

2. A decision from the U.S. Court of Appeals for the Ninth Circuit affirming terminating sanctions based on the district court's findings that Plaintiff intentionally deleted text messages from her phone and coordinated with other witnesses to do the same.

In *Jones v. Riot Hospitality Group LLC*, 95 F.4th 730 (9th Cir. 2024), a panel of the U.S. Court of Appeals for the Ninth Circuit, in an opinion written by U.S. Circuit Judge Andrew D. Hurwitz, addressed an appeal of a district court order granting terminating sanctions based on spoliation of text messages.

In this litigation under Title VII of the Civil Rights Act of 1964, Defendants obtained text messages in discovery that suggested Plaintiff had “abruptly stopped communicating with people she had been messaging almost daily.” *Id.* at 733. Plaintiff’s third-party imaging vendor produced a spreadsheet in response to a subpoena showing that messages between Plaintiff and her co-workers had been deleted from her mobile phone. *Id.* at 734.

In subsequent depositions, Plaintiff’s co-workers testified that they had exchanged text messages with Plaintiff at relevant times, but Plaintiff failed to comply with an order from the district court to produce those messages. The parties retained a forensic search specialist by order of the district court, and the forensic specialist received Plaintiff’s phone along with the phones of two of her co-workers. The forensic specialist extracted messages containing stipulated search terms and sent them to Plaintiff’s counsel, Philip Nathanson, who was supposed to — but did not — send the discoverable messages to Defendants. Nathanson failed to comply with subsequent court orders to produce the messages, and the district court ordered the forensic specialist to produce them directly to Defendants.

Defendants later moved for terminating sanctions under Federal Rule of Civil Procedure 37(e)(2) and submitted an expert report from the forensic specialist opining that “an orchestrated effort to delete and/or hide evidence subject to the Court’s order has occurred” based on an analysis of the volume of messages sent and received between the phones. The district court dismissed the case with prejudice, finding that Plaintiff deleted text messages and cooperated in the deletion of messages by her witnesses, intending to deprive Defendants of their use in litigation. Plaintiff appealed.

Judge Hurwitz began his analysis by explaining that Rule 37(e) applies when ESI “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.” *Id.* at 735. He stated that if a

district court finds the loss prejudicial, it “may order measures no greater than necessary to cure the prejudice,” but dismissal is authorized if the court finds that an offending plaintiff “acted with the intent to deprive another party of the information’s use in the litigation.”

Summarizing the actions taken by the court below, Judge Hurwitz noted that the district court had found that Plaintiff intentionally deleted relevant text messages with co-workers from 2017 and 2018 and coordinated with her witnesses to delete messages from 2019 and 2020. The district court drew “reasonable inferences from the circumstances” and found that Plaintiff did so with the intent to deprive Defendants of use of the messages in this suit. The district court had also found that the deleted messages could not “be restored or replaced through additional discovery.” Applying the five-factor test for terminating sanctions articulated in *Anheuser-Busch, Inc. v. Nat. Beverage Distribs.*, 69 F.3d 337, 348 (9th Cir. 1995), the district court had found dismissal warranted.

Judge Hurwitz disagreed with Plaintiff’s primary contention on appeal that the district court abused its discretion by dismissing the case because her conduct was neither willful nor prejudicial to Defendants. Citing to the advisory committee’s note to the 2015 amendment of Rule 37, Judge Hurwitz stated that terminating sanctions required only findings that the Rule 37(e) prerequisites were met, the spoliating party acted with the intent required under Rule 37(e)(2), and lesser sanctions were insufficient to address the loss of the ESI.

Judge Hurwitz found that the district court had not clearly erred in finding that Plaintiff intentionally deleted ESI. He noted that Rule 37(e) does not define “intent,” but the word “is most naturally understood as involving the willful destruction of evidence with the purpose of avoiding its discovery by an adverse party.” And because 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,” including the timing of destruction, affirmative steps taken to delete evidence, and selective preservation.

Judge Hurwitz also disagreed with Plaintiff’s argument that the district court erred in finding intent because the forensic specialist could not confirm that every deletion of a text message was intentional or quantify the intentional deletions. He noted that there was “ample circumstantial evidence that [Plaintiff] intentionally destroyed a significant number of text messages and collaborated with others to do so.” For example, the district court had relied on a screenshot of a message sent to Plaintiff that was missing from Plaintiff’s phone in its original form, showing that Plaintiff had “deleted at least one message that had a direct bearing on her case.” The district court had concluded that Plaintiff “affirmatively selected certain text

messages for deletion while otherwise preserving text messages sent around the same time,” and Judge Hurwitz found this conclusion supported by the record. *Id.* at 736.

Judge Hurwitz explained that Defendants’ ability to take depositions did not cure the prejudice caused by Plaintiff’s conduct, and he agreed with the district court’s finding that Plaintiff’s destruction of ESI “impaired [Defendants’] ability to go to trial and threatened to interfere with the rightful decision of the case.” But he noted that Rule 37(e)(2) does not mention prejudice as a prerequisite to sanctions, including dismissal. Judge Hurwitz pointed to the advisory committee notes, which explained that a finding of prejudice was not included as a requirement because “the finding of intent required by [Rule 37(e)(2)] 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.” Judge Hurwitz found that the district court had relied on that inference here and that nothing further was required.”

Judge Hurwitz likewise rejected Plaintiff’s argument that dismissal was a measure “greater than necessary to cure the prejudice.” He noted that the district court had expressly considered less drastic sanctions but reasonably concluded that none would likely be effective. He pointed to Plaintiff’s repeated violations of court orders even after monetary sanctions had been imposed to find that the district court’s conclusion was not an abuse of discretion.