regard to litigation in evaluating preservation efforts; some litigants, particularly individual litigants, may be less familiar with preservation obligations than others who have considerable experience in litigation.

Because the rule calls only for reasonable steps to preserve, it is inapplicable when the loss of information occurs despite the party's reasonable steps to preserve. For example, the information may not be in the party's control. Or information the party has preserved may be destroyed by events outside the party's control--the computer room may be flooded, a “cloud” service may fail, a malign software attack may disrupt a storage system, and so on. Courts may, however, need to assess the extent to which a party knew of and protected against such risks.

Another factor in evaluating the reasonableness of preservation efforts is proportionality. The court should be sensitive to party resources; aggressive preservation efforts can be extremely costly, and parties (including governmental parties) may have limited staff and resources to devote to those efforts. A party may act reasonably by choosing a less costly form of information preservation, if it is substantially as effective as more costly forms. It is important that counsel become familiar with their clients' information systems and digital data--including social media--to address these issues. A party urging that preservation requests are disproportionate may need to provide specifics about these matters in order to enable meaningful discussion of the appropriate preservation regime.

Fed. R. Civ. P. 37(e), advisory committee notes 2015 revisions.

“The duty to preserve material evidence arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation.” Silvestri v. Gen. Motors Corp., 271 F.3d 583, 591 (4th Cir. 2001).

Old Rule under 2006 version (still in effect in some states' civil procedure rules):

Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of routine, good-faith operation of an electronic information system.

Fed. R. Civ. P. 37(f) (eff. 2006); see, e.g., NC R. Civ. P. 37(b1).

B. Scope of Preservation Obligations

Once the duty attaches, preservation obligations extend to all relevant ESI within the party's possession, custody, or control. This includes emails, documents, messaging platforms, mobile device data, shared drives, cloud storage, and relevant social media content.

Courts have made clear that preservation requires affirmative steps. Routine deletion or overwriting policies must be suspended as to relevant data, and counsel must identify custodians and systems likely to contain discoverable information.

"Evidence that must be preserved includes documents, electronically stored information, and physical evidence that the party knows or reasonably should know is relevant to claims or defenses in the action, is reasonably calculated to lead to the discovery of admissible evidence, or is reasonably likely to be requested during discovery." R.F.M.A.S., Inc. v. So, 271 F.R.D. 13, 23–24 (S.D.N.Y.2010).

"[T]he duty to preserve extends to those employees likely to have relevant information—the 'key players' in the case." Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 218 (S.D.N.Y.2003).

C. Litigation Holds and Oversight

Federal courts repeatedly emphasize the importance of timely and effective litigation holds. Counsel must issue written holds, identify relevant custodians, and ensure that routine data destruction is suspended. Importantly, courts place responsibility on counsel—not just employees—to monitor compliance and follow up as necessary.

In-house counsel are uniquely positioned to coordinate between legal, IT, and business units to ensure that litigation holds are implemented across complex systems. Documentation of these efforts is critical to demonstrating reasonableness if preservation efforts are later challenged. This may involve disabling an auto-delete function and/or segregating certain data to avoid overwriting its metadata. See Matthew Ralph & Caroline D. Sweeney, E-Discovery and Antitrust Litigation, 26 Antitrust 58, 59 (2011-2012); Richard L. Miller & Kristen Werries Collier, Avoiding the Innocent Spoliation of Evidence, 24 Chi. B. Ass'n Rec. 40, 43 (2010).

D. Proportionality and Reasonableness

Preservation obligations are not limitless. Federal Rule of Civil Procedure 26(b)(1) incorporates proportionality principles, and Rule 37(e) focuses on whether a party took "reasonable steps" to preserve ESI. Courts recognize that perfection is not required, but reasonableness is assessed in light of the circumstances, including the party's resources, systems, and knowledge at the time.

E. Selected Examples

DR Distribs., LLC v. 21 Century Smoking, Inc., 513 F. Supp. 3d 839 (N.D. Ill. 2021) – internal chats

In re Pfizer Inc. Sec. Litig., 288 F.R.D. 297 (S.D.N.Y. 2013) – internal file-sharing system data

Silvestri v. Gen. Motors Corp., 271 F.3d 583, 588 (4th Cir. 2001) – physical evidence

III. Spoliation: Risks, Standards, and Consequences

A. What Constitutes Spoliation

Spoliation is generally defined as the destruction, alteration, or failure to preserve evidence that should have been

preserved for use in litigation. In the ESI context, spoliation claims are governed primarily by Federal Rule of Civil Procedure 37(e). Note that the rule does not apply to non-ESI spoliation by its plain text.

Rule 37(e) applies when:

1. ESI that should have been preserved in the anticipation or conduct of litigation is lost;
2. The loss resulted from a failure to take reasonable steps to preserve it; and
3. The information cannot be restored or replaced through additional discovery.

Fed. R. Civ. P. 37(e).

B. Sanctions Framework Under Rule 37(e)

Rule 37(e) establishes a tiered sanctions framework.

If the loss of ESI prejudices another party, the court may order measures no greater than necessary to cure the prejudice. These may include additional discovery, cost shifting, or evidentiary limitations.

More severe sanctions—such as adverse inference instructions, dismissal, or default judgment—require a finding that the party acted with the intent to deprive another party of the information’s use in litigation. This rule significantly narrowed prior spoliation doctrines that allowed severe sanctions for mere negligence.

“Even where the preservation obligation has been breached, sanctions will only be warranted if the party responsible for the loss had a sufficiently culpable state of mind.” *In re Pfizer Inc. Sec. Litig.*, 288 F.R.D. 297, 314 (S.D.N.Y. 2013) (quoting *In re WRT Energy Sec. Litig.*, 246 F.R.D. 185, 195 (S.D.N.Y.2007)). “A court may impose sanctions if it finds that the party acted at least negligently in destroying or losing the spoliated material.” *Id.* (quoting *Harkabi v. SanDisk Corp.*, 275 F.R.D. 414, 418 (S.D.N.Y.2010)).

Note that Rule 37(e), as revised, overrules prior caselaw which set a lower bar for imposing spoliation consequences for electronically stored information. See, e.g., *Hoffer v. Tellone*, 128 F.4th 433, 438 (2d Cir. 2025).

C. Selected Examples

Skanska USA Civil Southeast, Inc. v. Bagelheads, Inc., 75 F.4th 1290 (11th Cir. 2023)

- In this maritime-related litigation, Skanska failed to suspend routine deletion policies and to capture text and cell-phone data from five custodians after litigation was reasonably anticipated and a litigation hold was issued.
- The district court found that Skanska had acted with the requisite *intent to deprive* because it “took no action” to educate custodians about preservation, made no effort to collect custodial phones, and failed to preserve known ESI. The court imposed adverse-inference sanctions and attorney fee awards under Rule 37(e)(2).
- The Eleventh Circuit affirmed the spoliation sanctions, holding that the district court did not clearly err in its bad-faith finding (equated with “intent to deprive”), and did not abuse its discretion in imposing Rule 37(e)(2) sanctions.
- The plaintiff complained on appeal that the district court’s spoliation instruction was supported entirely on circumstantial evidence and based on mere negligence. The Eleventh Circuit emphasized that the company

offered no credible explanation other than carelessness amounting to gross negligence for its failure to implement reasonable preservation steps after notice. It also relied, in part, the plaintiff's (alleged spoliator) status as a "sophisticated" "multinational company," and imputed

Hoffer v. Tellone, No. 22-1377 (2d Cir. Feb. 13, 2025)

- In a § 1983 action, the plaintiff alleged that police officers' taser video evidence had been overwritten. He requested an adverse-inference instruction based on spoliation.
- The district court denied the request, finding insufficient evidence of the requisite *intent to deprive* under Rule 37(e)(2).
- The Second Circuit affirmed the denial of an adverse-inference sanction on appeal.
- The court clarified that under post-2015 Rule 37(e)(2), a movant must prove *intent to deprive* by a preponderance of the evidence, not merely negligence or gross negligence.

Jones v. Riot Hospitality Group, LLC, 95 F.4th 730 (9th Cir. 2024)

- The plaintiff failed to produce text messages as ordered and evidence suggested an orchestrated effort to delete relevant messages.
- The district court concluded that the plaintiff intentionally deleted ESI with the intent to deprive the defendant of its use and dismissed the case as a sanction against the plaintiff.
- The Ninth Circuit affirmed the district court's imposition of the terminating sanction on the basis that the Rule 37(e)(2) prerequisites were met and the plaintiff acted with *intent to deprive*.
- The appellate court clarified that when ESI is intentionally deleted and evidence supports that the intent requirement is satisfied, dismissal is available and not an abuse of discretion.

D. Practical Consequences for In-House Counsel

Spoliation allegations can derail litigation strategy, increase costs, and damage credibility with courts. Even when severe sanctions are not imposed, responding to spoliation motions diverts resources and attention. Proactive investigation and preservation are the most effective tools for minimizing these downstream risks.

Conclusion

Digital evidence is now central to modern litigation, and its management requires a coordinated approach across investigation, preservation, and spoliation risk mitigation. Early, ethical investigation informs effective preservation. Defensible preservation practices reduce the likelihood of spoliation claims. Together, these efforts protect both the litigation posture and institutional credibility of the organization.

For in-house counsel supervising litigation, the message is clear: understand the technology, act early, document decisions, and ensure that both legal and ethical obligations are met in the digital age.