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FEDERAL E-DISCOVERY

Ninth Circuit Affirms Dismissal
Sanction for Text Message Spoliation

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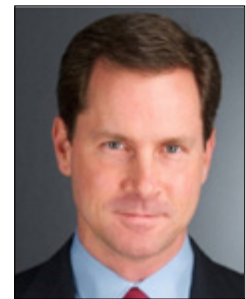
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Federal Rule of Civil Procedure 37(e) was adopted in 2015 to provide federal courts with a uniform standard to determine when and whether to impose sanctions on parties who have failed to preserve electronically stored information (ESI). Courts, though, have differed in their application and interpretation of the rule, and scant guidance on Rule 37(e) has been provided to magistrate and district court judges by circuit courts of appeal.

In a recent decision, the U.S. Court of Appeals for the Ninth Circuit clarified and affirmed the use of Rule 37(e) as the standard for imposing sanctions for the loss of ESI and upheld the dismissal of a plaintiff's employment discrimination case as a sanction for intentional spoliation of text messages. The decision offers valuable guidance on the elements and evidence of intent under Rule 37(e)(2), the relationship between Rule 37(e) and prior circuit precedent, and the discretion of courts to impose the harshest sanctions for egregious spoliation. It also serves as a cautionary tale for parties who may be tempted to delete or hide relevant ESI from their adversaries.



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'Jones v. Riot'

During discovery in *Jones v. Riot Hospitality Group*, 2024 WL 927669 (9th Cir. Mar. 5, 2024), defendant Riot obtained text message exchanges between plaintiff Jones and her friends and coworkers between December 2015 and October 2018. Riot noticed that gaps existed in the text messages, reflecting "instances where Jones appeared to have abruptly stopped communicating with people she had been messaging almost daily."

Responding to a subpoena, Jones's technology vendor "produced a spreadsheet showing that messages between Jones and her co-workers had been deleted from Jones' mobile phone." Additionally, "[i]n subsequent depositions, two of the co-workers, both of whom Jones had identified as prospective trial witnesses, testified that they had exchanged

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text messages with Jones about the case since October 2018.”

The district court ordered Jones to produce these messages; “Jones failed to comply.” The court then ordered the parties to jointly retain a forensic expert to extract messages from the phones of Jones and certain prospective witnesses. Once hired, this expert extracted responsive messages and, following the court’s direction, sent them to the plaintiff’s counsel, who was then supposed to forward any non-privileged, responsive messages to the defendants.

Counsel, though, did not, notwithstanding multiple district court orders and deadline extensions. The

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district court eventually ordered the expert to send non-privileged messages directly to Riot and “assessed \$69,576 in fees and costs” against the plaintiff and her counsel.

After finally receiving the text messages, Riot then “moved for terminating sanctions under Federal Rule of Civil Procedure 37(e)(2).” In support of its motion, Riot submitted a report it had commissioned from the forensic expert, who “concluded, after comparing the volume of messages sent and received between phone pairs, that ‘an orchestrated effort to delete and/or hide evidence subject to the court’s order has occurred.’”

The district court granted Riot’s motion and “dismissed the case with prejudice, finding that Jones deleted text messages and cooperated in the deletion of messages by her witnesses, intending to deprive Riot of their use in litigation.”

The Ninth Circuit

Appealing the district court’s decision, Jones argued, inter alia, that her actions did not violate Rule 37(e), claiming “that the district court abused its discretion by dismissing the case because her conduct was neither willful nor prejudicial to Riot.”

Addressing Jones’s claim that her conduct was not intentional, the Ninth Circuit explained that “Rule 37(e) does not define ‘intent,’ but in context, the word is most naturally understood as involving the willful destruction of evidence with the purpose of avoiding its discovery by an adverse party.” It found that since “intent can rarely be shown directly, a district court may consider circumstantial evidence in determining whether a party acted with the intent required for Rule 37(e)(2) sanctions. Relevant considerations include the timing of destruction, affirmative steps taken to delete evidence, and selective preservation.”

The Ninth Circuit listed a number of items that provided “ample circumstantial evidence that Jones intentionally destroyed a significant number of text messages and collaborated with others to do so,” including that “Jones and one of the witnesses obtained new phones shortly after they were ordered to hand over their devices for imaging” and failed to hand over the previous phones, “effectively preventing discovery of messages deleted from those phones.”

Turning to Jones’s claim that there was no prejudice to Riot, the Ninth Circuit determined that the district court’s finding of prejudice was supported by the record but, importantly, noted that prejudice is not required under Rule 37(e)(2). The court stated that “Rule 37(e)(2) does not mention prejudice as a prerequisite to sanctions, including dismissal.”

Citing to the Advisory Committee Notes for the Rule, the Ninth Circuit wrote that the finding of intent required under this subsection “can support not only an inference that the lost information was unfavorable to the party that intentionally destroyed it, but also an inference that the opposing party was prejudiced

by the loss of information that would have favored its position...Subdivision (e)(2) does not require any further finding of prejudice.”

Jones additionally argued that that district court should have imposed a sanction less severe than dismissal. Addressing this, the Ninth Circuit observed that “the district court expressly considered less drastic sanctions, including those in Rule 37(e)(1) and lesser sanctions authorized under Rule 37(e)(2), and reasonably concluded that none would likely be effective.” It found that “[c]onsidering the nature of the spoliated ESI and...repeated violations of court

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orders even after monetary sanctions had been imposed, the district court’s conclusion was not an abuse of discretion.”

The Ninth Circuit also addressed the application of Rule 37(e) vis-à-vis existing circuit precedent. The district court, while applying Rule 37(e), had additionally conducted an analysis under “the five-factor test for terminating sanctions articulated in *Anheuser-Busch*,” a Ninth Circuit precedent from 1995, and found case dismissal to be warranted. Here, the Ninth Circuit clarified that the “*Anheuser-Busch* test generally controls the imposition of terminating sanctions, but we deal here with Rule 37(e)(2). To dismiss a case under Rule 37(e)(2), a district court need only find that the Rule 37(e) prerequisites are met, the spoliating party acted with the

intent required under Rule 37(e)(2), and lesser sanctions are insufficient to address the loss of the ESI.”

Based on this analysis, the Ninth Circuit affirmed the district court, determining that the “district court did not clearly err in finding that Jones intentionally deleted ESI.”

Rule 37(e)

Since its enactment in December 2015, courts have taken varying approaches to applying Federal Rule of Civil Procedure 37(e). Some have applied it to the letter, while others have relied on other standards or even have excluded it from ESI sanctions analyses, despite the intent behind the rule to provide one standard for federal courts to use when considering sanctions for the failure to preserve ESI.

The Ninth Circuit’s decision in *Jones v. Riot* provides rare insight and guidance from a circuit court of appeals on e-discovery law. Adding to the jurisprudence on Rule 37(e) and on sanctions for failure to preserve ESI, the decision sets forth when and how the rule may be applied and clarifies that circuit court precedent from before the rule’s adoption does not control.

It also addresses what is necessary for a finding of “intent” under Rule 37(e)(2), which may be especially helpful in the absence of guidance in the text of or comments to the rule. Moreover, the Ninth Circuit made clear that unlike with Rule 37(e)(1), Rule 37(e)(2) does not require a separate, explicit finding of prejudice.

Notably, both the district court and the Ninth Circuit in *Jones v. Riot* demonstrated a willingness to use their authority to punish egregious spoliation, a warning to parties that courts in such situations may not hesitate to impose the most severe of sanctions.