

## Technology Today

## E-DISCOVERY

# Second Circuit Sets State of Mind and Burden of Proof Requirements for Sanctions Under FRCP 37(e)(2)

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**N**early ten years ago, amended Federal Rule of Civil Procedure 37(e) went into effect with the aim of establishing clear guidelines and a new standard on allowable sanctions for spoliation of electronic evidence.

The Rule looked to resolve the inconsistent ways in which the circuits were imposing sanctions against parties for failing to preserve electronic evidence, including the varying degrees of culpability courts were requiring for imposition of severe sanctions.

In the Second Circuit, most notably, parties could be subject to severe, case-terminating sanctions if their negligence led to the loss of electronically stored information ("ESI") that they should have preserved.

While amended Rule 37(e)(2), along with the corresponding Advisory Committee Note,



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required a finding of "intent to deprive" before a court may consider imposing the most severe sanctions, some courts nonetheless diverged, conducting analyses under circuit precedent that pre-dated the amended Rule.

In a recent, noteworthy decision, the United States Court of Appeals for the Second Circuit weighed in on the appropriate interpretation and application of Rule 37(e)(2), establishing a framework that sets both state of mind and burden of proof requirements for sanctions under the Rule.

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## District Court Trial & The Potentially Missing Video

In *Hoffer v. Tellone*, 128 F.4th 433 (2d Cir. Feb. 13, 2025), the plaintiff alleged in a Section 1983 action that police officers used excessive force during his arrest. During trial in the Southern District of New York, a dispute arose over a possible video of an officer's "use of a taser gun" on the plaintiff.

The parties had differing recollections of when the taser gun was used, though both the plaintiff and the officer who deployed the taser recalled it being used twice. The officer testified that each deployment of the taser gun should generate both a log documenting its use and also a video showing the deployment.

The district court thus declined the plaintiff's request to include an adverse inference jury instruction.

But the log seemed to show only one deployment during the arrest, which the officer "testified corresponded to the *second* time he tased Hoffer."

With respect to the video, the officer "testified that he had only seen the video of the second deployment, because the video of the first deployment 'had somehow been overwritten.' . . . [The officer] did not provide any further explanation as to the absence of the first video."

The plaintiff's counsel subsequently "orally requested that the district court instruct the jury that it could draw an adverse inference against the Officer Defendants based on the purported spoliation of the first video." Assessing this request under Federal Rule 37(e)(2), the district court found that "that the evidence before it was insufficient to establish that any defendant 'acted with an intent to deprive [Hoffer] of the use of the video.'"

The district court explained "that there was no 'clear evidence' that the first taser video existed in

the first place" and that, among other observations, "nothing in [the officer's] testimony suggested that he had any direct knowledge or experience with the document management system for taser videos, let alone with this video in particular."

The district court thus declined the plaintiff's request to include an adverse inference jury instruction. The jury eventually, after a modified *Allen* charge, found for the defendants.

## State of Mind and Burden of Proof Required under Rule 37(e)(2)

On appeal to the Second Circuit, the plaintiff-appellant argued that the district court "erred in denying his request for an adverse inference instruction, based on a missing video of him being tased, pursuant to Federal Rule of Civil Procedure 37(e)(2)."

Two key issues disputed by the parties were "whether the district court erred in requiring a showing that the spoliating party acted with 'intent to deprive' for an adverse inference instruction under Rule 37(e)(2) [and] whether the requirements of Rule 37(e)(2) must be proven by clear and convincing evidence or by a preponderance of the evidence[.]"

The court first analyzed the state of mind required for sanctions under Rule 37(e)(2). As background, the court noted "[b]efore 2015, a party seeking an adverse inference instruction based on lost evidence—electronic or otherwise—had to establish that a party obligated to preserve or produce such evidence who failed to do so acted with 'a culpable state of mind.' See *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 107 (2d Cir. 2002).

We held that this requirement could be satisfied when a party acted knowingly or negligently—in other words, an intentional act was not required to establish a 'culpable state of mind.'" Federal Rule of Civil Procedure 37(e) was amended in 2015 "to specify the measures a court could employ if electronically

stored information ('ESI') was wrongfully lost and the findings required to order such measures."

Subsection (e)(2) lists more serious sanctions "namely, presuming that the lost information was unfavorable to the spoliating party, giving an adverse inference instruction to the jury, dismissing the action, or entering default judgment—that the court may impose 'only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation.'"

The court highlighted that the "Advisory Committee notes to the 2015 Amendment explicitly

In sum, we hold that to impose sanctions pursuant to Rule 37(e)(2), a district court (or a jury, if authorized by the district court) must find, by a preponderance of the evidence, that a party acted with the "intent to deprive" another party of the lost ESI

state that subdivision (e)(2) rejects cases such as *Residential Funding* that authorize adverse inference instructions upon a finding of negligence."

The plaintiff-appellant argued, and the court acknowledged, that despite Rule 37(e)(2) expressly requiring an "intent to deprive" finding, "various decisions by this court, issued after the 2015 Amendment, have referenced or used the lesser 'culpable state of mind' standard in the context of lost ESI." The court found, though, that "any such implication was mistaken after the 2015 Amendment" and declared:

Today, we make clear that the imposition of a sanction under Rule 37(e)(2) requires a finding of "intent to deprive another party of the information's use in the litigation." Thus, the 2015 Amendment to Rule 37(e)(2) abrogated the lesser "culpable state of mind" standard used in *Residential Funding*, in the context of lost ESI. A party's

acting negligently or knowingly will not suffice to justify the sanctions enumerated in Rule 37(e)(2).

The court further noted that with this holding as to the required state of mind for Rule 37(e)(2) sanctions, it joins "the majority of our sister circuits," citing findings from the Fourth, Fifth, Sixth, Eighth, Ninth, and Eleventh Circuit Courts of Appeal.

Next, the Second Circuit addressed "whether Rule 37(e)(2)'s requirements must be proven by clear and convincing evidence or by a preponderance of the evidence," noting "the varying approaches taken by district courts within this circuit."

Here the court found that "preponderance of the evidence" was the appropriate standard for a determination under Rule 37(e)(2).

It noted a number of reasons for this determination including, *inter alia*, that (i) it is the "usual rule in civil cases;" (ii) the nature of the sanctions authorized "does not justify venturing above the preponderance default;" (iii) Rule 37(e)(2)'s required finding of intent "sets a sufficiently high bar such that a 'clear and convincing' burden of proof is unnecessary;" and (iv) "neither the language of Rule 37(e)(2) nor the Advisory Committee notes to the 2015 amendment suggests an intent to impose a heightened burden of proof."

Based on this rationale, the court held "that a party seeking sanctions under Rule 37(e)(2) must establish the requisite elements—including that the party act with 'intent to deprive'—by a preponderance of the evidence."

### **Applying the Rule 37(e)(2) Framework**

After additionally finding that a district court may make factual determinations relating to Rule 37(e)(2) on its own or send such questions to a jury, the Second Circuit summarized:

In sum, we hold that to impose sanctions pursuant to Rule 37(e)(2), a district court (or a jury, if authorized by the district court) must find, by a preponderance of the evidence, that a party

acted with the “intent to deprive” another party of the lost ESI. The lesser “culpable state of mind” standard articulated in *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99 (2d Cir. 2002), does not apply to the imposition of sanctions under Rule 37(e)(2).

Applying this “Rule 37(e)(2) framework” to the matter at hand, the court determined “that the district court did not abuse its discretion in declining to instruct the jury that it could infer that the purportedly lost taser video was unfavorable to the Officer Defendants.”

Specifically, as to state of mind, the district court had “appl[ie]d the correct ‘intent to deprive’ standard” and had found there was insufficient evidence of such intent. And with respect to the burden of proof, “it does not appear that [the district court] improperly applied a heightened ‘clear and convincing’ standard.” As such, the Second Circuit ruled against the plaintiff-appellant and affirmed the district court.

## Conclusion

The Second Circuit’s significant decision in *Hoffer v. Tellone* provides important clarification on key aspects of Federal Rule of Civil Procedure 37(e)(2). Resolving intra-circuit disparity and advancing inter-circuit consistency, the Second Circuit clearly established that sanctions under Rule 37(e)(2) require a finding, by a preponder-

ance of the evidence, that the party acted with the “intent to deprive” another party of the information’s use in litigation.

This decision aligns the Second Circuit with the majority of other circuits and abrogates, in the context of spoliation of electronic evidence, the lesser “culpable state of mind” standard previously articulated in the court’s landmark *Residential Funding* decision.

Importantly, the Second Circuit noted that its ruling did “not call into question the applicability of *Residential Funding* to cases that fall outside the province of Rule 37(e)(2)—namely, cases evaluating the loss of non-electronic evidence.”

The court’s ruling underscores the importance of intent in determining sanctions for lost ESI, emphasizing that negligence or even knowing conduct will not suffice to meet the threshold for the severe sanctions listed in Rule 37(e)(2).

Additionally, the court’s determination that “preponderance of the evidence” is the appropriate standard of proof for these findings ensures that the burden remains consistent with the general rule in civil cases.

This decision will serve as a critical guide—in the Second Circuit and beyond—on future motions for sanctions for spoliation of electronically stored information, both for parties who bring such motions and the courts that rule on them.