

# From Signal to ChatGPT: Preservation, Privilege and Practical Governance Lessons for Corporate Fiduciaries

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Recent Delaware decisions provide practical guidance relevant to directors and officers of Delaware corporations who employ two emerging technologies in strategic transaction processes: disappearing instant messages and AI-assisted legal advice. In *In re World Wrestling Entertainment Merger Litigation*, the Delaware Court of Chancery addressed spoliation of electronically stored information (ESI) under Court of Chancery Rule 37(e) where key deal participants used the instant messaging platform Signal and changed message-retention settings after litigation holds were issued. Other recent decisions, including *Fortis Advisors v. Krafton* and *United States v. Heppner*, shed light on the discoverability of generative AI prompts, which may later become part of the evidentiary record and may not necessarily remain private or privileged. These decisions suggest that corporate fiduciaries should assume that both instant messaging platforms and AI chats can become consequential evidence in deal litigation.

*World Wrestling Entertainment* arose from claims that Vince McMahon, WWE's controlling stockholder, steered the company toward a transaction with Endeavor, whose chief executive officer was allegedly McMahon's long-time friend. The Endeavor transaction materialized against the backdrop of McMahon's departure from the company amid allegations of sexual misconduct, his later return to the board and the company's ensuing exploration of strategic alternatives. During both the investigation into McMahon's alleged misconduct and the company's sale process, WWE's in-house legal team issued hold notices directing custodians to preserve relevant ESI, including instant messages, and to suspend automatic deletion protocols. Despite this, McMahon and other custodians affirmatively changed their default Signal settings to short auto-delete windows measured in hours or days. Because the missing Signal messages struck at backchannel communications concerning the misconduct investigation and the Endeavor transaction, the failure to preserve them became central to the plaintiffs' sanctions motion.

Before reaching the merits, the court first addressed timing and declined to defer the sanctions motion until after trial. Because the facts about the failure to preserve ESI and the affirmative changes to the deletion settings were largely undisputed, and the requested remedies would affect how the parties prepared for trial, the court held that the proper time to decide the motion was before trial. The court then structured the Rule 37(e) analysis through four questions: whether there was a duty to preserve the Signal messages, whether the Signal messages were lost, whether they were lost because the defendants failed to take reasonable steps to preserve them and whether the loss caused prejudice.

On the first element, the court emphasized that a duty to preserve arises not only when a party actually anticipates litigation, but also when a party reasonably should anticipate it. Thus, although it was clear that McMahon and the other custodians had preservation obligations once WWE's in-house legal team issued the hold notices, the court held that the sale-process-related preservation duties arose earlier. The court reasoned that the hold related to the misconduct allegations already encompassed communications that touched on the potential sale process. The court further noted that, in the M&A context, preservation duties can arise even before a formal litigation hold is issued because the frequency of M&A litigation may lead sophisticated parties to anticipate it. Applying that reasoning, the court concluded that McMahon and the other custodians were required to preserve evidence relating to the potential sale before the sale-process hold was later issued.

On the second and third elements, the court held that the Signal messages were lost and that the loss resulted from the defendants' failure to take reasonable steps to preserve them. In this regard, the court emphasized that simply circulating a litigation hold was not enough, and that each custodian was required to take steps to comply with the hold, including disabling the auto-delete functions and preserving relevant messages before they disappeared. Rather than complying with these obligations, McMahon and the other custodians affirmatively changed their retention settings and caused the messages to be lost. The court also pointed to evidence that McMahon and other custodians encouraged the use of Signal because of the secrecy it provided. Taken together, those facts led the court to conclude that McMahon and the other custodians were reckless and failed to take reasonable steps to preserve relevant ESI.

On the fourth and final factor, the court found that the plaintiffs had shown prejudice by offering a plausible explanation for why the missing messages likely contained relevant evidence. Having found that the plaintiffs satisfied Rule 37(e)'s requirements, and that McMahon and the other custodians acted recklessly, the court imposed evidentiary sanctions, including establishing presumptions that certain specified facts were true and shifting the burden of proof such that the defendants could only rebut those presumptions with clear and convincing evidence.

*Krafton and Heppner* highlight the discovery risks that may arise from exchanges through another type of emerging electronic platform: generative AI. In *Heppner*, the U.S. District Court for the Southern District of New York held that certain of a criminal defendant's exchanges with a generative AI platform were not protected by either the attorney-client privilege or the work product doctrine. In *Krafton*, the Court of Chancery treated the CEO's use of ChatGPT to formulate a "takeover" strategy as part of the factual record in later litigation and scrutinized his deletion of specific ChatGPT logs. As the use of generative AI becomes more commonplace, courts will increasingly be called on to address its use in a variety of contexts. But at least in these early stages of AI, directors, officers and other transaction participants should be aware that using generative AI can have unanticipated and unintended consequences in litigation.

These recent decisions offer several practical lessons for corporate fiduciaries and their advisers. *World Wrestling Entertainment* illustrates that the use of auto-delete features following the issuance of litigation holds or when litigation should reasonably be anticipated can materially affect trial and the adjudication of M&A litigation; that preservation duties may, in certain circumstances, arise before any litigation hold is circulated; and that, once those duties attach, advisers should consider advising clients to take affirmative preservation steps, including checking message and email settings, disabling auto-delete functions and preserving relevant communications in full. *Krafton* and *Heppner* add a separate but related lesson: practitioners should advise clients to be cautious about using generative AI tools, especially AI tools that lack sufficient confidentiality guardrails, as those exchanges may later be discoverable, unprivileged or otherwise become part of the evidentiary record.

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