

## Technology Today

## FEDERAL E-DISCOVERY

## Ninth Circuit Rules on Inherent Authority and FRCP 37(e)

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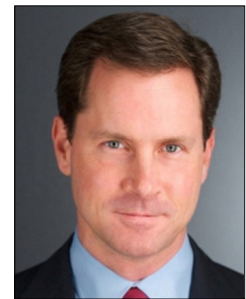
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In this space nine years ago, nearly to the day, we analyzed the newly-enacted amendments to the Federal Rules of Civil Procedure relating to e-discovery. These amendments included a new Rule 37(e), designed to govern the imposition of sanctions by a court when a party has failed to preserve electronically stored information (“ESI”), thus resolving a circuit split on the degree of culpability required for certain sanctions.

Even after a herculean effort by the rules committee over many years in what was often a complex and challenging drafting process, we still wondered “Will new Rule 37(e) actually result in uniformity across the circuits or open the door for new judicial divergence?” One key issue was the notion, as documented in the corresponding advisory committee note, that Rule 37(e) foreclosed a court’s ability to rely on its inherent authority for imposing such sanctions.



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In the years since, while many courts have followed Rule 37(e) to the letter, others have not, and have continued to issue sanctions under their inherent authority for failure to preserve ESI. A recent decision from the United States Court of Appeals for the Ninth Circuit, though, challenges such determinations by courts, concluding that Rule 37(e) precludes a court from invoking its inherent authority to issue certain spoliation sanctions enumerated under that rule.

**The District Court’s Ruling**

In *Gregory v. State of Montana*, 2024 WL 4312740 (9th Cir. Sept. 27, 2024), the plaintiff claimed civil rights violations under 42 U.S.C. §1983. Her allegations included the use of excessive force by a

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State of Montana (State) probation officer during an incident that took place in the parking lot adjacent to a probation office.

The entire incident was recorded "by an external surveillance camera that monitored the parking lot and that was operated by the probation office." *Id.* at \*3. The plaintiff, Gregory, tried on multiple occasions to ensure that the State preserved the surveillance footage. Nonetheless, after a series of apparent missteps and misunderstandings, including making a low-quality mobile phone video recording of the footage, the original footage

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of the incident was automatically deleted from the surveillance system. *Id.*

Gregory filed a motion for sanctions against the State for the loss of the recording. "In her motion, Gregory asked the district court to grant her a default judgment and to do so pursuant to the court's inherent authority, rather than under Rule 37." *Id.* at \*4. In its analysis of the appropriate sanction, "the court expressly found that 'Gregory cannot sustain her burden to establish gross negligence or willfulness on the part of the State' and that the State's conduct amounted only to 'recklessness.'" *Id.*

While rejecting the plaintiff's request to enter a default judgment, the district court still imposed a severe sanction. "Invoking its inherent authority," the district court determined the

proper sanction for loss of the footage was a jury instruction to take as established that the probation officer used excessive force against the plaintiff. *Id.* The jury later found in the plaintiff's favor as to this claim; the State and probation officer appealed the judgment against the officer and "the sanctions orders against the State on which that judgment was based." *Id.* at \*2.

### **The Ninth Circuit's Rule 37(e) Analysis**

Appealing the decision to the Ninth Circuit, the appellant-defendants argued "that Rule 37(e) exclusively governs the availability of the sort of sanctions that were imposed for the loss of evidence that occurred here and that, as a result, the district court erred by relying on its inherent authority." *Id.* at \*6.

In its analysis, the Ninth Circuit noted the history of the inherent authority of federal courts "to fashion an appropriate sanction for conduct which abuses the judicial process," and that "[t]his inherent authority often remains available as an alternative source of sanctioning power even when there are statutes or rules that also provide for sanctions." *Id.* The court found, though, that while the United States Supreme Court has recognized such inherent authority, it "has also held that 'the exercise of the inherent power of lower federal courts can be *limited* by statute and rule" and that "a court may not invoke inherent authority in order to contravene the 'clear mandate' of an applicable statute or rule." *Id.* (citations omitted).

The court examined Federal Rule of Civil Procedure 37(e), which as amended in 2015, applies in situations where a party has failed to preserve ESI: "If electronically stored information that should have been preserved in

the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court: (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or (2) only upon finding that the party acted with

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the intent to deprive another party of the information's use in the litigation may: (A) presume that the lost information was unfavorable to the party; (B) instruct the jury that it may or must presume the information was unfavorable to the party; or (C) dismiss the action or enter a default judgment." *Id.* (citation omitted).

When a loss of information covered under Rule 37(e) occurs, wrote the Ninth Circuit, a court "must make the specified findings required by paragraphs (1) or (2) before it may impose a sanction, and those paragraphs require different findings depending upon the nature and severity of the sanction." *Id.* at \*7. While paragraph (1) establishes a "general authority . . . to impose remedial sanctions," it is paragraph (2) that "establishes a more demanding standard before the court may impose certain types of severe sanctions."

*Id.* The court highlighted that the advisory committee's note to Rule 37(e) "explicitly confirm[s]" this point. *Id.*

The court determined that the sanctions fashioned by the district court – instructing the jury to take as fact that the probation officer used excessive force against Gregory – "fall within the scope of paragraph (2) of Rule 37(e)." *Id.* It further found that "under the plain language of Rule 37(e)(2), these sanctions were 'only' available if the court first made the finding of intent required by the rule." *Id.*

### **Improper Reliance on Inherent Authority**

The Ninth Circuit concluded that with "Rule 37(e)'s careful specification of the findings that must be made before any sanction may be imposed for a covered loss of information, it is clear that the rule, by its terms, precludes a court from resorting to inherent authority to evade its strictures." *Id.* at \*8. Indeed, as cited by the court, the advisory committee's note to the 2015 amendment explicitly states that the rule "*forecloses reliance on inherent authority or state law to determine when certain measures should be used.*" *Id.*

Agreeing with the appellant-defendants, the court decided that "[b]ecause Rule 37(e) governs both the loss of information and the sanctions imposed in this case, and because the rule's specific requirements preclude invocation of a court's inherent authority, the district court erred as a matter of law by relying upon its inherent authority rather than applying Rule 37(e)." *Id.*

Having "found only that the State's actions amounted to 'recklessness,'" the district court did not find the required intent needed "to authorize the severe sanctions covered by Rule 37(e) (2)." Thus, the Ninth Circuit determined "that Rule 37(e)(2) precluded the district court from

imposing the sanctions that it did,” reversed the sanctions orders, and remanded the plaintiff’s excessive force action against the probation officer for a new trial. *Id.* at \*9.

### **More Uniformity or More Divergence?**

The Ninth Circuit’s decision in *Gregory v. State of Montana* offers significant insights into the long-running question whether courts can still rely on their inherent authority to sanction parties for failing to preserve ESI, or if that authority is, in fact, precluded by Rule 37(e).

First, the Ninth Circuit emphasized the importance of following the explicit requirements of Rule 37(e) when analyzing what curative measures or sanctions may be appropriate – or not – after the loss of ESI. This includes making the required findings of prejudice or intent to deprive another party of the information’s use in litigation before imposing any sanctions.

Second, in finding that Rule 37(e) precludes

a court from relying on its inherent authority to impose sanctions for the loss of ESI, the decision underscores the importance for practitioners to understand the possible boundaries of a court’s inherent authority in this area when seeking or defending against sanctions. Notably, courts do not face the same limitations when imposing sanctions under other subsections of Rule 37, such as Rule 37(b) for the failure to comply with a court order.

And third, while the Ninth Circuit has provided its interpretation of Rule 37(e) and its preclusion of the use of inherent authority, it is important to recognize that other circuits may rule differently. Legal practitioners should stay informed about developments in other jurisdictions and be prepared for the possibility of varying interpretations of Rule 37(e) across different federal circuits. This area of law is still evolving, and future rulings may further clarify or complicate the application of Rule 37(e).