



Spoliation:

Practical Implications and Ethical Considerations When Evidence Goes Missing

Oliver Wendell Holmes Inn



What is Spoliation

[Short video](#)



Hypothetical #1

[summarize facts]

[discuss how you would rule]



McNeel v. Union Pacific R. Co.,

276 Neb. 143, 156, 753 N.W.2d 321, 333, 28 I.E.R. Cas. (BNA) 88 (2008)

[what actually happened/summary]



Hypothetical #2

[summarize facts]



O'Brien v. Cessna Aircraft Co.,
2014 WL 11125416, at *4 (D. Neb. 2014).



Nebraska Ethical Rules

Nebraska Supreme Court Rules §3-503.4: Fairness to Opposing Party and Counsel

A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act



ABA Ethical Rules

Model Rules of Professional Conduct Rule 3.4: Fairness to Opposing Party and Counsel

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What does this mean?

What is your duty to preserve

How much do you preserve (relevance)

What is your responsibility once you learn of spoliation



Negligent and Intentional Spoliation

Is there a difference in the case law or ethical rules?



Electronic Spoliation

We all know we shouldn't start shredding when a lawsuit emerges, but how do we advise clients on protecting electronically stored information

Common sources:

Facebook and other social media - Stephanie? In the divorce context

Copyright - Mary Ann and Matthew

Metadata within documents - Kathryn



Electronic Spoliation: Social Media



Electronic Spoliation: Copyright and Intellectual Property



Electronic Spoliation: Metadata

Topics to address:

- What is metadata
- Where is metadata found
- Hypothetical about saving meta data?
- Why is metadata important (or not important - if in doubt - save it - cross reference any rules discussed earlier about definition of spoliation and relevance)
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<https://blog.specialcounsel.com/ediscovery/how-to-handle-metadata-with-care-and-avoid-spoliation-sanctions/>

<https://www.jacksonkelly.com/anticipation-litigation-advisor-blog/the-duty-to-preserve-metadataleidig-v-buzzfeed-inc-116-cv-00642-sdny-dec-19-2017>



Leidig v. BuzzFeed, Inc.

1:16-cv-00642 (S.D.N.Y. Dec. 19, 2017)

Buzzfeed published an article on its website with the headline “The King of Bullsh*t News”, to which the Plaintiffs were the subjects. Among other things, the article alleged that the Plaintiffs “fabricat[ed] and [sold] fake news stories.” Unsurprisingly, Plaintiffs were not pleased and sued for defamation. Buzzfeed answered the complaint and asserted affirmative defenses that the article was “substantially true” and that the Plaintiffs were public figures and could not prove constitutional malice by clear and convincing evidence. As part of Plaintiff’s initial evidentiary disclosures to Buzzfeed, they indicated that they had “taken down” the websites which had previously published the articles Buzzfeed discussed in the allegedly defamatory article, and indicated that they planned to produce screenshots of the websites as they appeared before they had been taken down. After discovery was requested, Plaintiffs’ produced 400 documents, including “documents bearing no metadata, including manually manipulated PDFs, summaries of underlying documents not produced, and screenshots and other text files generated by Plaintiffs after production of the Article” but no copies of the now-disabled websites were produced. Buzzfeed filed a Motion to Compel the authentic documents. The Court ordered production of the original versions of the documents with corresponding metadata, and specifically forbade Plaintiffs from producing screenshots, or other new document. As part of this, the Court specifically noted the possibility of spoliation sanctions. Buzzfeed then attempted to send a second request for production of documents, to which Plaintiffs failed to produce preserved versions of the disabled websites (and directed Buzzfeed to a third person website which purportedly archives websites), and again produced screenshots (as opposed to original documents) and other ESI with missing or incorrect metadata.

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<https://www.jacksonkelly.com/anticipation-litigation-advisor-blog/the-duty-to-preserve-metadataleidig-v-buzzfeed-inc-116-cv-00642-sdny-dec-19-2017>



Facebook and Social Media

If possible - find instructions for downloading and preserving metadata



Word, Excel, Adobe PDFs

How to check metadata?

Additional reminder: protect privileges by being aware of metadata when corresponding with opposing counsel. If we're looking to fill time, perhaps loop back to reminder of what is spoliation and what is protecting your work product.



Spoliation Considerations

What is the Court's response? Sanctions, jury instructions, etc.