

# Unleashing the Spoliation Inference: When and Why Courts Should Let the Jury Decide

*Thomas Y. Allman*

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# Unleashing the Spoliation Inference: When and Why Courts Should Let the Jury Decide

Thomas Y. Allman<sup>1</sup>

Under Rule 37(e), “[a]ny inference should be conditioned on a finding of intent, whether the intent finding is made by the jury or the Court.”<sup>2</sup>

## Introduction

Since the early 17th Century, courts have admitted evidence at trial that a party intentionally destroyed evidence relevant to the dispute being litigated. This permits “an inference, the ‘spoliation inference’ that the destroyed evidence would have been unfavorable to the position of the offending party<sup>3</sup> because it was motivated by a guilty conscience. It principally endeavors to restore the accuracy of the trial by filling the void left by the destroyed evidence with a logically deduced inference based on the probable contents of the spoliated materials.

Since December 1, 2015, Rule 37(e) has limited courts or juries from presuming that lost electronically store information (“ESI”) was unfavorable in the absence of a finding that the party acted with intent to deprive another party of its use in the litigation. FRCP 37(e)(2).<sup>4</sup> If it did not result from a “specific motive or intention” to keep the information from another party, the “backbone” of the evidentiary logic is lacking.<sup>5</sup> Rule 37(e) is “now aligned” with The Sedona

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<sup>1</sup> ©2023 Thomas Allman. Tom is Chair Emeritus of WG1 Sedona Conf. Working. Grp. and a former General Counsel. He served as a member of the 2010 E-Discovery Panel of the Duke Litigation Conference that advocated development of Amended Rule 37(e).

<sup>2</sup> MGA Ent., Inc. v. Harris, Case No. 2:20-cv-11548-JVC-AGR, 2023 WL 2628225, at \*8 (CD. Cal. Jan. 5, 2023)(a jury is not required to assume that a party has acted with intent and that the loss of information was unfavorable).

<sup>3</sup> Schmid v. Milwaukee Electric Tool, 13 F.3d 76, 78 (3<sup>rd</sup> Cir. 1994). The act is seen as an admission by conduct that is circumstantial evidence that the party believes that his position in the litigation is weak.

<sup>4</sup> Sanctions such as default and dismissal require the same proof but are warranted only under extreme circumstance and the jury plays no role in their choice. *See, e.g.*, GN Netcom v. Plantronics, 930 F.3d 76, 82-83 (3<sup>rd</sup> Cir. July 10, 2019)(finding no error by district court in choosing “the lesser sanction of a permissive adverse inference instruction”).

<sup>5</sup> “The necessary showing of belief” in a weak case is lacking. Maguire and Vincent, *Admissions Implied from Spoliation or Related Conduct*, 45 Yale L.J. 226, 235 (1935).

Principles in concluding that “unintentional destruction of relevant ESI is not sufficient to trigger the imposition of spoliation sanctions.”<sup>6</sup> The “intent to deprive” requirement involves a “serious and specific sort of culpability” that rejects cases such as *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2nd Cir. 2002), that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence.<sup>7</sup> A showing of either “will not do the trick.”<sup>8</sup> The Advisory Committee Note acknowledges that either courts or juries may determine if “intent to deprive” exists.

However, the careless or negligent spoliation of ESI may justify an evidentiary response if it causes prejudice. Under the Amended Rule, a court may deploy “curative measures” that include informing the jury about the circumstances of the spoliation of ESI accompanied by carefully tailored instructions “other than [those] to which subdivision (e)(2) applies.”<sup>9</sup> FRCP 37(e)(1). This necessarily opens the door to a certain amount of speculation by the jury. Instructed or not, “if a party satisfies the preamble and can show prejudice, the jury might make an adverse inference on its own, based on the arguments and evidence presented.”<sup>10</sup> As noted at the time, “[g]reat care will be required” to ensure that informing the jury as a curative measure does not have the prohibited effect” of Rule 37(e)(2)(b).<sup>11</sup>

This Essay explores the efficacy of employing the jury to determine intent through use of a conditional adverse inference instruction as suggested by the Advisory Committee Note.<sup>12</sup> Only a relatively small number of courts have chosen

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<sup>6</sup> Comment, Principle 14, *The Sedona Principles*, 19 Sedona Conf. J. 1, 193 (2018).

<sup>7</sup> Advisory Committee Note.

<sup>8</sup> *Applebaum v. Target Corporation*, 831 F. 3d 740, 745 (6<sup>th</sup> Cir. Aug. 2, 2016).

<sup>9</sup> Advisory Committee Note. The negligent spoliation of tangible evidence continues to be sufficient to justify permissive adverse inferences in some Circuits. *See, e.g., Kontos v. Target Stores*, No. CV-20-00171-PHX-MTL, 2022 WL 36471, at \*6 (D. Ariz. Jan. 4, 2022).

<sup>10</sup> Ariana J. Tadler and Henry J. Kelston, *What You Need to Know About the New Rule 37(e)*, 52-JAN Trial 20, 23 (January 2016).

<sup>11</sup> Thomas Y. Allman, *The 2015 Civil Rules Package as Transmitted to Congress*, 16 Sedona Conf. J. 1, 39 (2015).

<sup>12</sup> See Appendix (describing that form of instruction and listing examples of its use before and after the Amended Rule).

to defer to the jury for such a finding.<sup>13</sup> However, since the jury ultimately will assess culpability when deciding whether to presume if the lost and unrecoverable ESI was adverse to the wrongdoer,<sup>14</sup> giving *both* tasks to the jury is often appropriate.

## Background

The federal civil system, “under the influence – if not the command – of the Seventh Amendment,” assigns the resolution of disputed questions of fact to the jury.<sup>15</sup> To some courts, when the issue of intent is raised in the context of spoliation, “it is a question of fact for the jury like any other.”<sup>16</sup> However, it seems clear that there is no Seventh Amendment *right* to a trial by jury on the underlying facts governing pretrial discovery motions.<sup>17</sup> As a result, courts have overwhelmingly chosen to decide for themselves if the requisite predicate finding of intent exists when assessing the availability of adverse inference jury instructions.<sup>18</sup> The Advisory Committee Note acknowledges that the intent finding required by subdivision Rule 37(e)(2) “may be made by the court when ruling on a pretrial motion, when presiding at a bench trial or when deciding whether to give an adverse inference at trial.”

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<sup>13</sup> Of the forty-six examples of evidentiary measures imposed under Rule 37(e) in the year prior to May 2023, sixteen decisions (35%) involved court-directed adverse inference instructions and only (15%) involved conditional adverse inferences predicated on jury determination of intent. The remaining twenty-three cases decisions (53%) allowed the jury to receive evidence of the spoliation as curative measures.

<sup>14</sup> A permissive adverse inference instruction necessarily leaves it to the jury to “examine the quantum of intent in the context of determining whether to presume the information is unfavorable.” Memorandum to Rules Committee from Chief Counsel, May 9, 2014, at 2-3 (copy on file with Author).

<sup>15</sup> *Gasperini v. Center for Humanities*, 518 U.S. 415, 432 (1996).

<sup>16</sup> *Van Winkle v. James*, No. 22-3068, 2023 WL 5994138, at \*5 (5<sup>th</sup> Cir. Sept. 15, 2023)(remanding to require jury to determine if intent was sufficient to justify an adverse inference). *See also* *Gorelick, et. al, Destruction of Evidence §2.22A Procedural Questions (Division of Power Between Judge and Jury)* (2020-3 Cum. Suppl)(“if the facts are contested, the issue should go to the jury”).

<sup>17</sup> A motion for sanctions “when premised” on discovery misconduct under Rule 37” does not implicate the Seventh Amendment’s jury trial guarantee. *Montefiore Medical Center*, No. 21-2084, 2023 WL 5519148, \*6 n.8 (2nd Cir. Aug. 28, 2023)(collecting cases).

<sup>18</sup> *See e.g., Mannion v. American Freight Systems*, No. CV-17-03263-PHX-DWL, 2020 WL 417492, at \*4 (D. Ariz. Jan. 27, 2020)(“the question of whether sanctionable spoliation occurred should not be a jury issue”).

However, the Note *also* acknowledges the authority of a court to decide that the jury “should” make the predicate factual finding of intent to deprive subject to an appropriate limiting instruction.<sup>19</sup> The process is analogous to a summary judgment in that the court must make a preliminary finding of sufficient evidentiary basis, then turn it over to the jury to resolve the factual dispute. In *Vodusek v. Bayliner Marine Corp*, the District Court famously provided the jury with appropriate guidelines for evaluating the evidence “[r]ather than deciding the spoliation issue itself.”<sup>20</sup> In *Rimkus v. Cammarata*, the jury was to decide whether the defendants had “intentionally deleted emails and attachments to prevent their use in litigation.”<sup>21</sup> The Appendix lists more than (60) examples of conditional adverse inference instructions utilized in the spoliation context.

Under Rule 37(e), the trial court serves as the gatekeeper to ensure there is sufficient relevant evidence to sustain a plausible claim that the party acted with intent to deprive.<sup>22</sup> The jury receives evidence of spoliation as a matter of conditional relevance under Federal Rule of Evidence 104(b).<sup>23</sup> Panels in the Fourth,<sup>24</sup> Eighth<sup>25</sup> and Eleventh<sup>26</sup> Circuits have acknowledged this role for the jury in regard to adverse inference instructions. In *Alabama Aircraft Industries v. Boeing*, for example, the jury was instructed that “if you do not” find that Boeing deleted information with intent to deprive, “you may not infer from the loss of the information that it was unfavorable to Boeing.” The instruction “correctly stated

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<sup>19</sup> Advisory Committee Note, Subdivision (e)(2)(“If a court were to conclude that the intent finding should be made by the jury,” it may infer the lost information was unfavorable “only if [it] first finds that the party acted with intent to deprive”).

<sup>20</sup> 71 F. 3d 148, 157 (4<sup>th</sup> Cir. 1995). The jury was charged that if it found the parties had failed to meet their obligations regarding destruction of loss of evidence it could “assume the evidence made unavailable” would have been unfavorable to the plaintiff’s theory in the case. *Id.* at 155.

<sup>21</sup> 688 F. Supp. 2d 598, 620 & n.34 (S.D. Tex. Feb. 19, 2010).

<sup>22</sup> Rule 104 of the Federal Rules of Evidence requires the court to make an initial assessment about admissibility of the evidence outside the presence of the jury. *See Paice LLC v. Hyundai Motor Company*, Civil Action No. MJG-12-499, 2015 WL 4984198 (D. Md. Aug. 18, 2015)(refusing to admit evidence of spoliation at trial because not materially relevant to claims or defenses of the movant).

<sup>23</sup> Gregory P. Joseph, *Rule 37(e): The New Law of Electronic Spoliation*, 99 JUDICATURE 35, 40 (Winter 2015).

<sup>24</sup> *Lee v. Belvac Prod. Mach.*, Case No. 20-1805, 2022 WL 4996507, at \*3-4 (4<sup>th</sup> Cir. Oct. 4, 2022)(Per Curiam).

<sup>25</sup> *Infogroup v. DatabaseUSA*, 956 F.3d 1063, 1067 (8<sup>th</sup> Cir. April 27, 2020).

<sup>26</sup> *Alabama Aircraft Industries v. Boeing*, Case No. 20-11141, 2022 WL 433457, at \*6 & 16 (11<sup>th</sup> Cir. Feb. 14, 2022)(Per Curiam).

the law and did not mislead the jury” by requiring it to find the “predicates for an adverse-inference instruction found in Rule 37(e)(2).” It was “the judge of the facts as to what happened in this case, including what happened to these electronic documents, and why it happened.”<sup>27</sup> If a jury does not find intent to exist, it is still free to weigh the evidence relevant to spoliation in conjunction with other issues such as the credibility of the trial witnesses.<sup>28</sup>

## Intent to Deprive

The intent to deprive requirement looks to the *cause* of the violation. The mental task involved is that of an inference, not the rebuttable presumption of evidence law.<sup>29</sup> It endorses the suggestion by the Sedona Conference that the Amended Rule should be “focused on a specific intent to deprive an opposing party of evidence.”<sup>30</sup> The issue is whether the party purposefully destroyed evidence to prevent its use in the litigation before the jury “may or must presume the information was unfavorable to the party” that lost it. It emerged from a “long, convoluted, but extremely interesting history” that concluded with a surprise overnight change to the proposed rule at the April 2014 Advisory Committee meeting in Portland, Oregon,<sup>31</sup> with a bright [and uniform] line between the conduct for which courts may impose severe sanctions and that for which they may not.<sup>32</sup>

The intent-to-deprive standard functions as a self-defining definition that can be utilized by courts and juries alike. It means that “the evidence shows, or it is

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<sup>27</sup> *Id.* at \*16 (finding no abuse of discretion).

<sup>28</sup> *Cornejo v. EMJB*, No. SA-19-CV-01265-ESC, 2021 WL 4526703, at \*5 (W.D. Tex. Oct. 4, 2021)(such as evaluating testimony about the “serendipitous loss” of a cell phone)

<sup>29</sup> *Cf. Pension Committee, Pension Committee v. Banc of Am. Securities*, 685 F.3d 456, 497 n. 251 (S.D.N.Y. May 28, 2010).

<sup>30</sup> Subcomm. Notes, Feb. 8, 2014, at 1; Agenda Book, Rules Mtg., April 10-11, 2014, at 406 of 580. The party “must have acted with ‘specific intent’ to deprive an opposing party of material evidence.” Kenneth J. Withers (submitted on behalf of Sedona Conference WG1 Steering Committee), November 26, 2013 (quoted in Thomas Y. Allman, *The Sedona Principles (Third Edition): Continuity, Innovation, and Course Correction*, 51 Akron L. Rev. 889, 914 (2017)).

<sup>31</sup> Charles Yablon, *Byte Marks: Making Sense of New F.R.C.P. 37(e)*, 69 Fla. L. Rev. 571, 573 (2017)(the revised and shortened Rule is a “rifle shot” aimed at rejecting prior case law that permitted imposition of severe sanctions for negligently lost ESI).

<sup>32</sup> *Id.* at 580.

reasonable to infer, that a party purposefully destroyed evidence to avoid its litigation obligations.”<sup>33</sup> Since it is difficult to ascertain intent based on direct evidence, courts often must infer its presence from circumstantial evidence. One issue is the degree to which actions of employees are imputed to corporate parties, especially agents who fail to carry out their preservation duties but deny having acted intentionally.<sup>34</sup> In some cases, corporate parties have been found to have acted with the requisite intent because there was no showing of “any cogent explanation” for a failure to preserve.<sup>35</sup>

Courts are not easily convinced that spoliation conduct rises to the stringent intent requirement. In *Fashion Exchange v. Hybrid Promotions*, a District Judge, employing a “clear and convincing evidence” standard, concluded that it was not reasonable to infer the party had acted with intent to deprive.<sup>36</sup> In *MGA Ent., Inc. v. Harris*, the court was not even persuaded “by [a] preponderance of the evidence” that the conduct was undertaken with the intent to deprive the other parties of relevant evidence.<sup>37</sup>

### Why Choose the Jury?

The Advisory Committee Note acknowledges the authority of juries to decide disputed issues of intent, although the guidance from the Advisory Committee on when to do so is quite opaque.<sup>38</sup> A nascent pre-rule movement rejecting such a role for the jury was decisively rejected.<sup>39</sup> However, as noted earlier, the overwhelming majority of courts faced with requests for adverse

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<sup>33</sup> Phan v. Costco Wholesale Corp., N 19-5713, 2020 WL 507, at \*2 (N.D. Cal. Aug. 24, 2020).

<sup>34</sup> Yablon, *supra*, at 587 (failures to carry out duties “with varying degrees of egregiousness”).

<sup>35</sup> Skanska USA v. Bagelheads, Inc., No. 22-10203, 2023 WL 4917108, at \*14 (11<sup>th</sup> Cir. Aug. 2, 2023)(“in the district court’s view, bad faith was the only thing that explained the company’s actions”).

<sup>36</sup> No. 14-CV-1254 (SHS)(OTW), 2021 WL 1172265, at \*7 (S.D.N.Y. March 29, 2021) (referring to 2019 WL 6838672, at \* 7 (S.D. N.Y. Dec. 16, 2019).

<sup>37</sup> Case No. 2:20-cv-11548-JVC-AGR, 2023 WL 2628225, at \*8 (C.D. Cal. Jan. 5, 2023)(at best, it reflects its incompetence).

<sup>38</sup> Gregory P. Joseph, *Rule 37(e): The New Law of Electronic Spoliation*, 99 Judicature 35, 40 (No. 3, Winter 2015)(“[n]owhere does the Advisory Committee Note indicate “when” the issue of intent should be decided the jury).

<sup>39</sup> Some had argued that “adverse inference instructions should inform jurors as a matter of law that spoliation occurred.” Hon David Norton, et. all, *Fifty Shades of Sanctions: What Hath the Goldsmith’s Apprentice Wrought?*. 64 S.C.L. Rev. 559, 461, 470 (2013)

inference jury instructions continue to determine the predicate issue of intent for themselves. Rarely does a District Judge even acknowledge that it has rejected the possibility of delaying the issue to trial for resolution by the jury.<sup>40</sup>

There is a long-standing preference for a “jury, not the court” to determine issues that are “contingent upon resolution of the conflicting testimony and credibility determinations.”<sup>41</sup> Jurors can discuss and sort out competing concerns and conflicting testimony and values” in ways that a court never could.<sup>42</sup> In *Hunting Energy Services v. Kavalas*, the court observed that determining if a party acted in bad faith is a “prototypical function of the jury.”<sup>43</sup> Turning to the jury is particularly attractive when the disputed issue of intent is a close one.<sup>44</sup> In *Alabama Aircraft v. Boeing*, for example, the Eleventh Circuit approved the trial court decision, at the request of the party charged with spoliation, for the jury to make an “independent” finding on the intent issue before it could draw any adverse inferences.<sup>45</sup> In *Ayers II v. Heritage-Crystal Clean*, even though *it* had found no intent to deprive, the court decided that the fact-finding role “should not be completely taken from the jury” since it might differ with a more “fulsome record and after hearing live testimony.”<sup>46</sup>

In *DR Distributors LLC v. 21Century Smoking, Inc.*, the district court determined that the jury should decide the disputed intent issue because reasonable minds could differ on the topic. As it explained, “[t]here is certainly enough evidence for a reasonable person to conclude that Defendants intentionally destroyed [the ESI]. But a reasonable person could likewise find that Defendants

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<sup>40</sup> Cf. *Kadribasic v. Walmart*, C.A. No. 1:19-cv-03498-SDG, 2021 WL 1207468, at \*5 (N.D. Ga. March 30 2021)( the record “presents only speculation and conjecture” of bad faith spoliation).

<sup>41</sup> *Coastal Bridge v. Hetec*, 833 Fed.Appx. 565, 572 (5<sup>th</sup> Cir. Nov. 6, 2020 ).

<sup>42</sup> Neil Vidmar & Valeri P. Hans, *American Juries* (Prometheus Books 2007), at 270 (“Judges don’t have the benefit of a community sounding board”).

<sup>43</sup> Case No. 3:15-CV-228 JD, 2018 WL 4539818, at \*11 (N.D. Ind. Sept. 20, 2015)(noting that the Committee Notes “contemplate that possibility” as one which the jury “will be able to fairly evaluate and resolve”).

<sup>44</sup> Mark S. Sidoti and Kevin H. Gilmore, *The Resurgence of Electronic Evidence Spoliation Sanctions*, 333-DEC N.J. 28, 33 (2021)(the option is best used when the issue is a close one).

<sup>45</sup> 2022 WL 433457, at \*16. The trial court had initially determined that Boeing had acted with an intent to deprive. See 319 F.R.D. 730, 746 (N.D. Ala. March 9, 2017).

<sup>46</sup> No. 1:20-cv-5076, 2022 WL 2355909, at \*4 & n. 3 (N.D. Ill. June 1, 2022).



did not intentionally destroy the ESI.”<sup>47</sup> Because it did not conclude that the party had acted with intent to deprive, it decided that “the jury will be allowed to consider the evidence of the Defendant’s behavior resulting in the loss of ESI along with all the other evidence in making its decisions.”<sup>48</sup> In *Plymale v. Cheddars Casual Café*, it was left for the jury because the “competing explanations” for the failure to preserve presented “multiple questions” of fact which were “open and ripe” for the finder of fact.<sup>49</sup>

The determination can require consideration of numerous factors such as the type of evidence, the timing and manner of spoliation, and the reasons the spoliator may offer for the destruction of the evidence.<sup>50</sup> The evaluation is likely to be more accurate if based on the proof actually before the jury.<sup>51</sup> In *Woods v. Scissons*, the decision would be based on a more “fully developed evidentiary record.”<sup>52</sup> In *Aramark Management v. Borgquist*, the jury would have the benefit of live testimony to assess the credibility of explanations for the loss of information.<sup>53</sup> In *Modern Remodeling v. Tripod Holdings*, while there was “sufficient, but not definitive” evidence that data was deleted with intent to deprive, the decision ultimately rested heavily on determination of witness credibility – an issue “best reserved for the jury.”<sup>54</sup>

It is often preferable to rely on the jury when the intent issue is so closely intertwined with merits that a pretrial court decision could “usurp the jury’s function as the trier of fact [at trial] and result in inconsistent findings.”<sup>55</sup> That was

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<sup>47</sup> 513 F. Supp.3d 839, 981 (N.D. Ill. Jan. 19, 2021).

<sup>48</sup> *Id.*, at 982. *Cf. Pable v. Chicago Transit Authority*, No. 19-CV 7868, 2023 WL 2333414, at \*32 & n. 17 (N.D. Ill. March 2, 2023) (refusing to utilize the jury when reasonable jurors could *not* disagree).

<sup>49</sup> 7:20 -CV-102 (WLS), 2022 WL 988313, at \*7 & n. 7 (M.D. Ga. Mar. 31, 2022) (a jury could draw an inference that the party wanted to preserve the video but the inference could also be drawn that the party wanted to eliminate evidence that contradicted that testimony).

<sup>50</sup> Charles W. Adams, *Spoliation of Electronic Evidence: Sanctions versus Advocacy*, 18 Mich. Telecomm. & Tech. L. Rev. 1, 50 (2011).

<sup>51</sup> *See, e.g., Thermotek v. Orthoflex*, No. 3:11-cv-870-D (BF), 2015 WL 4138722, at \*12 (N.D. Tex. July 7, 2015) (the intent issues are “best resolved” in the context of the trial itself).

<sup>52</sup> No. CV-17-08038-PCT-GMS, 2019 WL 3816727, at \*6-\*7 (D. Ariz. Aug. 14, 2019).

<sup>53</sup> Case No. 8:18-cv-01888-JLS-KES, 2021 WL 863746. At \*18-\*19 (D. Ariz. Aug. 14, 2019).

<sup>54</sup> Civil Action No. CCB-19-1397, 2021 WL 3852323, at \*13 (D. Md. Aug. 27, 2021).

<sup>55</sup> *Tchatat v. O’Hara*, 14 Civ. 2385 (LGS), 2017 WL 3172715, at \*11 (S.D.N.Y. July 25, 2016), *aff’d* 795 Fed.Appx. 34, 37 (2<sup>nd</sup> Cir. Dec. 20, 2019).

the case in *Bryant v. County of Los Angeles*, where the court hearing the discovery motions refused to resolve the conflicting evidence on intent because it “could hamstring the District Judge” in conducting the trial on the merits.<sup>56</sup> In *Tripp v. Walmart*, the intent finding was seen as best made by the jury because the circumstances raised “multiple factual questions of import” that could be entirely “determinative” of the merits.”<sup>57</sup> In *Cahill v. Dart*, the jury was to decide the question of intent since it was so “closely tied” to the resolution of a malicious prosecution claim.<sup>58</sup>

Ultimately, the choice of factfinder on intent falls within the sound discretion of the court. When the Fifth Circuit recently remanded a refusal to permit the jury to resolve the disputed issue of intent because it felt that the jury should make the determination, it cautioned that its holding “does not indicate that courts should “freely give such an issue to the jury.”<sup>59</sup> There are sound reasons, reflecting the need for judicial efficiency and conservation of resources, for courts to resolve pre-trial motions for sanctions themselves when the issue is not material to the case and referral to the jury could be substantially prejudicial or confusing. Moreover, the trial court retains discretion, upon hearing evidence at trial, to let the jury decide the issue<sup>60</sup> or decide it for itself on the “full record.”<sup>61</sup>

### The Adverse Inference(s)

The ultimate decision as to whether to infer adverse inferences from evidence of spoliation is the responsibility of a jury receiving an adverse inference instruction regardless of its form.<sup>62</sup> A district court may suggest possible

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<sup>56</sup> Case No. CV 20-9582-JFW(ex), 2021 WL 6104412, at \*1 (C.D. Cal. Nov. 21, 2021).

<sup>57</sup> Case No. 8:21-cv-510-WFJ-SPF, 2023 WL 399764 at \*9 (M.D. Fla. Jan. 25, 2023).

<sup>58</sup> No. 13-cv-361, 2016 WL 7034139, at \*4 (N.D. Ill. Dec. 2, 2016).

<sup>59</sup> *Van Winkle, Jr. v. James*, *supra*, 2023 WL 5994238 at \*5 - \*6 (5<sup>th</sup> Cir. Sept. 15, 2023)(listing the specific circumstances that justified its decision).

<sup>60</sup> *Lexpath Techs. Holdings v. Brian R. Welch*, 744 Fed. App. 74, 79 (3<sup>rd</sup> Cir. July 30, 2018).

<sup>61</sup> *See, e.g., Paice LLC v. Hyundai Motor Company*, Civil Action No. MJG-121-499, 2015 WL 4984198 at \*2-\*3, n. 3 (D. Md. Aug. 18, 2015)(suggesting that the court “defer this issue until the evidence comes in at trial)

<sup>62</sup> *Waymo v. Uber Technologies*, No. C 17-00939 WHA, 2018 WL 646701, at \*18 & \*23 (N.D. Cal. Jan. 30, 2018).

inferences<sup>63</sup> provided they “do not misstate the law or fail to convey the relevant principles in full.”<sup>64</sup> It may also “adjust” the severity of the instruction, framing it as permissive or mandatory, “corresponding in part to the sanctioned party’s degree of fault.” However, a permissive adverse inference instruction “does not guarantee anyone a windfall; it leaves the decision in the hands of the jury.”<sup>65</sup>

The process has been described as unleashing a “wild card” capable of having “no effect, an effect [only] on a particular issue, or an uncontrollable effect on the entire case.”<sup>66</sup> Movants are not shy about their requests.<sup>67</sup> Recognizing this, many courts simply instruct the jury that it is for them to decide what the impact and the degree to which it may find it determinative. The jury in *John v. County of Lake* was to be told only that “whether Defendant’s failure to preserve is important to you in reaching a verdict in this case, and what that failure signifies, is for you to decide.”<sup>68</sup> However, in *First Financial Security v. Freedom Equity*, the jury was instructed that it could presume that deleted text messages would have helped prove that the defendant had encouraged former employees to leave their employment and join the defendant.<sup>69</sup>

## Curative Measures

Upon a showing of prejudice from the loss of relevant evidence due to failures to preserve subject to Rule 37(e), courts may inform the jury about the circumstances as a curative measure, provided it is not greater than necessary to cure prejudice. FRCP 37(e)(1).<sup>70</sup> This has proven to be extremely popular for

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<sup>63</sup> *Epic Systems Corporation v. Tata Consultancy Services*, 14-cv-748-wmc, 2016 WL 1317704, at \*1-\*2 (W.D. Wisc. April 1 2016)(instructing the jury as to possible inferences).

<sup>64</sup> *Hicks v. Forest Preserve District*, 677 F.3d 781, 790, 791-92 (7<sup>th</sup> Cir. 2012).

<sup>65</sup> *Flagg v. City of Detroit* 715 F. 3d 165, 178 (6<sup>th</sup> Cir. 2013)(determined on a “case-by-case” basis).

<sup>66</sup> Jamie S. Gorelick, et. al, *Destruction of Evidence* §3.2 (2019-3 Cum. Suppl.)(“DSTEVID S 3.2”).

<sup>67</sup> *See, e.g., Industria de Alimentos Zenu S.A.S. v. Latinfood U.S. Corp.*, Civil Action No. 16-6576 (KM)(MAH), 2022 WL 1683747, at \*1 (D. N.J. May 26, 2022)(seeking instructions that the party “intentionally copied “ marks, sought to mislead the public, and that “goodwill was harmed as a result”).

<sup>68</sup> Case No. 18-cv-07935- WHA(SK), 2020 WL 3630391, at \*7 (N.D. Cal. July 3, 2020).

<sup>69</sup> Case No. 15-cv-1893-HRL, 2016 WL 5870218, at \*4 n.1 (N.D. Cal. Oct. 7, 2016)(reproducing instruction). *See also* 2017 WL 3593369, at \*4 & \*7 (N.D. Cal. Aug. 21 2017)(commenting on the reasons the resulting verdict did not, in its view, result from prejudice or anger on the part of the jury).

<sup>70</sup> The authority to “inform the jury” about discovery misconduct is also available under Rule 37(c)(1) and provides a useful supplement to Rule 37(e). *See, e.g., Fast v GoDaddy*, 340 F.R.D. 326, 351 n. 17 (D.

courts unable to find intent to deprive to exist.<sup>71</sup> However, while such evidence may easily “clear[] the baseline relevance hurdle of Federal Rules of Evidence 401 and 402<sup>72</sup> it should not be admitted to the jury if not materially relevant to the issues” in the case since it “would serve only to prejudice” the party and divert the jury from the issues that they must decide.<sup>73</sup>

When appropriately admitted, evidence of the circumstances “provides the jury, as the finder of fact, with the “context for the evidentiary imbalance” caused by the loss.<sup>74</sup> This may enable the jury to determine the weight and importance of what the data may have shown. According to the Committee Note, the court may also give “instructions to assist [the jury] in its evaluation of such evidence or argument, other than instructions to which subdivision (e)(2) applies.” Courts typically also permit the movants to argue for whatever inferences the movants hope the jury will draw.<sup>75</sup> In the *Premiera Blue Cross Consumer Data Security Breach Litigation*, the court explained that while it would not instruct the jury on possible “adverse inferences,” the movant would not be precluded from making that argument to the jury.<sup>76</sup>

These inferences can be quite specific, and risk crossing the “somewhat squishy line between measures that could be employed as curative and those forbidden absent a finding of the specified intent.”<sup>77</sup> In *Schnatter v. 247 Group*, the court explained that it would inform the jury about the spoliation of text messages

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Ariz. Feb. 3, 2022)(sanctioning failure to produce ESI as required by FRCP 26(e) when the failure to preserve could not be sanctioned under Rule 37(e) because it was subsequently produced).

<sup>71</sup> Thomas Y. Allman, *Dealing with Prejudice: How Amended Rule 37(e) Has Refocused ESI Spoliation Measures*, 26 Rich. J.L. & Tech 1, Appendix (2020)(listing 50 such examples as of mid-2019).

<sup>72</sup> The Sedona Conference *Commentary on ESI Evidence and Admissibility*, 22 Sedona Conf. J. 83, at n. 213 (2021).

<sup>73</sup> *Paice LLC v. Hyundai Motor Company*, *supra*, 2015 WL 4984198 at \* 4 (D. Md. Aug. 18, 2015)(barring introduction of evidence or reference to deletion of the ESI at issue since it would be an inappropriate punishment).

<sup>74</sup> *In re Keurig Green Mountain Single-Serve Antitrust Litigation*, 341 F.R.D. 474, 528 (S.D.N.Y. April 11, 2022)(it provides relevant evidence “going to the parties credibility and other factual issues”).

<sup>75</sup> *Best Value Auto Parts v. Quality Collision*, Case No. 10-12291, 2021 WL 220170 (W.S. Mich. May 31, 2021).

<sup>76</sup> Case No. 3:15-md-3633-SI, 2018 WL 5786206, at \*2 (D. Ore. Nov. 5, 2018).

<sup>77</sup> Subcomm. Notes., March 4, 2014, at 2; Agenda Book, April 10-11, Rules Mtg. April 10-11, 2014, at 438 of 580.

and “instruct the jury that it may draw whatever inferences it deems appropriate from those facts.”<sup>78</sup>

In *EPAC Technologies v. Harper Collins*, the District Judge permitted the parties to present evidence to the jury about the loss of warehouse data in a contract dispute about published books. The jury was instructed that the party had negligently failed to preserve missing data that “may have shown” whether materials were returned and other information, but the court left the findings and inferences as to their significance to the jury. It was informed that it could “give this [spoliation] whatever weight you deem appropriate as you consider all the evidence presented at trial.”<sup>79</sup> On appeal, the Sixth Circuit approved the instruction because it was no greater than necessary to cure prejudice.<sup>80</sup>

## Managing Curative Measures

When evidence and argument about spoliation is admitted to a jury for curative purposes, it creates a “trial within a trial”<sup>81</sup> that distracts from the merits and can give spoliation more importance than it deserves.<sup>82</sup> It may be time consuming and confusing to the jury, particularly if the evidence involves technical details concerning ESI that would require expert testimony. The jury may inappropriately conclude “that someone who suppresses evidence is more likely to be the kind of person who would be wrong on the merits.”<sup>83</sup> This raises the legitimate concern that the jury “would impermissibly consider [an] adverse inference.”<sup>84</sup> The Court in *Mueller v. Swift* had “little doubt” the jury will draw

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<sup>78</sup> C.A. No. 3:20-CV-00003-BJB-CHL, 2022 WL 2402658, at \*17 (W.D. Ky. March 14, 2022)(the instructions are no greater than necessary because they are only permissive in nature)(collecting cases).

<sup>79</sup> *EPAC Technologies v. Thomas Nelson*, No 3:12-cv-00463, 2018 WL 332205 at \*3 (M.D. Ten. May 14, 2018).

<sup>80</sup> 810 Fed. Appx. 389, 403 (6<sup>th</sup> Cir. April 15, 2020)(“even reviewing the propriety of the instructions de novo, we find [the] claim for a new trial based on these instructions fails”).

<sup>81</sup> *Stevens v. Brigham Young University – Idaho*, Case No. 4:16-cv-00530-BLW, 2019 WL 6499098, at \*5 (D. Idaho Dec. 3, 2019).

<sup>82</sup> *Decker v. GE Healthcare*, 770 F.3d 378, 398 (6<sup>th</sup> Cir. Oct. 20, 2014)(the court limited the testimony so as not to prejudice the party).

<sup>83</sup> Dale A. Nance, *Adverse Inferences About Adverse inferences*, 90 B.U.L. Rev. 1089, 1102 (2010).

<sup>84</sup> *Estate of Cindy Lou Hill*, No. 2:20-cv-00410-MKD, 2022 WL 1464830, at \*17 (E.D. Wash. May 9, 2022).

their “own adverse inferences” from such evidence whether “the Court instructs it or not.”<sup>85</sup>

According to the Advisory Committee Note, “[c]are must be taken” to ensure that curative measures do not have the same effect as those that are permitted only on a finding of intent to deprive another party of the lost information.<sup>86</sup> Under Federal Rule of Evidence 403, the trial court can exclude even relevant evidence of spoliation if the probative value of the evidence of spoliation is substantially outweighed by the costs involved in presenting it at trial. Moreover, the jury could also be informed that the party had not acted with intent to deprive.<sup>87</sup>

In *Hollis v. CERVA Corp.*, the trial court refused to impose sanctions under Rule 37(e)(2) “because of the difficulty to establish intent.”<sup>88</sup> Instead, it permitted the jury to receive evidence and argument about the circumstances surrounding the loss of the ESI under Rule 37(e)(1) and gave an instruction “patterned after” the suggested language in the Note, which provided that:

“If you decide that CEVA intentionally failed to preserve the video recording of November 28, 2018, to prevent Hollis from using the video recording in this case, you may – but are not required to – presume that the video recording was unfavorable to CEVA. You may then consider your decision regarding the video recording, along with all the other evidence, to decide whether CEVA terminated Hollis because of his race.”<sup>89</sup>

This instruction had the advantage of affirmatively *requiring* the jury to acknowledge adherence to the requirements of the Amended Rule. Courts in the

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<sup>85</sup> Civil Action No. 15-cv-1974-WJM-KLM, 2017 WL 3058027, at \*6 (D. Colo. July 19, 2017).

<sup>86</sup> Advisory Committee Note, Subdivision (e)(2).

<sup>87</sup> *Mixon v. Pohlman*, Civil Action No. 20-1216, 2022 WL 2867091, at \*10 (E.D. La. July 21, 2022)(the court could simply notify the jury that the destruction of the video was routine and without have been reviewed or determined to be relevant).

<sup>88</sup> 603 F. Supp.3d 611, 624 (N.D. Ill. May 19, 2022)(having observed that “[h]umans are just as likely to be dimwitted as they are dastardly”).

<sup>89</sup> *Id.* at 626 n.1. The case was settled after the jury received its instructions and had begun deliberations, but before a verdict was reached.

Northern District of California have utilized a similar approach when admitting evidence under Rule 37(e)(1) by giving a modified California state pattern instruction.<sup>90</sup> In *Meta Platforms v. BrandTotal*, where the party had “at least negligently failed to preserve relevant evidence,” the court planned to instruct the jury in accordance with that instruction that “it may draw an adverse inference if it finds that [the] failure [to preserve] was intentional.”<sup>91</sup>

The Supreme Court has aptly observed that the jury should not be left “to roam at large with only its untutored instincts to guide it.” While “no judge can prevent jurors from speculating” about motivation, a judge can (and should) “use the unique power of the jury instruction to reduce that speculation to a minimum.”<sup>92</sup> Juries should not be “left free to speculate for themselves” about the significance of the missing evidence.<sup>93</sup>

## Conclusion

A jury is well equipped to *both* determine the reasons for the non-production of ESI that should have been preserved as well as the impact such failure may have, if any, on the merits of the claims or defenses at issue. A conditional adverse inference instruction as recommended to that effect also serves as mechanism for enforcing the “rifle-shot” of Rule 37(e)(2)(B) designed to prevent juries from drawing severe inferences from negligent conduct.<sup>94</sup> Juries are just as capable of setting aside their personal prejudices in reaction to discovery misconduct as are judges — provided they have been given sufficient information and guidance.<sup>95</sup> A court, in the exercise of its sound discretion, should at least consider giving such a

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<sup>90</sup> CACI 204 (“Willful Suppression of Evidence”).

<sup>91</sup> 605 F. Supp.3d 128, 1240 & 1277 (N.D. Cal. June 6, 2022). *See also* Dish v. JADOO, Case No. 20-cv-01891-CRB(B), 2022 WL 11270394, at \*4 (N.D. Cal. Oct. 19, 2022), *reh’g den.* 2023 WL 3801947 (N.D. Cal. June 1, 2023)( an appropriate measure under Rule 37(e)(1) for “non-intentional spoliation”).

<sup>92</sup> Carter v. Kentucky, 450 U.S. 288, 301, 303 (1981)( “jurors are not experts in legal principles”)

<sup>93</sup> Callahan v. Toys “R” US – Delaware, Civil Case No. 15-012815-JMC, 2017 WL 2191578, at \*4 (D. Del. May 18, 2017).

<sup>94</sup> Thomas Y. Allman, *Rule 37(e): The Report from Portland*, 1 (the final rule “grants broad discretion to trial judges to deal with ESI lost due to breach of a duty to preserve, coupled with a ‘rifle shot’ aimed at Residential Funding Corp. v. DeGeorge” in order to take some very severe measures off the table) (available online).

<sup>95</sup> Alexndra C. Lahav, *The Jury and Participatory Democracy*, 55 Wm. \* Mary L. Rev. 1029, 1055-1056 (2014)(jurors are serious about applying the law).

jury instruction when there is a genuine dispute about the motivation for failures to preserve that is sufficiently material to justify the risks of confusion and prejudice involved.

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## Appendix: Conditional Adverse Inferences

The Advisory Committee Note clarifies that courts have discretion to require the jury to make the predicate findings that would justify their exercising authority under Rule 37(e)(2)(B) to draw adverse inferences.<sup>96</sup> The use of similar conditional adverse inference jury instructions have long been included in practice treatises such as those of Hon. Edward D. Devitt, et al. *Federal Jury and Practice and Instructions Civil and Criminal*<sup>97</sup> and Kevin F. O'Malley, et. al, *Federal Jury Practice and Instruction*. A proposed instruction (FED-JI § 104.27)(“Suppression or Fabrication of Evidence”) from O'Malley *et al.* was influential in the development of the language adopted by Rule 37(e)(2)(B) that is embodied in the suggested jury instruction in the Advisory Committee Note.<sup>98</sup>

The Judicial Conference of Seventh Circuit has also developed (and is currently updating) similar conditional jury instructions relating to spoliation that have been utilized in the Rule 37(e) context.<sup>99</sup> Federal Courts in the Northern District of California have also modified and used a conditional California State

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<sup>96</sup> Union Pump Co. v. Centrifugal Technology, 404 Fed.Appx 899, 903-904 n.4 (5<sup>th</sup> Cir. Dec. 16, 2010)(the fact that the jury makes the predicate findings does not diminish the efficacy of the adverse inference instruction).

<sup>97</sup> Gorelick *et al.*, Destruction of Evidence § 2.22F Procedural Questions (Jury Instructions)(2020-3 Cum. Suppl.)(reproducing Instruction § 14.07, 4<sup>th</sup> ed. 1992)(dealing with suppression or fabrication of evidence).

<sup>98</sup> The standard was referenced in and adapted for use in Rimkus v. Cammarata, 688 F. Supp.2d 598, 646 n. 34 (S.D. Tex. Feb. 19, 2010), which, in turn is “very similar” to the final text adopted in Rule 37(e)(2)(B). Subcomm. Notes., Feb. 8, 2014, at 2; Agenda Book, Rules Mtg. April 10-11, 2014, at 438 of 580.

<sup>99</sup> Seventh Circuit Federal Civil Jury Instruction 1.20 (Spoliation /Destruction of Evidence). *See, e.g.*, Malibu Media v. Harrison, 2015 WL 3545250, at \*6 (S.D. Ind. June 8, 2015).



instruction in providing jury instructions under the Amended Rule.<sup>100</sup> In addition, conditional “missing evidence” instructions – involving predicate findings other than culpability – were adapted for use in *Zubulake v. UBS Warburg* and other decisions in the Southern District of New York.<sup>101</sup> These decisions largely relied on the pattern instruction suggested in *Modern Federal Jury Instructions*, a practice manual developed by the Hon. Leonard R. Sand, et. al.<sup>102</sup>

In *Mali v. Federal*, the Second Circuit found no abuse of discretion in use of an adverse inference instruction to deal with the non-production of a photograph without requiring either the court or jury to make a predicate finding of culpability, explaining that it was not intended as punishment for misconduct.<sup>103</sup> The Discovery Committee viewed this decision as distinct from the recommended approach of the Advisory Committee Note.<sup>104</sup> According, the Note explains that subdivision (e)(2) does not limit the discretion of courts to give “traditional missing evidence instructions based on a party’s failure to present evidence it has in its possession at the time of trial.”

## The Decisions

The following decisions have utilized a conditional form of jury instruction to permit the jury to draw adverse inferences in the spoliation context if the jury

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<sup>100</sup> Dish Network v. JADOO, Case No. 20-cv-01891 CRB (LB), 2022 WL 11270394, at \*1 (N.D. Cal. Oct. 19, 2022)(utilizing CACI 204 (“Willful Suppression of Evidence”). See also *Meta Platforms v. BrandTotal Ltd.*, 605 F. Supp.3d 1218, 2022 WL 1990225, at \*7-\*7 (N.D. Cal. June 6, 2022) and *Phan v. Costco Wholesale Corp.*, Case No. 19-cv-05713-YGR, 2020 WL 5074349, at \*4 (N.D. Cal. Aug. 24, 2020).

<sup>101</sup> *Zubulake v. UBS Warburg*, 229 F.R.D. 422, 439-440 (S.D. N.Y. July 20, 2004)(“adapting” the Sand et. al pattern instruction as used in *Zimmerman v. Associates First Capital*, 251 F3d 376, 383(2<sup>nd</sup> Cir. May 31, 2001). See also *Saul v. Tivoli Sys.*, 97 Civ. 2386 (DC)(MHD), 2001 U.S. Dist. LEXIS 9873 (S.D.N.Y. July 17, 2001), *Pension Committee v. Banc of Am. Securities*, 685 F.3d 456, 470, 496-97 n. 52 & n. 251 (S.D.N.Y. May 28, 2010), *Sekisui American v. Hart*, 945 F. Supp. 2d 494, 510 (S.D.N.Y. (2013) and *DeCastro v. Kavadia*, 309 F.R.D. 167. 182 n. 18 (S.D.N.Y. July 6, 2015)(discussing SDNY practice).

<sup>102</sup> *Gorelick et al*, *Destruction of Evidence* § 2.22F Procedural Questions (Jury Instructions)(2020-3 Cum. Suppl.)(reproducing ¶ 75.01 (Vol 4 Mar. 1999).

<sup>103</sup> 720 F.3d 387, 392- 93 (2<sup>nd</sup> Cir. June 13, 2013)( citing, *inter alia*. the pattern instruction from Leonard B. Sand, et al., Civil ¶75.01).

<sup>104</sup> Subcomm. Notes., Feb. 8, 2014, at 1 & 3; Agenda Book, April 10-11, Rules Mtg. April 10-11, 2014, at 405 & 407 of 580 (Mali is “consistent with the idea that “missing evidence trial measures are distinct from punitive sanctions”).

concludes that specified predicate conditions exist, typically, but not always, involving the culpability of party that lost or destroyed relevant evidence subject to a preservation obligation.

1. *Wong v. Swier*, 267 F.2d 749, 761 (1959) (an inference is proper only “if the jury [has] first found” the party tampered with the evidence).
2. *Lewy v. Remington Arms*, 836 F.2d 1104, 1111 (8th Cir. Jan. 7, 1988) (permitting inference if failure to produce).
3. *Vodusek v. Bayliner Marine Corp.*, 71 F. 3d 148, 155 (4th Cir. 1995) (“rather than deciding the spoliation issue itself, the district court provide the jury with appropriate guidelines for evaluating the evidence”).
4. *Caparotta v. Entergy Corp.*, 168 F.3d 754, 760 (5th Cir. Feb. 15, 1999).
5. *Smith v. Borg-Warner Automotive*, No. IP 98-1609-C-T/G, 2000 WL 1006619, at \*10 (S.D. Ind. July 19, 2000).
6. *Zimmerman v. Associates First Capital*, 251 F.3d 376, 383 (2d Cir. May 31, 2001)(reproducing its “missing evidence” instruction).
7. *Saul v. Tivoli Sys.*, 97 Civ. 2386 (DC)(MHD), 2001 U.S. Dist. LEXIS 9873, at \*56 ((July 17, 2001) (citing Zimmerman).
8. *Zubulake v. UBS Warburg*, 229 F.R. 422 (S.D.N.Y. July 20, 2004) (“Zubulake V”) (adapting form from Sand, et al., Modern Federal Instructions, ¶75-7 (2004) and citing Zimmerman).
9. *Crowley v. Chait*, Civ. No. 85-2441 (HAA), 2004 WL 7338421, at \*9 (D. New Jersey. 29, 2004).
10. *Duque v. Werner Enterprises*, Civil Action No. L-05-183, 2007 WL 998156, at \*6 and n. 6 (S.D. Tex. March 30, 2007) (referencing 3 Fed. Jury Prac. and Instr. § 104:27).
11. *Nucor Corp. v. Bell*, 251 F.R.D. 191, 203-04 (D. S.C. Feb. 1, 2008) (criticizing the “allocation of labor “ in Zubulake V and Vodusek).
12. *Rimkus v. Cammarata*, 688 F. Supp. 2d 598, 620, 646, 643 & n.34 (S.D. Tex. Feb. 19, 2010) (referencing 3 Fed. Jury Prac. and Instr. § 104:27).
13. *American Family Mut. Ins. Co. v. Roth*, No. 05 C 3839, 2009 WL 982788, at \*10 (N.D. Ill. Feb. 20, 2009).
14. *Pension Committee v. Banc of Am. Securities*, 685 F.3d 456, 497 n. 251 (S.D.N.Y May 28, 2010).

15. *Socas v. The Northwestern Mut. Life Insur. Co.*, No. 07-02336-CIV, 2010 WL 3894142, at \*9 (S.D. Fla. Sept. 30, 2010).
16. *Union Pump v. Centrifugal Technology*, 404 Fed. Appx. 899, 903-904) (5th Cir. Dec. 16, 2010).
17. *Johnson v. Wells Fargo Home Mortg.*, 635 F.3d 401, 422 & n.2 (9<sup>th</sup> Cir. Feb. 15, 2011)
18. *Woodward v. Wal-Mart Stores East*, No. 5:09-CV-428 (CAR), 801 F. Supp.2d 1363, 1366 (M.D. Ga. July 13, 2011).
19. *Hallmark Cards v. Monitor Clipper Partners*, No. 08-0840-CV-W-ODS, 2012 WL 3047164, at \*6 (W.D. Mo. July 25, 2012) (requiring jury to first find the party willfully destroyed evidence referencing 3 Fed. Jury Prac. and Instr. § 104:27).
20. *Hallmark Cards v. Murley*, 703 F.3d 456, 459, 460-462 (8th Cir. Jan. 15, 2013).
21. *Mali v. Federal Insurance Company*, 720 F.3d 387, 391 (2d Cir. June 13, 2013) (if you find the non-production has not been satisfactorily explained, you may infer it would have been unfavorable).
22. *Swift Transportation v. Angulo*, 716 F.3d 1127, 1133 (8th Cir. June 17, 2013).
23. *Sekisui American v. Hart*, 945 F. Supp. 2d 494, 510 (S.D.N.Y. (2013) (referring to rebuttal or non-rebuttal of presumptions).
24. *Quantlab Technologies Ltd. v. Godlevsky*, Civil Action No. 4:09-cv-4039, 2014 WL 651944, at \*25 (S.D. Tex. Feb. 19, 2014).
25. *Malibu Media v. Harrison*, Cause No. 1:12-cv-1117-Wtl-MJD, 2015 WL 3545250, at \*6 (S.D. Ind. June 8, 2015) (utilizing Seventh Cir. Inst. No. 1.20).
26. *Epicor Software Corporation v. Alternative Technology Solutions*, Case No.: SACV 13-00448-CJC (JCGx), 2015 WL 12734011, at \*2 (C.D. Cal. Dec. 17, 2015)(relying on Committee Note).
27. *Evans v. Quintiles Transnational Corp.*, Civil Action No.:4:13-cv-00987-RBH, at \*5 & \*10 (D. S.C. Dec. 23, 2015).
28. *Cahill v. Dart*, No. 13-cv-361, 2016 WL 7034139, at \*4 (N.D. Ill. Dec. 2, 2016).
29. *Applebaum v. Target Corp.*, 831 F.3d. 740, 744-745 (2016).

30. *Gambrell v. Wilkinson CGR Cahaba Lakes*, No. 2:13-cv-02146-HGD, 2017 WL 1196862, at \*6 (N.D. Ala. March 31, 2017).
31. *EEOC v. GMRI*, Case No. 15-20561-CIV-Lenard/Goodman, 2017 WL 5068372, at \*31 (S.D. Fla. Nov. 1, 2017).
32. *Spencer v. Lunada Bay Boys*, Case No. CV-16-02129-SJO (RAOx), 2017 WL 10518023, at \*12 (Dec. 13, 2017), *recomm. adopted*, 2018 WL 839862, at \*1 (C.D. Cal. Feb. 12, 2018).
33. *Gibson v. Management & Training Corp.*, C.A. No. 3:16-CV-624-DPJ-FKB, 2018 WL 736265, at \*7 (S.D. Miss. Feb. 6, 2018).
34. *BankDirect v. Capital Premium Financing*, No. 15 C 10340, 2018 WL 1616725, at \*12 (N.D. Ill. April 4, 2018).
35. *Hunting Energy Services v. Kavalas*, Case No. 3:15-CV-228 JD, 2018 WL 4539818, at \*10-\*11 (N.D. Ind. Sept. 20, 2018).
36. *Lexpath Technologies Holdings v. Welch*, 744 Fed.Appx. 74, at n. 2 (3d Cir. July 30, 2018).
37. *Franklin v. Howard Brown Health Center*, No. 17 C 8376, 2018 WL 4784668, at \*7 (N.D. Ill. Oct. 4, 2018), *rept and recomm. adopted*, 2018 WL 2018 WL 5831995, at \*1 (N.D. Ill. Nov. 7, 2018).
38. *Infogroup, Inc. v. DatabaseUSA.com LLC*, No. 18:14-cv-49, 2018 WL 6624217 (D. Neb. Dec 18, 2018), *aff'd* 956 F.3d 1063, 1067 (8th Cir. April 27, 2020) (partial text of instruction).
39. *Sosa v. Carnival Corp.*, 18-20957-CIV ALTONAGA/CGOODMAN, 2018 WL 6335178 (S.D. Fla. Dec. 4, 2018), *decision confirmed*, 2019 WL 330865, \*3 & \*7 (S.D. Fla. Jan. 25, 2019).
40. *Woulard v. Greenwood Motor Lines*, Civil No. 1:17cv231-HSO-JCG, 2019 WL 3318467, at \*5 (S.D. Miss. Feb. 4, 2019).
41. *NuVasive, Inc. v. Kormanis*, Case No. 1:18CV282, 2019 WL 1171486, at \*13-\*14 (M.D. N. C. March 13, 2019).
42. *Coan v. Dunne*, 602 B.R. 429, 442 (D. Conn. April 16, 2019).
43. *Pals v. Weekly*, 8:17CV27 & 175, 2019 WL 7482263, at \*3-\*4 (D. Neb. June 28, 2019) (involving tangible property).
44. *Woods v. Scissons*, No. CV-08038-PCT-GMS, 2019 WL 3816727 (D. Ariz. Aug. 14, 2019).
45. *InfoGroup v. DatabaseUSA*, 956 F.3d 1063, 1067 (8th Cir. April 27, 2020).

46. *University Accounting v. Schulton*, Case No. 3:18-cv-1486-SI, 2020 WL 2393856, at \*22 (D. Ore. May 11, 2020) (reproducing “Final Jury Instruction 12B”).
47. *Phan v. Costco Wholesale Corp.*, Case No. 19-cv-05713-YGR, 2020 WL 5074349 (N.D. Cal. Aug. 24, 2020) (utilizing CACI 204).
48. *Aramark Management v. Borquist*, Case No. 8:18-cv-01888-JLS-KESx, 2021 WL 864067, at \*16, \*18-\*19 (C.D. Cal. Jan. 27, 2021).
49. *Pointdexter v. Western Regional Jail*, C.A. No. 3:18-1511, 2021 WL 1169383, at \*4 (S.D. West Va. March 26, 2021) (refusing request).
50. *Root v. Montana*, CV-18-164-BLG-SPN-TJC. 2021 WL 1597922, \*3 (D. Mont. April 23, 2021) (ignoring request).
51. *Van Dam v. Town of Guernsey*, Case No. 20-CV-60-SWS, 2021 WL 2942769 at \*4 (D. Wyo. June 4, 2021).
52. *Manning v. Safelite Fulfillment*, Case No. 17-2824 (RMB/MJS), 2021 WL 3542808, at \*4 (D. N.J. Aug. 8, 2021).
53. *Modern Remodeling v. Tripod Holdings*, Civil Action No. CCB-19-1397, 2021 WL 3852323, at \*13-14 (D. Md. Aug. 27, 2021).
54. *Cornejo v. EMJB*, SA-19=CV-01265-ESC, 2021 WL 4526703, at \*5 (W.D. Tex. Oct. 4, 2021).
55. *Mkrtchyan v. Sacramento County*, No. 2:17-cv-2366 TLN KJN, 2021 WL 5284322, at \*10 (E.D. Cal. Nov. 12, 2021) (noting possibility).
56. *Alabama Aircraft Industries v. Boeing*, No. 20-11141, 2022 WL 4333457, at \*6, \*16 & n.19 (11th Cir. Feb. 14, 2022) (Per Curiam) (requiring predicate findings of trigger of duty and intent to deprive).
57. *Stevens v. Brigham Young Univ.*, Case No. 4:16-cv-00530-BLW, 588 F. Supp. 3d 1117, at \*15 (D. Idaho March 2, 2022).
58. *Plymale v. Cheddars Casual Café*, Case No.: 7:20-CV-102 (WLS), 2022 WL 988313, at \*7 (M.D. Ga. March 31, 2022) (proposing to instruct that a “rebuttable presumption” was created if the jury found bad faith).
59. *Estate of Cindy Lou Hill*, No. 2:20-cv-00410-MKD, 2022 WL 1464830, at \*17 (E.D. Wash. May 9, 2022).
60. *Hollis v. CEVA Logistics U.S., Inc.*, 603 F. Supp. 3d 611, 625-626 (N.D. Ill. May 19, 2022) (reproducing “Factual Findings and Jury Instruction”).

61. *Ayers v. Heritage-Crystal Clean, LLC*, Case No. 1:20-cv-5076, 2022 WL 2355909, at \*4 (N.D. Ill. June 1, 2022) (utilizing Seventh Circuit Pattern Instr. 1.20 (Spoliation/Destruction of Evidence)).
62. *Meta Platforms v. BrandTotal Ltd.*, \_\_\_ F. Supp.3d \_\_\_, 2022 WL 1990225, at \*8 (N.D. Cal. June 6, 2022) (modifying CACI 204).
63. *Dish Network L.L.C. v. Jadoo TV, Inc.*, Case No. 20-cv-01891-CRB (LB), 2022 WL 11270394, at \*4 (N.D. Cal. Oct. 19, 2022)(modifying CACI 204).
64. *LKQ Corporation v. GM*, No 20 CO 02753, 2022 WL 14634800, at \*7 & \*9 (N.D. Ill. Oct 25, 2022).
65. *Tyson v. Department of Energy*, No. 3:21-cv-736 (JAM), 2022 WL 16949396, at \*4-\*5 (D. Conn. Nov. 15, 2022).
66. *Tripp v. Walmart*, Case No. 8:21-cv-510-WFJ-SPF, 2023 WL 399764 (M.D. Fla. Jan. 25, 2023).
67. *Pable v. Chicago Transit Authority*, No. 19 CV 7868, 2023 WL 2333414, at \*31 & n. 17 (N.D. Ill. March 2, 2023).
68. *Doe v. Willis*, Case No: 8:21-cv-1576-VMC-CPT, 2023 WL 2918507, at \*15 (M.D. Fla. April 12, 2023).
69. *Billy Van Winkle, Jr. v. James Arthur Rogers*, \_\_\_ F.4th \_\_\_, No. 22-30638, 2023 WL 5994238 (5th Cir. Sept. 15, 2023).