

# Jury Findings of Intent to Deprive under Rule 37(e): An Assessment

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## **Jury Findings of Intent to Deprive under Rule 37(e): An Assessment**

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Amended Rule 37(e)(2), effective as of December 1, 2015, famously permits courts to infer and juries to be instructed that they may or must presume that lost electronically stored information (“ESI”) was “unfavorable” *only* upon a finding that the party responsible acted “with the intent to deprive another party of the information’s use in the litigation.” This requires evidence of a “serious and specific sort of culpability.”<sup>2</sup>

Direct evidence of such intent is often lacking, and the motivation of the non-moving party must be inferred from the thoughts and actions of parties or their agents. When “there is no direct evidence” available, the fact-finder may infer culpable intent based on circumstantial evidence.<sup>3</sup> Most courts decide the issue themselves based on the pre-trial record developed during discovery.

However, when a court is unwilling or unable to make that finding, it may permit the jury to decide the issue, as suggested by the Advisory Committee Note.<sup>4</sup> They may also be permitted to decide whether to draw an adverse inference about the missing ESI. If the jury does not find that the party acted with an intent to deprive, it is still free to weigh the evidence in conjunction with other issues, such as the credibility of trial testimony.<sup>5</sup>

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<sup>1</sup> © 2022, Thomas Y. Allman. Mr. Allman, Chair Emeritus of WG 1 Sedona Working group, was a Member of the E-Discovery Panel at the 2010 Duke Conference Panel which advocated development of the Amended Rule.

<sup>2</sup> Auer v. City of Minot, 896 F.3d 854, 858 (8<sup>th</sup> Cir. July 19, 2018).

<sup>3</sup> Charles Yablon, *Byte Marks: Making Sense of New FRCP 37(e)*, 69 Fla. L. Rev. 571, 573, 585 (2017).

<sup>4</sup> Thomas Y. Allman, *Dealing With Prejudice: How Amended Rule 37(e) Has Refocused ESI Spoliation Measures*, 26 Rich. J.L. & Tech 1, 33 (2020)(“The Committee Note acknowledges the possibility that the court may conclude that the intent finding should be made by a jury”).

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

In *Hollis v. CEVA Logistic U.S. Inc.*, for example, the District Judge, having informed the jury of a failure to preserve as a curative measure under Rule 37(e)(1), instructed the jury that it could presume that the missing ESI was unfavorable if the party “intentionally failed to preserve [it] to prevent” its use in the case. If it made that finding, it could then consider that decision, “along with all the other evidence,” in deciding whether the plaintiff was terminated because of his race.<sup>6</sup>

This Essay explores the practice of enlisting the jury in this manner and discusses the practical limitations on its use.

## Background

Since the early 17<sup>th</sup> Century, courts have admitted evidence to the jury tending to show that a party destroyed evidence relevant to a dispute to permit “an inference, the ‘spoliation inference’ that the destroyed evidence would have been unfavorable to the positions of the offending party.”<sup>7</sup> These adverse inferences “necessarily open the door to a certain amount of speculation by the jury,” which is admonished that it may infer the presence of damaging information.<sup>8</sup> It may supply evidence essential to a claim or defense and can prevent a summary judgment premised on the absence of a triable issue of material fact.

Rule 37(e)(2) was “completely rewritten” in 2015 to provide a nationally uniform standard for when courts can give an adverse inference instruction.<sup>9</sup> Only if the party “acted with the intent to deprive another party of the information’s use in the litigation” may it be presumed to be unfavorable.<sup>10</sup> This is akin to requiring a finding of bad faith but is defined more precisely.<sup>11</sup> It has proven “tough to satisfy,

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<sup>6</sup> \_\_\_ F. Supp.3d \_\_\_, 2022 WL 1591731, at \*8 & \*9-10 (N.D. Ill. May 19, 2022). The case was settled after the jury received its instructions, but before a verdict was reached.

<sup>7</sup> *Schmidt v. Milwaukee Electric Tool*, 13 F. 3d 76, 78 (3<sup>rd</sup> Cir. 1994).

<sup>8</sup> *Morris v. Union Pac. R.R.* 373 F.3d 896, 900-901 (8<sup>th</sup> Cir. 2004).

<sup>9</sup> *FTC v. Noland*, No. CV-20-00047-PHX-DWL. 2021 WL 3857413, at \*5 (D. Ariz. Aug. 30, 2021)(quoting 1 Gensler, *FRCP Rules and Commentary*, Rule 37, at 1194 (2021)).

<sup>10</sup> The mental task involved is an inference, not the rebuttable presumption of evidence law. Minutes, Rules Comm. Mtg., April 10-11, 2014, at 24 (Hon. Paul Grimm, Chair, Discovery Subcommittee).

<sup>11</sup> *Auer v. City of Minot*, *supra*, 896 F. 3d at 858 (it requires proof of “intentional, bad-faith misconduct”).

as, perhaps, was the intent of the drafters.”<sup>12</sup> A showing of negligence or even gross negligence “will not do the trick.”<sup>13</sup>

Subdivision (e)(1) of the Amended Rule, however, authorizes courts to employ measures “no greater than necessary to cure” prejudice *without* requiring such a predicate finding of intent. Negligent conduct suffices. If the prejudice requirement is met, the court may, according to the Advisory Committee Note, permit a party to present evidence and argument to the jury regarding the spoliation and provide guidance about assessing its likely relevance other than instructions which require a finding of intent to deprive. This has proven to be a popular option.<sup>14</sup>

The Note explains that the court may also “conclude that that the intent finding should be made by a jury.” There was ample precedent for that delegation at the time the Note was prepared.<sup>15</sup> In *Rimkus v. Cammarata*, for example, the court was unable to determine if the spoliator had acted in bad faith and decided instead to inform the jury that it could, but need not, infer that deleted emails were unfavorable if it decided that the party had intentionally deleted them to prevent their use in the pending litigation.<sup>16</sup>

Since enactment of the Amended Rule, a substantial number of courts have chosen to permit the jury to assess intent. In practice, however, most courts simply decide the issue themselves prior to trial.<sup>17</sup> It is not an abuse of discretion for the court to refuse “to submit the issue of intent to a jury” when there is insufficient

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<sup>12</sup>John J. Jablonski, *Legal Backgrounder*, Wash. Legal Foundation, 35 No. 10, at 2 (April 20, 2020).

<sup>13</sup>Applebaum v. Target Corp. 831 F.3d 740, 745 (6<sup>th</sup> Cir. 2016).

<sup>14</sup>Allman, *Dealing With Prejudice*, *supra*, 26 Rich. J.L. & Tech 1, Appendix (2020)(listing 50 examples as of mid-2019).

<sup>15</sup>Memorandum, Andrea L. Kuperman to Hon. David G. Campbell, et. al, *Allocating Fact-Finding Roles for Sanctions Imposed Under Inherent Authority*, at 4 & 46 (May 9, 2014) (acknowledging precedent and cautioning against prohibiting it)(copy on file with Author).

<sup>16</sup>688 F. Supp.2d 598, 620, 646, 653 & n. 34(S.D. Tex. Feb. 19, 2010)(citing O’Malley, Grenig and Lee, 3 *Federal Practice and Instructions* § 104:27 (Suppression or Fabrications of Evidence)(6<sup>th</sup> Ed)(Jan. 2022)(“FED-JI § 104.27”).

<sup>17</sup>*See, e.g.* Fourth Dimension Software v. DerTouristik Deutschland, Case No. 19-cv-05561-CRB, 2021 WL 5919821, at \*11 (N.D. Cal. Dec. 15, 2021)(“the record strongly supports” an inference that the ESI was deleted to prevent the other party from using it in the litigation).

evidence in the record to justify such a decision.<sup>18</sup> In jurisdictions where “clear and convincing evidence” of such intent is required, it is more efficient to weed out cases early when that standard cannot be met.<sup>19</sup> Courts are regarded as the appropriate finder of fact on a Rule 37(e) motion and some courts may not be aware of the option to turn to the jury.<sup>20</sup>

## Why Utilize the Jury?

It has been astutely observed that “[n]owhere does the Advisory Committee Note indicate why or when” the issue of intent is appropriately left to the jury, rather than confined to the court.<sup>21</sup> However, the federal system, “under the influence – if not the command - of the Seventh Amendment,” assigns disputed questions of fact to the jury.<sup>22</sup>

That appears to have been an important consideration in many decisions.<sup>23</sup> In *Hunting Energy Services v. Kavalas*, the court explained that the role of assessing intent in that context was a “prototypical function” of the jury.”<sup>24</sup> In *Epicor Software v. Alternative Technology*, the court announced plans to present the intent issue to the jury because it was “an open issue of fact that is suitable for resolution by the jury.”<sup>25</sup>

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<sup>18</sup> Lee v. Belvac Production Machinery, No. 20-1805, 2022 WL 4996507, at \*3 (4<sup>th</sup> Cir. Oct. 4, 2022)(Per Curiam).

<sup>19</sup> Venture Group Enterprises v. Vonage Business Inc., No 20-CV-4095 (RA)(OTW), 2022 WL 4814830, at \*3 (S.D.N.Y. Sept. 30, 2022)(“on the record before the Court” there is not clear and convincing evidence sufficient to conclude intent to deprive).

<sup>20</sup> Drips Holding v. Teledrip, Case No. 5:19-cv-2789, 2022 WL 4545233, at \*3 (N.D. Ohio Sept. 29, 2022)(rejecting argument that jury should decide intent issue because Rule 37(e)(2) measures are “not a cause of action”).

<sup>21</sup> Gregory P. Joseph, *Rule 37(e); The New Law of Electronic Spoliation*, 99 Judicature 35, 40 (No. 3 Winter 2015)(“The Advisory Committee Note is opaque on this issue”).

<sup>22</sup> Gasperini v. Center for Humanities, 518 U.S. 415, 432 (1996)(quoting from Byrd v. Blue Ridge Rural Elec. Cooperative, 356 U.S. 525, 537 (1958)).

<sup>23</sup> Steven Baicker-McKee, *Mountain or Molehill?*, 55 Duq. L. Rev. 307, 320 (2017).

<sup>24</sup> Case No. 3:15-CV-228 JD, 2018 WL 4539818, at \*10-\*11 (N.D. Ind. Sept. 20, 2018).

<sup>25</sup> Epicor Software v. Alternative Technology, Case No.: SACV 13-00448-CJC(JCGx), 2015 WL 12734011, at \*1-2 (C.D. Cal. Dec. 17, 2015).

In *DR Distributors LLC v. 21 Century Smoking*, the court left it to the jury to decide because “reasonable people could disagree as to whether Defendants intended to destroy this ESI.”<sup>26</sup> In *Ayers II v. Heritage-Crystal Clean*, the court noted that even though *it* had found no intent to deprive, the fact-finding role on this issue “should not be completely taken from the jury” since it might reach a different conclusion.<sup>27</sup>

In *Alabama Aircraft v. Boeing*, the District Court agreed to require the jury to make an independent assessment of the intent issue after the party that had lost the emails sought the opportunity to address the jury. The court had originally determined that the defendant had acted with an intent to deprive since “no credible explanation” was given as to why it had intentionally deleted certain emails.<sup>28</sup> At trial, the jury was instructed that:

“If you find [that] Boeing deleted this information with the intent to deprive [Plaintiff] of the use of the information in litigation relating to this dispute, you may infer that the lost information was unfavorable to Boeing. If you do not make these findings, you may not infer from the loss of the information that it was unfavorable to Boeing. . . . [Y]ou are judge of the facts as to what happened in this case, including what happened to these electronic documents, and why it happened.”<sup>29</sup>

On appeal after a verdict against Boeing, the Eleventh Circuit found the instruction “correctly stated the law and did not mislead the jury” noting that the District Court could have imposed an “even harsher sanction” of allowing the jury to simply draw the adverse inference based on the predicate findings it had made before the trial, citing the Advisory Committee Note and explaining its comfort in relying upon it.<sup>30</sup>

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<sup>26</sup> 513 F. Supp.3d 389, 981-982 (N. D. Ill. Jan 19, 2021).

<sup>27</sup> No. 1:20-cv-5076, 2022 WL 2355909, at \*4 & n. 3 (N.D. Ill. June 1, 2022).

<sup>28</sup> 313 F.R.D. 730, 746 (N.D. Ala. Mar. 9, 2017)(while there is no “direct evidence of an intent to deprive” there “certainly is sufficient circumstantial evidence”).

<sup>29</sup> Case No. 20-11141, 2022 WL 422457, at \*6 (11<sup>th</sup> Cir. Feb. 14, 2022)(cleaned up).

<sup>30</sup> *Id.* at \*16 & n. 19 (“although they do not bind us, we afford ‘great weight’ to the interpretations in the Advisory Committee Notes”).

Another consideration in deciding to utilize the jury is the ability of the factfinder to assess demeanor evidence.<sup>31</sup> In *Modern Remodeling v. Tripod Holdings*, where there was “sufficient, though not definitive evidence” to support a finding that data was deleted with intent to deprive, the court noted that the decision rested heavily on “determinations of witness credibility – an issue best reserved for a jury.”<sup>32</sup> In *Aramark Management v. Borquist*, the jury was the preferred option because while the “timing of the spoliation [was] suspicious,” the jury might find credible the explanation that the party was clearing out old devices and did not believe they included ESI related to the case.<sup>33</sup>

The possibility of a more complete record at trial is also important. By delaying the finding of intent until after all the testimony is admitted, at least some proof of the facts underlying the spoliation motion and possibly additional evidence on the issue of intent will supplement the motion record. In *Woods v. Scissons*, for example, the Court “declined” to make the intent finding “on the facts before it” so that the “determination of intent” could be made by the jury on a “more fully developed evidentiary record.”<sup>34</sup> This also permits the court to revisit an initial decision<sup>35</sup> and decide whether there is a basis for an adverse inference.<sup>36</sup> The trial court under those circumstances has ample discretion to revisit prior rulings upon hearing evidence at trial.<sup>37</sup>

In many cases, it is a combination of all these factors. In *Sosa v. Carnival Corporation*, the Court refused to reconsider its initial order permitting movant to

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<sup>31</sup> Andrew S. Pollis, *The Death of Inference*, 55 B.C.L. Rev. 435, 441-442 (2014)(“the jury is the lie detector”)(emphasis in original). It is not unusual for courts considering spoliation motions prior to trial to hold evidentiary hearing for the same reason. See, e.g., *Keybank v. Williams*, Civil Action No. 1:19-cv-03714-CMA-SKC, 2022 WL 3446019, at \*1 (D. Colo. Aug. 17, 2022)(hearing four witnesses testifying under oath).

<sup>32</sup> Civil Action No. CCB-19-1397, 2021 WL 3852323, at \*13 (D. Md. Aug. 27, 2021)(the jury could then (properly instructed) determine the impact, if any on the merits of the claims or defenses).

<sup>33</sup> Case No. 8:18-cv-01888-JLS-KESx, 2021 WL 864067, at \*19 (C.D. Cal. Jan. 27, 2021), *recmm'd adopted*, 2021 WL 863746 (C.D. Cal. March 8, 2021).

<sup>34</sup> No. CV-17-08038-PCT-GMS, 2019 WL 3816727, \*6-\*7 (D. Ariz. Aug 14, 2019).

<sup>35</sup> *Shaffer v. Gaither*, No. 5:14-cv-00106-MOC-DSC, 2016 WL 6594126, at \*3 (W.D. N.C. Sept.1, 2016).

<sup>36</sup> *Franklin v. Howard Brown Health Center*, No 17 C 8376, 2018 WL 4784668, at \* 7 (N.D. Ill. Oct. 4, 2018), *R & R adopted* 2018 WL 5831995 (Nov. 7, 2018)(“we will consider appropriate jury instructions regarding this evidence at trial”).

<sup>37</sup> Hon. Xavier Rodriguez, *E-Discovery Update*, 87 The Advoc. (Texas) 5, 14-15 n. 77 (2019).

choose to present issue to the jury because “the record is murky,” a critical witness will testify, some of the circumstances are odd and the court was not convinced of the credibility of other witnesses.<sup>38</sup>

## The Evidence

Jurors tasked with assessing intent may receive relevant evidence of spoliation, including expert evidence, under subdivision (e)(1) to address prejudice or under subdivision (e)(2) to provide context for deciding whether to draw adverse inferences should intent be found to exist.<sup>39</sup> Any such spoliation-related evidence, including rebuttal evidence, easily “clears the baseline relevance hurdle of Federal Rules of Evidence 401 and 402.”<sup>40</sup> Factual findings made during pre-trial motion practice may be identified as well. In *Hollis v. CEVA Logistics, supra*, the court furnished its “Factual Findings” to the jury along with its instructions.

While both parties are typically permitted to elicit evidence at trial pertaining to the spoliation issue, the admission of such evidence is “subject to reasonable limitations.”<sup>41</sup> Under Federal Rule of Evidence 403, the court may exclude evidence whose probative value is substantially outweighed by the dangers arising from its admission.<sup>42</sup> As the Court explained in *Waymo v. Uber Techs.*, while evidence of litigation misconduct is admissible, it will not be allowed to consume the trial to the point that it becomes a distraction from the merits.<sup>43</sup>

## Instructions

The jury is typically instructed about the existence of the duty to preserve relevant ESI and provided information which explains why the court has already

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<sup>38</sup> Case No. 18-20957-CIV-ALTONAGA/CGOODMAN, 2019 WL 330865, \*3 (S.D. Fla. Jan. 25, 2019).

<sup>39</sup> The Sedona Conference, *Commentary of ESI Evidence & Admissibility, Second Edition*, 22 Sedona Conf. J. 83, 175-178 (2021).

<sup>40</sup> *GN Netcom v. Plantronics*, 930 F.3d 76, 87 (3<sup>rd</sup> Cir. July 10, 2019).

<sup>41</sup> *Kelley v. BMO Harris Bank N.A.*, Case No. 19-cv-1756 (WMW), 2022 WL 4547022, at \*5 (D. Minn. Sept. 29, 2022)(“the parties are mistaken if they believe that the presentation of such evidence will [be] unlimited”).

<sup>42</sup> FRE 403 (“one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time or needlessly presenting cumulative evidence”).

<sup>43</sup> No. C 17-00939 WHA, 2018 WL 646701, at \*18 (N.D. Cal. Jan. 30, 2018).



determined that the non-moving party failed to meet that obligation. It is then informed that it may draw an adverse inference about the lost ESI only if concludes that the party acted “with the intent to deprive” another party of the information’s use in the litigation. It may also be informed of the standard of proof that must be satisfied.<sup>44</sup> As one jury was instructed, “[t]his is only a permissive inference, however, not a mandatory one” and it is available only if you find that the party acted with the intent to deprive.<sup>45</sup>

If the jury finds intent, it may (or in rare cases, must) consider whether the lost ESI was unfavorable.<sup>46</sup> It may be instructed to decide for itself what effect to give the finding of intent to deprive<sup>47</sup> and may be given specific examples of reasonable inferences. Arguments of counsel may be useful in assisting the jury with its analysis.<sup>48</sup> In *Hollis v. CEVA*, the jury was instructed that it could consider its decision on intent, along with other evidence, in deciding whether the party terminated the plaintiff because of his race.<sup>49</sup> In *Coan v. Dunne*, the court planned to instruct the jury that it could use it as evidence of an intent to defraud.<sup>50</sup>

## Limiting Instructions

Once a jury is informed that a party has breached its duty to preserve, it is “branded” as a bad actor, guilty of destroying evidence that it should have retained for use by the jury.<sup>51</sup> To mitigate concerns about jury overreaction when deciding the intent issue, the Advisory Committee Note requires that:

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<sup>44</sup> The jury in *Ayres, supra*, was instructed it must find intent “by a preponderance of the evidence.” The Second Circuit requires “clear and convincing” proof.

<sup>45</sup> *University Accounting service v. Schulton*, Case No. 3:18-cv-1486-SI, 2020 WL 2393856, at \*22 (D. Ore. May 11, 2020)(Final Jury Instr. 12B (“Adverse Inferences”).

<sup>46</sup> *Infogroup, Inc. v. DatabaseLLC*, No. 18-3723, 956 F.3d 1063, 1067 (8<sup>th</sup> Cir. April 27, 2020)(approving trial court use of instruction permitting the jury to infer that the missing database was favorable to the moving party upon finding intent).

<sup>47</sup> *Id.* at 995 & 999 (offsetting identical instructions). The parties ultimately requested that neither instruction be given. *Id.* at 1000.

<sup>48</sup> Charles W. Adams, *Spoilation of Electronic Evidence: Sanctions v. Advocacy*, 18 Mich. Telecomm. & Tech. L. Rev. 1, 30, 52, 54- 58 (2011)(“drawing the connection” is better left to counsel advocacy since they need not be concerned about maintaining the neutrality required for a jury instruction).

<sup>49</sup> 2022 WL 1591731, at \*10.

<sup>50</sup> 602 B.R. 429, 441-42 (D. Conn. Apri. 16, 2019).

<sup>51</sup> *Morris v. Union Pac. R.R., supra*, 373 F.3d at 900.

“[T] court’s instruction should make clear that the jury may infer from the loss of the information that it was unfavorable to the party that lost it only if the jury first finds that the party acted with the intent to deprive another party of the information’s use in the litigation. If the jury does not make this finding, it may not infer from the loss that the information was unfavorable to the party that lost it.”<sup>52</sup>

As the Note explains, “[n]egligent or even grossly negligent behavior” does not support the inference that the evidence was unfavorable to the party responsible for loss or destruction of the evidence and the “better rule” is “to limit the most severe measures to instances of intentional loss or destruction.” Other limiting instructions, such as that the missing or destroyed ESI was unlikely to be relevant are within the sound discretion of the trial court.<sup>53</sup>

There is a similar risk of jury over-reaction when it is merely informed of the spoliation under Rule 37(e)(1) as a curative measure.<sup>54</sup> While it may not be *instructed* that it may conclude that the missing ESI was unfavorable, it can consider the spoliation evidence along with all the other evidence in the case. The parties may argue about the “favorable or unfavorable character of the lost evidence” to the jury.<sup>55</sup> In other words, if the party “can show prejudice, the jury might make an adverse inference on its own, based on the arguments and evidence presented.”<sup>56</sup> Absent a similar limiting instruction, the jury may feel free to speculate for themselves that merely negligent conduct sufficed.

In *DriveTime Car Sales Company v. Pettigrew*, for example, the court made no finding of intent to deprive, but planned to permit the parties to argue for

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<sup>52</sup> Advisory Committee Note.

<sup>53</sup> *Decker v. GE Healthcare Inc.*, 770 F.3d 378, 397 (6<sup>th</sup> Cir. Oct. 20, 2014)(refusing to give such an instruction because it would give the issue of the lost or discarded evidence “a lot more importance that it has had in this trial”).

<sup>54</sup> Alexander Gross, *A Safe Harbor from Spoliation Sanctions*, 2015 Colum. Bus. L. Rev. 705, 758-59 & n. 219 (2015)(arguing that the Note “leaves the door open” for negligent parties to be subject to a permissive adverse inference instruction without requiring intent to deprive).

<sup>55</sup> Minutes, Rules Comm. Mtg. April 10-11, 2014, Ins. 994-997.

<sup>56</sup> Ariana J. Tadler and Henry J. Kelston, *What You Need To Know About the New Rule 37(e)*, 52-JAN Trial 20, 21 (2016).

“whatever inference it hopes the jury will draw,” citing *EPAC Techs. v. Thomas Nelson*.<sup>57</sup> The jury in *EPAC* had been instructed that the party had negligently failed to preserve data which “may have shown” highly relevant information. It was told to give this “whatever weight you deem appropriate as you consider all of the evidence presented at trial.”<sup>58</sup> On appeal the Sixth Circuit found no abuse of discretion in such an instruction.<sup>59</sup>

The jury in a case like *DriveTime* should be made aware that Rule 37(e) does not permit adverse inferences to be drawn from merely negligent conduct. It might also be informed that the court had not found that the conduct was motivated by an intent to deprive.<sup>60</sup> Without that information, jurors may speculate that the court had drawn that conclusion. Providing the jury with information about the reasons for and the extent of any limitations involved demonstrates respect for them as adjudicators who are “capable of setting aside their personal preferences, just as judges do.”<sup>61</sup>

## Pattern Instructions

Pattern or Model Jury Instructions are useful for both courts and parties. They can provide a framework from which jury instructions can be tailored to the particular facts and legal issues of the case. Unfortunately, while the Third, Fifth, Seventh, Eighth, Ninth and Eleventh Federal Circuits have compiled many such instructions, civil spoliation instructions are rare.<sup>62</sup>

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<sup>57</sup> Case No.: 2:17-cv-371, 2019 WL 1746730, at \*5 (S.D. Ohio April 18, 2019).

<sup>58</sup> No. 3:12-CV-00463, 2018 WL 3322305, at 3 (M.D. Tenn. May 14, 2018)(the parties can present competing arguments about the impact of the loss).

<sup>59</sup> 810 Fed. Appx. 389, 403 (6<sup>th</sup> Cir. April 15, 2020).

<sup>60</sup> See, e.g., *Wilson v. HH Savannah, LLC*, CV 420-217, 2022 WL 3273714, at n. 2 (S.D. Ga. July 28, 2022)( the court “should inform the jury that the documents had been inadvertently destroyed and that the Court found no bad faith on the part of Hyatt”).

<sup>61</sup> Alexandra D. Lahav, *The Jury and Participatory Democracy*, 55 WM & Mary L. Rev. 1029, 1055-1056 (2014)(it is consistent with evidence that “jurors are serious about applying the law”).

<sup>62</sup> The Seventh Circuit Instruction (Civil) 1.20 is a rare exception. The Fifth Circuit Civil Pattern Instructions include Instruction 2.9 (Witness Not Called) and the Ninth Circuit has no *civil* counterpart to its Model Criminal Instruction 3.19 (Lost or Destroyed Evidence).

However, the Seventh Circuit Pattern Civil Jury Instruction 1.20 (Spoliation/Destruction of Evidence) can be and has been adapted to provide an instruction that permits a jury to draw an adverse inference upon finding intent to deprive.<sup>63</sup> The court in *Ayers II v. Heritage-Crystal Clean* did so in preparing to instruct the jury to assume that lost ESI would have been unfavorable if it found by a preponderance of the evidence that it had been destroyed in bad faith.<sup>64</sup>

The spoliation instruction (“FED-JI § 104.27”) from *Federal Practice and Instructions* also provides a useful analogy when juries are used to assess intent as a condition to considering a permissive adverse inference.<sup>65</sup> That is less the case with certain state model instructions.<sup>66</sup>

## Conclusion

There is much to be said for “at least considering” whether to allow the jury to decide the intent to deprive issue assuming there is sufficient trial evidence supporting it.<sup>67</sup> Some see this as a “measured option” for use when the intent issue presents “a close question.”<sup>68</sup> But its value has not been limited to that context, as is amply demonstrated by the cases cited herein. However, it appears likely to remain lightly used in light of the preference of most courts to resolve the issue prior to trial as part of the discovery process.

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<sup>63</sup> Instruction 1.20 provides that when evidence is destroyed, the jury “may assume that such evidence would have been unfavorable” only if it finds that the party intentionally destroyed the evidence in “bad faith.”

<sup>64</sup> 2022 WL 2355909, at \*4 & notes 3-4 (N.D. Ill. June 1, 2022).

<sup>65</sup> O’Malley, Grenig and Lee, 3 *Federal Practice and Instructions* § 104:27 (Suppression or Fabrication of Evidence)(6<sup>th</sup> Ed)(Jan. 2022)(“FED-JI § 104.27”)(if the jury finds that a “party willfully[suppressed][hid][destroyed] evidence in order to prevent its being presented in this trial, you may consider such [conduct] in determining what inferences to draw from the evidence or facts in the case”).

<sup>66</sup> See, e.g., *Meta Platforms v. BrandTotal Ltd*, \_\_\_ F. Supp.3d \_\_\_, 2022 WL 1990225, at \*7-\*8 (N.D. Cal. June 6, 2022)(applying California CACI 204 (“Willful Suppression of Evidence”) without clarifying that specific intent, not merely intentional conduct, is required by the Rule).

<sup>67</sup> *Gipson v. Mgt. & Trg.*, CA 3:16-CV-624-DPJ-FKB, 2018 WL 736265, at \*7 (S.D. Miss. Dec. 6, 2018).

<sup>68</sup> Mark S. Sidoti and Kevin H. Gilmore, *The Resurgence of Electronic Evidence Spoliation Sanctions*, 333-DEC N.J. 28, 33 (2021).