

CLIENT ALERT

## Significant Sanctions Ruling by the Ninth Circuit Rejects Inherent Authority and Reinforces Specific Intent Standard for Case-Ending Sanctions

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Over the last several years, there have been a number of opinions issued by district courts continuing to rely upon their “inherent authority” to sanction parties for the loss of electronically stored information (ESI). Similarly, we have seen broader use of various types of evidentiary instructions as “curative measures” under Federal Rule of Civil Procedure 37(e)(1). The Ninth Circuit Court of Appeals’ recent opinion in *Gregory v State of Montana*, 118 F.4th 1069, 2024 WL 4312740 (9th Cir. 2024) is a strong signal that Rule 37(e) is the only means available to a district court to impose any type of discovery sanction for the loss of ESI. The opinion also sends a strong message limiting the use of some evidentiary instructions absent the showing of “specific intent” to deprive.

In *Gregory*, the Ninth Circuit reversed the district court’s order of sanctions against the State of Montana for failing to preserve surveillance footage of a parking lot encounter between a probation officer and the plaintiff, who alleged the officer used excessive force in violation of the Fourth Amendment. The district court had relied upon its “inherent authority” to impose sanctions, rather than applying Rule 37(e), which governs the loss of ESI in litigation. The district court found that the defendant acted “recklessly” by allowing the video to be deleted due to automatic deletion settings, despite repeated, failed efforts to preserve it. As a result, the district court imposed several sanctions, including: (1) instructing the jury to take it as “established as a matter of law” that the defendant used unreasonable force—a central element of the plaintiff’s claim; (2) barring any testimony about the content of the lost footage or a “poor-quality, second-level copy” made by one of the defendants using his mobile phone (including testimony by other officers on the scene to the extent their testimony touched on interaction between the plaintiff and the officer accused of excessive force); and (3) instructing the jury that it may infer that the lost footage was favorable to the plaintiff’s allegations.

In reversing and remanding for a new trial, the Ninth Circuit explained that Rule 37(e) was amended in 2015 to provide a uniform standard for imposing sanctions for the loss of ESI and to abrogate prior cases that authorized adverse-inference instructions based on negligence or gross negligence alone. The Court noted that the Rules Advisory Committee’s notes to the amended rule confirmed that Rule 37(e) “forecloses reliance on inherent authority or state law to determine when” specified “severe” measures (to include default judgment, dismissal, and adverse evidence jury instructions) could be ordered as sanctions for spoliation. The Court also noted that the Rule requires different findings depending on the nature and severity of the sanction contemplated, and that the Rule specifically states that the sanctions selected by the district court here are “only” available upon finding that the party acted with “intent to deprive another party of the information’s use in the litigation.”

The Court rejected the plaintiff's arguments that the district court's reliance on its inherent authority was proper, that the sanctions were not covered by Rule 37(e)(2), and that the State's conduct amounted to intent to deprive. The Court observed, first, that video system was entirely digital in nature, rendering the video content ESI such that the Rule's language and purpose precluded the district court from circumventing its clear mandate. Second, the Court observed that the sanctions imposed by the district court were either expressly listed in Rule 37(e)(2) or had the same, or a more severe, effect as those listed. The Court emphasized that Rule 37(e)(2) constitutes "a demanding specific-intent standard," involving the "willful destruction of evidence with the purpose of avoiding its discovery by an adverse party." The Court pointed out that the district court here specifically found that "the State conduct amounted only to 'recklessness,'" which it confirmed "is not enough to authorize the severe sanctions covered by Rule 37(e)(2) and imposed by the district court here." The district court therefore lacked authority to impose the sanctions that it did.

Notably, the Court extended this reasoning not just to the specifically enumerated sanction of an adverse-inference jury instruction of the kind the district court employed here, but also to the district court's finding as a matter of law as to the issue of unreasonable force and to the evidentiary preclusions awarded. Again citing the Advisory Committee notes, the Court noted that "curative measures" awarded in the absence of a finding of intent to deprive must not "have the effect of measures that are permitted under subdivision (e)(2)," such as "precluding a party from offering any evidence in support of the central or only claim or defense in the case." The Court found that district court's instruction that the jury "take as established that [the officer] had used excessive force" was "effectively a conclusive presumption that the lost video was so unfavorable to the State on the issue of excessive force that that ultimate fact at issue should be taken as resolved in [the plaintiff's] favor." These sorts of dispositive sanctions, the Court held, "may 'only' be imposed if the court first makes the specific finding of intent required by" Rule 37(e)(2).

This is an important decision for parties facing motions under Rule 37(e) in the Ninth Circuit, and may be an influential one for cases in other circuits. In recent years, we have seen an erosion of Rule 37(e)(2)'s strict "intent to deprive" standard and the protection that case-ending—or effectively case-ending—sanctions could only be ordered where that intent has been found. Some courts have endorsed an interpretation of "intent to deprive" under subsection (e)(2) that equates to more ambiguous concepts such as "bad faith," which courts often have not interpreted to require willful and purposeful conduct designed to shield documents or information from discovery by an opponent. Some courts, likewise, have adopted draconian "curative measures" under subsection (e)(1), even when falling short of finding intent to deprive, such as precluding evidence or directing findings as to elements of a claim or defense. The *Gregory* decision suggests that neither of these erosions should be tolerated within the Ninth Circuit.

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