Cahill

March 17, 2025

Second Circuit Says Specific Intent Is Required to Impose Sanctions for Spoliation Under FRCP 37(e)(2), Contributing to Emerging Consensus Across the Circuits

On February 13, 2025, the Second Circuit held that to impose sanctions for spoliation under Federal Rule of Procedure 37(e)(2), the moving party must show, by a preponderance of the evidence, that the accused party acted with the "intent to deprive" another party of lost electronically stored information ("ESI") — i.e., a showing of negligence, or even gross negligence, will not suffice.[1] The Second Circuit's decision in *Hoffer* v. *Tellone* adds to an emerging consensus across circuits on the appropriate standard for evaluating requests for sanctions for spoliation of evidence under Rule 37(e)(2).

I. Factual and Procedural Background

On February 9, 2018, Richard Hoffer brought suit against the City of Yonkers, the City of Yonkers Police Department, and several individual police officers under 42 U.S.C. § 1983, alleging that the defendant officers used excessive force when arresting him in November 2016.[2] In late 2021, a trial on Hoffer's claims took place in the U.S. District Court for the Southern District of New York, during which Hoffer testified that one of the defendant officers, Trevor Goff, tased him twice on his lower back while Hoffer was incapacitated.[3] Goff did not contest that he had tased Hoffer twice.[4] Rather, Goff testified that he first tased Hoffer while two officers were attempting to control him, which caused Hoffer to fall to the ground.[5] Goff testified that he tased Hoffer a second time after determining that Hoffer was "trying to collect himself and get up to flee again."[6]

Goff also testified that the taser generates a log, which provides a record of each time the taser is used, and explained that the log from the date of Hoffer's arrest showed two deployments: one at 4:16 p.m., when Goff tested the taser at the start of his shift, and a second at 8:02 p.m., which corresponded to the

[1] *Hoffer* v. *Tellone*, --- F.4th ---, 2025 WL 479041, at *7 (Feb. 13, 2025).

[2] *Id.* at *1.

[3] *Id.*

[4] *See id.*

[5] *Id.*

[6] *Id.* (quoting App'x 424).

second reported tasing.[7] Goff further testified that each time the taser is used, the device generates a video, but that he had only seen a video of the second deployment because the video of the first tasing "had somehow been overwritten."[8] Goff provided no further explanation as to why there was no video made of the first tasing.[9] Hoffer's girlfriend, however, testified that she had seen one of the other defendant officers holding a USB drive after Hoffer's arrest and heard her say to Goff, "It shows everything that we did and nothing that he did."[10] Hoffer's counsel has pointed to this statement as evidence of the officers' intent to deprive Hoffer of the first taser video.[11]

Following Goff's trial testimony, Hoffer's counsel asked the district court judge to instruct the jury that it could draw an adverse inference against the officer defendants based on the purported spoliation of the first taser video.[12] The court analyzed the request under Fed. R. Civ. P. 37(e)(2), which allows courts to impose sanctions on parties where ESI should have been preserved but was lost.[13]

After reviewing Hoffer's request under the language of Fed. R. Civ. P. 37(e)(2), the district court declined to give the instruction, concluding that (i) there was no "clear evidence" that a video of the first tasing had ever existed, (ii) Goff's comment about "something being overwritten" was unclear, and (iii) Goff's testimony did not suggest that he had any direct knowledge or experience with managing the system for taser videos or with the particular taser video at issue.[14] The district court further reasoned that the officer testimony confirming that there were two taser deployments, in addition to the apparent lack of any effort to cover up this fact, undermined Hoffer's theory that the defendant officers purposely destroyed the video.[15]

Consistent with this ruling, the district court did not include an adverse inference instruction in its jury charge, and Hoffer's counsel did not object to the jury instructions at that time.[16] At the end of the trial, the jury found in favor of the officer defendants.[17] Hoffer then moved to set aside the verdict entered in Goff's favor, arguing that no reasonable juror could have concluded that Goff did not use excessive force.[18] The district court denied that motion, and on June 28, 2022, Hoffer appealed.[19]

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[7] *Id.* at *2.

[8] *Id.* (quoting App'x 426).

[9] *Id.*

[10] *Id.* (quoting App'x 389–90).

[11] *See, e.g.*, Appellant's Opening Brief at 2, *Hoffer* v. *Tellone*, No. 22-1377 (2d Cir. Jan. 18, 2024).

[12] *Tellone*, 2025 WL 479041, at *2.

[13] *Id.*; *see also* Fed. R. Civ. P. 37(e)(2) ("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 . . . only upon finding that the party acted with 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.").

[14] *Tellone*, 2025 WL 479041, at *2 (citing App'x 644–645).

[15] *Id.* (citing App'x 645).

[16] *Id.*

[17] *Id.*

[18] *Id.* at *3.

[19] *Id.*; *see also* Notice of Civil Appeal, *Hoffer* v. *Tellone*, No. 22-1377 (2d Cir. June 28, 2022).

II. The Second Circuit's Decision

On appeal, Hoffer argued that the district court erred when it failed to instruct the jury that it could draw an adverse inference against the officer defendants based on the alleged spoliation of the first taser video.[20] On February 13, 2025, the Second Circuit affirmed the district court's judgment.[21]

The Second Circuit analyzed the language of Fed. R. Civ. P. 37(e)(2) to determine (i) the state of mind required for a court to impose sanctions under Rule 37(e)(2), (ii) the proper standard for determining whether Rule 37(e)(2)'s requirements are met, and (iii) whether factual questions in this context must be submitted to the jury.[22]

First, as to the state of mind requirement, the Second Circuit held that the text of Fed. R. Civ. P. 37(e), as amended in 2015, allows courts to impose certain sanctions, including adverse inference instructions, "only upon finding that the party acted with the ***intent to deprive*** another party of the information's use in the litigation."[23] The Second Circuit explained that before 2015, parties requesting an adverse inference instruction based on lost ESI or other evidence had to make the lesser showing of "a culpable state of mind," which could be satisfied with a showing that a party acted "knowingly" or "negligently."[24] The 2015 amendments, however, raised the standard to require a showing of specific intent in the context of ESI losses, with the Advisory Committee notes stating that adverse inference instructions should "logically" be reserved for "instances of intentional loss or destruction."[25] Thus, negligence or even gross negligence will not suffice.

In reaching its conclusion, the Second Circuit rejected Hoffer's contention that the court had not required a showing of specific intent in post-2015 decisions, such as *Rossbach* v. *Montefiore Med. Ctr.*[26] and *Klipsch Grp., Inc.* v. *ePRO E-Com. Ltd.*,[27] which referenced or used the less stringent "culpable state of mind" standard.[28] The court explained that these prior decisions did not expressly hold that Rule 37(e)(2) sanctions could be imposed based on a showing of less than "intent to deprive," and "any such implication was mistaken after the 2015 Amendment."[29]

Second, the court also held that a "preponderance of the evidence," rather than "clear and convincing evidence," is the appropriate burden of proof for determining the applicability of Rule 37(e)(2).[30] The Second Circuit reasoned that, because the preponderance standard is the "usual rule" for civil cases and is already used in similar contexts, applying this burden of proof to Rule 37(e)(2) motions would "further[]

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[20] *Tellone*, 2025 WL 479041, at *3.

[21] *Id.* at *8.

[22] *Tellone*, 2025 WL 479041, at *3.

[23] *Id.* at *4 (emphasis added) (quoting Fed. R. Civ. P. 37(e)(2)).

[24] *Id.* at *3

[25] *Id.* at *4; *see also* Fed. R. Civ. P. 37(e)(2) advisory committee's notes to 2015 amendment.

[26] 81 F.4th 124 (2d Cir. 2023).

[27] 880 F.3d 620 (2d Cir. 2018).

[28] *Tellone*, 2025 WL 479041, at *4.

[29] *Id.*

[30] *Id.* at *5.

the goal of uniformity."[31] The court further noted that (i) there were no interests or rights at stake under Rule 37(e)(2) that would justify imposing a higher burden than the typical rule for civil actions, (ii) the specific intent requirement alone sets a "sufficiently high bar" without the need for a higher burden of proof, (iii) neither the text of Rule 37(e)(2) nor the 2015 Advisory Committee notes indicate that the Committee intended to impose a higher burden of proof, and (iv) imposing a stricter burden of proof would risk undermining the "prophylactic and punitive purposes of the adverse inference."[32]

Lastly, the Second Circuit determined that courts can resolve disputed questions of fact relevant to imposing Rule 37(e)(2) sanctions on their own, including with respect to evidence of specific intent.[33] Specifically, the Second Circuit held that courts ***may***—but are not required to—reserve those questions for the jury.[34] The Second Circuit reasoned that Rule 37(e)'s explicit reference to what "***the court***" could do "upon finding that the party acted with the intent to deprive" confirmed that judges can take on the role of factfinder in this context.[35] The Second Circuit found that this interpretation was further confirmed by the 2015 Advisory Committee notes for Rule 37(e)(2), which explain that the Rule "limits the ability of ***courts*** to draw adverse inferences" to instances "when ***a court*** finds that the information was lost with the intent to prevent its use in litigation."[36]

Applying this framework to the facts, the Second Circuit determined that the district court did not abuse its discretion when it declined to give an adverse inference instruction to the jury regarding the missing taser video.[37] The Second Circuit found that the district court had applied the correct "intent to deprive" standard, and that the factual findings it made to evaluate the merits of Hoffer's request were not clearly erroneous.[38] The Second Circuit noted, for example, that the district court was entitled to doubt the credibility of Hoffer's witness, and that it was reasonable for the district court to find that the officer testimony admitting to two taser deployments undermined Hoffer's theory of record manipulation.[39]

The Second Circuit also held that, although it was not clear what burden of proof the district court had applied, it did not appear to have applied the incorrect "clear and convincing" standard.[40] The Second Circuit noted that the evidence would, in any event, fall short of meeting the preponderance standard because the district court did not identify "***any*** direct or circumstantial evidence that the City of Yonkers or any of the individual defendants had the requisite intent."[41]

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[31] *Id.*

[32] *Id.* at *5–6.

[33] *Id.* at *6–7.

[34] *Id.*

[35] *Id.* at *6 (emphasis in original).

[36] *Id.* (emphasis in original).

[37] *Id.* at *7.

[38] *Id.*

[39] *Id.*

[40] *Id.* at *8.

[41] *Id.* (emphasis in original) (quoting App'x 646).

III. Conclusion

The Second Circuit's decision resolves intra-circuit conflict in the Second Circuit as to the appropriate burden of proof when evaluating motions under Rule 37(e)(2),[42] and is in line with the Fourth, Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits, representing an emerging consensus on this issue.[43]

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If you have any questions about the issues addressed in this alert, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email authors Joel Kurtzberg (Partner) at 212.701.3120 or jkurtzberg@cahill.com; John MacGregor (Partner) at 212.701.3445 or jmacgregor@cahill.com; Victoria Yuhas (Associate) at 212.701.3112 or vyuhas@cahill.com; or email publicationscommittee@cahill.com.

[42] *See, e.g.*, *Chepilko* v. *Henry*, 722 F. Supp. 3d 329, 338 n.2 (S.D.N.Y. 2024) (reasoning that "intent to deprive" must be shown by clear and convincing evidence, "given the severity of the sanctions permitted under" Rule 37(e)(2) (quoting *Lokai Holdings LLC* v. *Twin Tiger USA LLC*, 2018 WL 1512055, at *8 (S.D.N.Y. Mar. 12, 2018))); *In re Aluminum Warehousing Antitrust Litig.*, 2016 WL 11727416, at *5 (S.D.N.Y. May 19, 2016) (applying the preponderance burden to "intent to deprive" finding).

[43] *See Jones v. Riot Hosp. Grp. LLC*, 95 F.4th 730, 735 (9th Cir. 2024); *Ford v. Anderson Cnty., Texas*, 102 F.4th 292, 323–24 (5th Cir. 2024); *Skanska USA Civ. Se. Inc. v. Bagelheads, Inc.*, 75 F.4th 1290, 1312 (11th Cir. 2023) (specifying that "intent to deprive" means "more than mere negligence"); *Wall v. Rasnick*, 42 F.4th 214, 222–23 (4th Cir. 2022); *Auer v. City of Minot*, 896 F.3d 854, 858 (8th Cir. 2018); *Applebaum v. Target Corp.*, 831 F.3d 740, 745 (6th Cir. 2016) ("A showing of negligence or even gross negligence will not do the trick.").