

No Fifth Chances: Ignoring Court's Warning Leads to Terminal Sanctions

Article By:

Alexander Piala, PhD

In an appeal from litigation-ending sanctions, the US Court of Appeals for the Fifth Circuit held that misconduct in the face of judicial warnings supports the use of litigation-ending sanctions and that evidence a party forgot about does not count as “new” evidence when remembered for the purpose of a motion for reconsideration. *Calsep A/S v. Ashish Dabral*, Case No. 22-20440 (5th Cir. Oct. 11, 2023) (**Clement**, Elrod, Willett, JJ.)

Insights Reservoir Consulting (IRC), a company owned by Ashish Dabral, was hired to make a computer program that assesses oil-well efficiency. To develop that software, Dabral turned to his college friend who worked at Calsep A/S, a software company that designs and sells oil-well assessment software. Dabral hired his friend away from Calsep, and IRC subsequently developed and sold its own oil-well efficiency software.

Surprised at the sudden appearance of a competitor, Calsep investigated and found that IRC had recently hired one of its former employees. Calsep conducted an internal audit and found that its former employee had absconded with trade secrets just before leaving. Calsep sued Dabral and IRC.

In discovery, Calsep requested the complete development history of IRC's new software. Dabral resisted such disclosure as "overbroad," but the district court ordered production of the requested materials. Shortly thereafter, the district court further entered an order specifically enjoining the parties from the "destr[uction] of any potentially relevant evidence, including electronically stored information."

In response to the discovery request, Dabral only produced portions of the development history, and its produced history included sections that were either incomplete or manipulated. In response, Calsep filed another motion to compel. The district court ordered Dabral to "come clean" and comply "voluntarily" before the court resorted to sanctions. Dabral represented that the entire history had been produced and that it was missing only portions deleted before the lawsuit.

The district court held an evidentiary hearing, and Dabral admitted that many of the deletions actually occurred during the lawsuit. The district court levied terminal sanctions based on Dabral's violation of four separate court orders and serial discovery misconduct. Seven months later, Dabral filed a motion for reconsideration based on new information he found in his storage unit in India. The district court denied the motion. Dabral appealed both the sanctions ruling and the denial of the motion for reconsideration.

The Fifth Circuit first analyzed the sanctions. It limited its analysis to sanctions under Rule 37, which (in the Fifth Circuit) requires four specific findings before terminal sanctions can be levied:

1. The violation was willful or bad faith.
2. The client was responsible.
3. The violation caused substantial prejudice.
4. A lesser sanction would not have the desired deterrent effect.

The Fifth Circuit held that Dabral's pattern of conduct supported a

finding of bad faith. Dabral admittedly deleted evidence, delayed discovery and ignored several court orders. And when the district court gave him a last chance to “come clean,” he instead deleted more data and made a false representation.

The Fifth Circuit also held that Dabral’s conduct resulted in prejudice. The district court found—based on expert testimony—that Dabral’s deletions made it impossible to analyze IRC’s software as required to satisfy Calsep’s evidentiary burden. The Court noted that Dabral’s constant misleading productions and dilatory conduct itself was substantial prejudice.

The Fifth Circuit then considered whether lesser sanctions would have had the desired effect. Because Dabral was given multiple opportunities to address the discovery issues and still did not comply with the district court’s orders despite an explicit admonition to do so, the Fifth Circuit agreed that the district court did not err by concluding that lesser sanctions would not have worked. As the Fifth Circuit noted, the district court need not consider specific lesser sanctions when “it’s plain that a lesser sanction wouldn’t have done the trick.” That is “especially true” when a party fails to comply with explicit warnings. In fact, as the Court explained, warnings and second chances are themselves a lenient sanction, which supports a subsequent terminal sanction.

Finally, the Fifth Circuit affirmed the district court’s denial of Dabral’s motion for reconsideration. Dabral based his motion on the allegation that seven months after entry of the sanctions order he found many of the files that had previously been reported as deleted in a storage unit in India. The Court explained that such evidence is not “new”—the data was under Dabral’s control the entire time. Newly produced is different from newly discovered. The Court also noted that the “new” evidence did not include all the deleted data and thus would not have changed the outcome of the sanctions even if the evidence was considered new.

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