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INFORMING JURIES ABOUT SPOILIATION OF ELECTRONIC EVIDENCE AFTER AMENDED RULE 37(E): AN ASSESSMENT

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“Court[s] can . . . provide a fair trial to both sides” while
“empowering the jury to assess what impact, if any, that
spoliation had on a party’s ability to prove its case.”¹

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¹ GN Netcom, Inc. v. Plantronics, Inc., C.A. No. 12-1318-LPS, 2018 WL 273649, at *3 n.2 (D. Del. Jan. 3, 2018), *rev'd on other grounds*, 930 F.3d 76 (3d Cir. 2019).

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INTRODUCTION

The frequency of civil jury trials in Federal Courts is rare, and it is even rarer for the judge to provide juries with information about the spoliation of electronically stored information (ESI) during a trial on the merits. The 2015 revisions to Fed. R. Civ. P. 37(e) (the “Rule” or the “Amended Rule”) have resulted in a largely unanticipated upsurge in such opportunities.

There were at least fifty reported examples of the use of this option as of mid-2019, and the frequency of use since then, if anything, has increased.² For example, Rule 37(e)(1) routinely permits parties to inform the jury of negligent or grossly negligent spoliation as a “curative measure” to ameliorate prejudice.³ This is due, in part, to the explicit rejection of adverse-inference jury instructions based on such spoliation pursuant to Rule 37(e)(2).⁴ Those instructions are a “powerful tool”⁵ whose availability is now limited to instances involving a showing of an “intent to deprive” the party of the use of the ESI.

The Committee Note also encourages the use of juries as part of authorizing conditional adverse inferences, which are based on a jury assessment that the requisite intent existed.⁶

Some view these developments as problematic intrusions on the historic responsibility of the judiciary and a potential source of

² Thomas Y. Allman, *Dealing with Prejudice: How Amended Rule 37(e) Has Refocused ESI Spoliation Measures*, 26 RICH. J.L. & TECH. 1 app. (2020) (listing examples).

³ See FED. R. CIV. P. 37(e).

⁴ Camille A. Olson & Matthew C. Christoff, *E-Discovery and Social Media Discovery*, SB002 ALI-CLE 1067, at *6 (2019) (severe sanctions have been “denied in whole or in part in approximately 82 percent of cases”).

⁵ *Morris v. Union Pac. R.R.*, 373 F.3d 896, 900 (8th Cir. 2004) (the “federal judge brands one party as a bad actor, guilty of destroying evidence that it should have retained for use by the jury”).

⁶ FED. R. CIV. P. 37(e) advisory committee’s note to 2015 amendment [hereinafter Committee Note].

mischief.⁷ Under that view, courts should deal with pre-trial discovery disputes without involving the jury because of the risks involved. Monetary sanctions and orders of preclusion come to mind.⁸

As the court in *Telectron, Inc. v. Overhead Door Corp.* explained, “[W]e can only speculate as to the significance which a jury might attach” to receiving such evidence in the middle of the trial.⁹ “[I]t tends to make the trier regard those responsible as scoundrels who deserve defeat, or at least to use their imaginations about what the missing evidence would [have] show[n].”¹⁰

On the other hand, spoliation evidence can support “legitimate inferences bearing on questions of ultimate liability.”¹¹ The risk, of course, is that the jury may nonetheless be persuaded to find against the party who lost the evidence even though their behavior was, at most, negligent.

While the final word has not yet been spoken on the proper division of fact-finding labor between judges and juries under the Rule,¹² it seems clear that it is possible to have a fair trial on the merits for both sides while informing the jury of spoliation. Whether this justifies the risks involved is another matter.

I. RULE 37(E)

The Amended Rule skillfully blends evidentiary measures and sanctions to address spoliation of ESI, filling the “preservation” gap in Rule 37¹³ while foreclosing reliance on

⁷ A former Magistrate Judge has noted to the Author that bad behavior by counsel and parties is common during discovery and it is understandable that advocates for the other side would love to get it before the jury, but it is often not relevant to the merits.

⁸ If case-dispositive measures are warranted, the court may also consider imposing a default or dismissal.

⁹ 116 F.R.D. 107, 136 (S.D. Fla. 1987) (entering default judgment instead of relying on the jury).

¹⁰ John Leubsdorf, *Fringes: Evidence Law Beyond the Federal Rules*, 51 IND. L. REV. 613, 638 (2018).

¹¹ Andrew S. Pollis, *Trying the Trial*, 84 GEO. WASH. L. REV. 55, 116 (2016).

¹² *Lexpath Techs. Holdings, Inc. v. Welch*, 744 Fed. Appx. 74, 79 n.3 (3d Cir. 2018) (“We have not yet spoken to the proper ‘division of fact-finding’ labor between judges and juries when issuing a spoliation sanction.” (internal citation omitted)).

¹³ The E-discovery Panel at the 2010 Duke Litigation Conference recommended such a rule. John G. Koeltl, *Progress in the Spirit of Rule 1*, 60 DUKE L.J. 537, 544

inherent authority or state law to do so.¹⁴ It became effective as of December 1, 2015¹⁵ as part of a package of Amendments to the Civil Rules known as the “2015 Amendments.”¹⁶

It is “a simpler and less ambitious” version of a preliminary proposal released for public comment in August 2013¹⁷ and brings a uniform approach to the way in which courts handle claims of spoliation of ESI. It embraces the common law definition of what “should have been preserved”¹⁸ and invokes a standard of care which does not call for perfection.¹⁹ If the party has taken reasonable steps, Rule 37(e) measures are not warranted.²⁰

Subdivision (e)(2) makes presumptions and adverse-inference jury instructions available when the spoliation is motivated by an “intent to deprive” another party of the use of the ESI in the litigation.²¹ Case-dispositive measures such as dismissals or default judgments are also available.²²

Subdivision (e)(1), on the other hand, makes a broad range of curative measures available without a finding of culpability when “no greater than necessary to cure . . . prejudice.”²³ This includes

(2010) (“a rule addressing preservation (spoliation) would be a valuable addition to the Federal Rules”). The Members of the Panel were the Hon. Shira A. Scheindlin, Hon. John Facciola, and four practitioners, including the Author. *See generally* Memorandum from Gregory P. Joseph to Hon. John G. Koeltl (May 11, 2010), https://www.uscourts.gov/sites/default/files/e-discovery_panel_executive_summary.pdf [<https://perma.cc/MC5Y-A99D>]. Greg Joseph chaired the Panel. *See id.*

¹⁴ *Newberry v. Cty. of San Bernardino*, 750 Fed. Appx. 534, 537 (9th Cir. 2018).

¹⁵ Proposed Amendments to the Fed. Rules of Civil Procedure, 305 F.R.D. 457 (2015).

¹⁶ *See generally*, Thomas Y. Allman, *The 2015 Civil Rules Package as Transmitted to Congress*, 16 SEDONA CONF. J. 1 (2015) [hereinafter *2015 Civil Rules Package*].

¹⁷ Ariana J. Tadler & Henry J. Kelston, *What You Need to Know About the New Rule 37(e)*, 52 TRIAL 20, 21 (2016) (“a modest adjustment in the developing law of preservation”).

¹⁸ Committee Note, *supra* note 6 (“[The Rule] does not attempt to create a new duty to preserve.”).

¹⁹ The Rule is “meant to encourage reasonable preservation behavior.” Hon. Paul W. Grimm, as quoted in Civil Rules Advisory Comm., Meeting Minutes 22 (April 10-11, 2014) [hereinafter Grimm Comments]. Judge Grimm chaired the Discovery Subcommittee that developed Rule 37(e). *See id.*

²⁰ *See, e.g., Bragg v. Sw. Health Sys., Inc.*, No. 18-cv-00763-MSK-NRN, 2020 WL 3963714, at *7 (D. Colo. July 13, 2020).

²¹ FED. R. CIV. P. 37(e)(2).

²² *Id.* *See also Roadrunner Transp. Servs. v. Tarwater*, 642 Fed. Appx. 759, 759 (9th Cir. 2016).

²³ FED. R. CIV. P. 37(e)(1).

admitting evidence and argument about spoliation to the jury. “Much is entrusted to the court’s discretion.”²⁴

The remedies available under Subdivision (e)(1) and (e)(2) are complementary, not alternatives. A moving party may, for example, be allowed to present evidence to the jury about the destruction of ESI as well as receive an adverse-inference jury instruction when warranted.

II. NEW LIMITS

An adverse-inference jury instruction is not available unless a party acted with an “intent to deprive” another party of the use of the ESI in the litigation.²⁵ The Rule rejects cases such as *Residential Funding Corp. v. DeGeorge Fin. Corp.*²⁶ that authorize such instructions based on negligence or gross negligence. Such behavior “does not logically support” the inference “that the evidence was unfavorable to the party responsible for loss or destruction of the evidence.”²⁷

In *Zubulake v. UBS Warburg LLC*, for example, relying on *Residential Funding Corp.*, an adverse-inference instruction was given because some employees disregarded preservation instructions.²⁸ The result was a substantial verdict (and

²⁴ Committee Note, *supra* note 6, at Subdivision (e)(1).

²⁵ FED. R. CIV. P. 37(e)(2); Thomas Y. Allman, *Rule 37(e): The Report from Portland*, 4-5 (April 14, 2014), http://www.lfcj.com/uploads/3/8/0/5/38050985/allman_rule_37e_the_report_from_portland_4.14.14.pdf [<https://perma.cc/4LLZ-BF8H>] (reproducing copy of last-minute revisions adopted at the final Rules Meeting).

²⁶ 306 F.3d 99, 101 (2d Cir. 2002).

²⁷ Committee Note, *supra* note 6, at Subdivision (e)(1). As then Magistrate Judge Facciola noted in *D’Onofrio v. SFX Sports Grp., Inc*, No 06-687 (JDB/JMF), 2010 WL 3324964, at *10 (D.D.C. 2010) (“When, as in this case, it is not a party’s bad faith that leads to the destruction of evidence, its actions hardly bespeak an intention worthy of such a harsh punishment [as an adverse-inference instruction] because the logical premise of the instruction—that the spoliator must have destroyed the evidence to keep any one from seeing it—is not there.”).

²⁸ 229 F.R.D. 422, 440 (S.D.N.Y. 2004) (relying on *Residential Funding Corp.*, 306 F.3d at 99) (if the jury finds “the evidence would have been material in deciding facts in dispute” it will be permitted, but not required, “to infer that the evidence would have been unfavorable to UBS”).

settlement) said to have been influenced by the adverse-inference charge.²⁹

While the “intent to deprive” requirement has eliminated the use of adverse-inference jury instructions in such cases, they remain available. In *GN Netcom, Inc. v. Plantronics, Inc.*, for example, the jury was asked to determine if the spoliation had “tilted the playing field” against the moving party and was instructed that it had the freedom to draw inferences to balance that impact should it feel it was necessary.³⁰

In *Orion Drilling Co. v. EQT Prod. Co.*, the jury was told that it “may choose to find that [the spoliation] is determinative, somewhat determinative or not at all determinative in reaching your verdict.”³¹ In *Legacy Data Access, LLC v. MediQuant, Inc.*, there was “sufficient evidence, combined with the instruction of spoliation,” to permit the jury to conclude that unlawful appropriation of trade secrets existed.³² An adverse inference may also bar the issuance of a summary judgment.³³

III. INFORMING THE JURY

According to the Committee Note, Rule 37(e)(1) authorizes courts to permit the jury to receive evidence and argument about spoliation if “no greater than necessary to cure the prejudice” resulting from a failure to take reasonable steps to preserve.³⁴ This responds to the perceived need for something curative that

²⁹ *Sanctions in Electronic Discovery Cases: Views from the Judges*, 78 FORDHAM L. REV. 1, 7-9 (2009) (remarks of Hon. Shira A. Scheindlin) (“I have no doubt that this huge verdict [\$9 million in compensatory and over \$20 million in punitive damages] was due in large part to the charge as “I played a small role” in the settlement after trial.)

³⁰ C.A. No. 12-1318-LPS, 2017 WL 4417810, at *3 (D. Del. Oct. 5, 2017), *rev'd and remanded on other grounds*, 930 F.3d 76, 83 (3d Cir. 2019) (the court properly opted for “a permissive adverse instruction”).

³¹ No. 16-1516, 2019 WL 4273861, at *32 (W.D. Pa. Sept. 10, 2019), *aff'd*, 826 Fed. Appx. 204, 218 (3d Cir. 2020) (the “permissive and tailored adverse-inference instruction was reasonable and not an abuse of discretion”) (citing *GN Netcom*, 930 F.3d at 83).

³² No. 3:15-cv-00584-FDW-DSC, 2017 WL 6001637, at *8 (W.D.N.C. Dec. 4, 2017).

³³ *See Auer v. City of Minot*, 896 F.3d 854, 858 (8th Cir. 2018).

³⁴ Committee Note, *supra* note 6, at Subdivision (e)(1).

permits courts to have a choice between doing nothing and issuing serious sanctions.³⁵

The Rule thus channels the historic practice in some Circuits of allowing “lesser sanctions” in the absence of bad faith.³⁶ As Judge Grimm explained to the Rules Committee at the time of adoption, there is “a proper evidentiary aspect to lost information” that is not a “sanction.”³⁷

Typically, a decision to inform the jury follows a determination that a showing of an “intent to deprive” has not been made. In *Nuvasive, Inc. v. Madsen Med., Inc.*, where that was the case, the court reconsidered its initial plan to give an adverse-inference instruction and decided to allow the parties to present evidence and argument regarding the loss for the jury to consider along with other evidence in the case.³⁸

Reasonable rebuttal and argument is available and the court has discretion to give guidance to the jury. However, doing so must not have the prohibited impact of instructions available under Subdivision (e)(2).³⁹ The purpose is to help restore the party to the same position he “would have been in” had the duty to preserve been respected.⁴⁰ It is not intended to enable the jury “to *punish* the spoliating party absent proof of ‘intent to deprive.’”⁴¹

A. Prejudice

Evidence of spoliation is admissible under Subdivision (e)(1) only if the loss of ESI has caused meaningful prejudice to the presentation of proof of a claim or defense.⁴² This “serve[s] as a

³⁵ Civil Rules Advisory Comm., Notes of Discovery Subcommittee Conference Call 5 (Aug. 27, 2012).

³⁶ *Henning v. Union Pac. R.R.*, 530 F.3d 1206, 1220 (10th Cir. 2008) (stating that courts may impose lesser sanctions absent a finding of bad faith if missing evidence is relevant to proof of an issue at trial) (citations omitted).

³⁷ Grimm Comments, *supra* note 19, at 24.

³⁸ No.: 13cv2077 BTM(RBB), 2016 WL 305096, at *3 (S.D. Cal. Jan. 26, 2016).

³⁹ Committee Note, *supra* note 6, at Subdivision (e)(2).

⁴⁰ *Storey v. Effingham Cty.*, CV415-149, 2017 WL 2623775, at *5 (S.D. Ga. June 16, 2017).

⁴¹ Hon. Shira A. Scheindlin & Natalie M. Orr, *The Adverse Inference Instruction After Revised Rule 37(e): An Evidence-Based Proposal*, 83 *FORDHAM L. REV.* 1299, 1309 (2014).

⁴² *FED. R. CIV. P.* 37(e)(1).

bulwark against frivolous or strategic motions”⁴³ and incorporates the “long-standing legal principle embodied in the phrase used on basketball courts everyday across the country: ‘No harm; no foul.’”⁴⁴

Prejudice varies along a spectrum from “an inability to prove claims or defenses to little or no impact on the presentation of proof.”⁴⁵ As the Committee Note suggests, assessing its significance “necessarily involves determining the importance of the missing ESI to the claims or defenses.”⁴⁶ In *Living Color Enters., Inc. v. New Era Aquaculture, Ltd.*, satisfaction of the requirement required the party to show a direct nexus between the missing evidence and the allegations made in the complaint.⁴⁷ “The [R]ule does not place [the] burden of proving or disproving prejudice on one party or the other.”⁴⁸

The moving party must offer “plausible, concrete suggestions as to what [the lost] evidence might have been.”⁴⁹ In *Hamilton v. Ogden Weber Tech. Coll.*, the lost emails were “reasonably” expected to have contained evidence of a retaliatory motive important to the case.⁵⁰ Not only must the missing evidence be probative, but it must also affirmatively support the claim or defense.⁵¹

There is no prejudicial impact from the loss of ESI when “the abundance of preserved information” is “sufficient to meet the

⁴³ A. Benjamin Spencer, *The Preservation Obligation: Regulating and Sanctioning Pre-Litigation Spoliation in Federal Court*, 79 FORDHAM L. REV. 2005, 2034 (2011).

⁴⁴ *Snider v. Danfoss, LLC*, 15 CV 4748, 2017 WL 2973464, at *1, *4 (N.D. Ill. July 12, 2017) (there is no prejudice from “the loss of irrelevant ESI”).

⁴⁵ *Steves & Sons, Inc. v. Jeld-Wen, Inc.*, 327 F.R.D. 96, 110 (E.D. Va. 2018) (quoting *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 532 (D. Md. 2010)).

⁴⁶ Comments, Hon. John M. Facciola to Author, January 2, 2021 (on file with author).

⁴⁷ No. 14-cv-62216-MARRA/MATTHEWMAN, 2016 WL 1105297, at *5-6 (S.D. Fla. Mar. 22, 2016).

⁴⁸ Committee Note, *supra* note 6, at Subdivision (e)(1).

⁴⁹ *Percella v. City of Bayonne*, Civ. No. 14-3695 (KM) (JBC), 2020 WL 6559203, at *11 (D.N.J. Nov. 9, 2020).

⁵⁰ No. 1:16-cv-00048-JNP-DBP, 2017 WL 5633106, at *3 (D. Utah Nov. 21, 2017).

⁵¹ *Ungar v. City of New York*, 329 F.R.D. 8, 15 (E.D.N.Y. 2018) (the “remedial prong” of the prejudice requirement requires that the evidence be shown to have supported his or her case).

needs of all parties”⁵² or when it would not significantly improve the ability to prove the claims at issue.⁵³ In *Capricorn Mgmt. Sys., Inc. v. Gov’t Emps. Ins. Co.*, the moving parties “were unable to show that any lost information was important or how they were prejudiced.”⁵⁴

Unless the court explicitly explains why proof of negligent spoliation makes a party’s liability more or less likely it risks reversal for admitting irrelevant evidence. As a former Magistrate Judge has noted, “reversal is more likely if the court of appeals senses that the lower court encouraged the jury to punish a negligent fool for being a negligent fool.”⁵⁵

B. Examples

In *EPAC Techs., Inc. v. Thomas Nelson, Inc.*, the trial judge informed the jury that certain data which might have been important to the case was not preserved, after a modification to the original form proposed by the Magistrate Judge.⁵⁶ The jury was instructed that it could give that information “whatever weight you deem appropriate as you consider all of the evidence presented at trial.”⁵⁷ After a verdict in favor of the moving party, the use of the instruction was affirmed by the Sixth Circuit.⁵⁸

⁵² Committee Note, *supra* note 6, at Subdivision (e) (explaining that ESI “often exists in multiple locations, [and] loss from one source may often be harmless when substitute information can be found elsewhere”).

⁵³ *Steves & Sons, Inc. v. Jeld-Wen, Inc.*, 327 F.R.D. 96, 110 (E.D. Va. 2018) (any benefit “is almost totally speculative”).

⁵⁴ 15-CV-2926 (DRH) (SIL), 2020 WL 1242616, at *7 (E.D.N.Y. Mar. 16, 2020).

⁵⁵ Comments, Hon. John M. Facciola to Author, Jan. 2, 2021 (on file with author) (also observing that the Federal Rules of Evidence do not permit an inference to be drawn from a person’s character. FED. R. EVID. 404(a)).

⁵⁶ No. 3:12-cv-00463, 2018 WL 3322305, at *3 (M. D. Tenn. May 14, 2008).

⁵⁷ *Id.* The Magistrate Judge had recommended that the trial court instruct that the “data, now lost, would have shown whether” certain facts critical to the case existed. *Id.* The trial judge changed the instruction to provide what the data “may” have shown, making a “slight alteration” to conform to the Committee Note. *Id.* The non-moving party had argued that the instruction “invades the province of the jury.” *Id.* However, it is far from clear that the change resolved the challenge. It can be argued that the instruction also came close to informing the jury that the information was unfavorable.

⁵⁸ *EPAC Techs., Inc. v. HarperCollins Christian Publ’g, Inc.*, 810 Fed. Appx. 389, 403 (6th Cir. 2020) (use affirmed as no greater than necessary both as a matter of discretion and de novo), *aff’g*, 398 F. Supp. 3d 258, 280 (M.D. Tenn. 2019) (refusal of trial court to reconsider the form because the permissive form of the instruction prevents an assessment of its impact on the verdict).

In *BMG Rights Mgmt. (US) LLC v. Cox Commc'ns, LLC*, the trial judge “alerted the jury to the fact of spoliation, identified the missing evidence, and permitted [it] to consider that fact in their deliberations” consistent with Rule 37(e)(1).⁵⁹ The court had rejected an argument that a dismissal was required because “lesser measures were sufficient.”⁶⁰

In *Esquivel v. Brownsville Indep. Sch. Dist.*, the jury was to be permitted to receive evidence concerning the loss of video footage and instructed that its loss “may have prevented [the party] from producing evidence of [the liability of the party that lost it].”⁶¹ The court noted that the party “should not be allowed to hide its spoliation of evidence from the jury, however unintentional that spoliation may have been.”⁶²

In *Waymo LLC v. Uber Techs., Inc.*, the trial court decided that evidence of use of communications that automatically disappeared forever was admissible as it was “relevant as a possible explanation for why Waymo . . . failed to turn up more evidence of misappropriation” of trade secrets.⁶³

In *Karsch v. Blink Health Ltd.*, the court admitted evidence and argument to help “rectify the evidentiary imbalance” created by the spoliation and to provide evidence “going to the parties’ credibility and other factual issues.”⁶⁴

In *Porter v. City and Cty. of San Francisco*, the court planned to inform the jury that a critical recording had been spoliated and that the failure to preserve it prevented the jury from hearing what was communicated, how it was stated and what was said in response.⁶⁵ The court explained that although not “a perfect fix, it

⁵⁹ 199 F. Supp. 3d 958, 986 (E.D. Va. 2016), *aff'd in part and vac'd in part on other grounds*, 881 F.3d 293 (4th Cir. 2018).

⁶⁰ *Id.* at 985-86 (noting that the moving party had been permitted to identify the spoliation issue at trial which was sufficient).

⁶¹ *Esquivel v. Brownsville Indep. Sch. Dist.* (*In re Esquivel*), No. 1:16-cv-40, 2018 WL 7050211, at *7 (S.D. Tex. Nov. 20, 2018, *report and recommendation aff'd*, No. 1:16-cv-00040, 2019 WL 219888, at *2 (S.D. Tex. Jan. 16, 2019).

⁶² *Id.*

⁶³ No. C 17-00939 WHA, 2018 WL 646701, at *21 (N.D. Cal. Jan. 30, 2018) (admissible if it can do so through qualified witnesses and evidence).

⁶⁴ 17-CV-3880 (VM) (BCM), 2019 WL 2708125, at *27 (S.D.N.Y. June 20, 2019).

⁶⁵ No. 16-cv-03771-CW(DMR), 2018 WL 4215602, at *4-5 (N.D. Cal. Sept. 5, 2018).

will cure the prejudice to Porter caused by the spoliation, but go[] no further.”⁶⁶

In *Youngevity Int’l v. Smith*, the court decided to allow the jury to receive evidence and argument about deleted text messages to be considered “beside other evidence.”⁶⁷ It permitted evidence of intent to be offered because of the possibility that the party had intended to destroy the evidence.⁶⁸ It assessed this approach to be permissible because “it is less formidable than sanctions allowed for a finding of intent.”⁶⁹

C. Arguments of Counsel

Courts typically permit the moving party to “argue for whatever inference they hope the jury will draw”⁷⁰ when the predicate conditions of Subdivision (e)(1) are satisfied. The District Court in *Issa v. Delaware State Univ.* emphasized that “[t]he jury will be assisted in fulfilling its obligations by hearing [about] the contested evidence from both sides”⁷¹

The District Judge in *In re Premera Blue Cross Customer Data Sec. Breach Litig.* planned to allow argument about the “adverse inferences” which could be drawn without itself doing so.⁷² In *Sec. Alarm Fin. Enters. v. Alarm Prot. Tech., LLC*, however, the court planned to prohibit arguments “that the jury may or should presume that the spoliated evidence was favorable” to it.⁷³

The Rules Committee was told at the time the Rule was adopted that argument “about [the] inferences the jury should draw from all the evidence about the favorable or unfavorable character of the lost evidence” would generally be appropriate.⁷⁴

Professor Charles Adams has argued that courts should, when possible, rely on attorney advocacy and the good sense of the

⁶⁶ *Id.* at *5.

⁶⁷ No.: 3:16-cv-704-BTM-JLB, 2020 WL 7048687, at *5 (S.D. Cal. July 28, 2020).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *HLV, LLC v. Page & Stewart*, No. 1:13, cv-1366, 2018 WL 2197730, at *4 (W.D. Mich. Mar. 2, 2018).

⁷¹ C.A. No. 14-168-LPS, 2019 WL 1883768, at *1 (D. Del. Apr. 26, 2019).

⁷² No. 3:15-md-2633-SI, 2018 WL 5786206, at *2 (D. Or. Nov. 5, 2018).

⁷³ No. 3:13-cv-00102-SLG, 2016 WL 7115911, at *8 (D. Alaska Dec. 6, 2016).

⁷⁴ Grimm Comments, *supra* note 19, at 24.

jurors to decide how the proof of spoliation should affect the outcome of the trial.⁷⁵ This is because “[e]mphasizing arguable inferences to jurors is the job of advocates, not courts.”⁷⁶

According to that source, jurors “are likely to view the arguments of attorneys with a healthy bit of skepticism, especially if, as is often the case, the jury is instructed that statements of attorneys are not evidence.”⁷⁷ The court may intervene if an attorney’s argument is improper, but “generally [it] should allow zealous advocacy [as] long as [it] stays within reasonable bounds.”⁷⁸

In *Rothman v. City of New York*, the court placed limits on what inferences counsel could and could not urge in advance of trial.⁷⁹ In *Waymo LLC v. Uber Techs., Inc.*, the court prohibited argument about a plan, not implemented, which had “no discernible relevance” to the case and appeared to be offered “in an apparent bid to poison the judge, if not the jury, against Uber.”⁸⁰

D. Instructions

The Committee Note was initially silent on whether a court should issue guidance when evidence and argument is made available without a showing of bad faith. This was consistent with historical practice involving “lesser sanctions.” As one court put it, while denying such a request prior to the Rule “[t]he jury will

⁷⁵ Charles W. Adams, *Spoliation of Electronic Evidence: Sanctions Versus Advocacy*, 18 MICH. TELECOMM. & TECH. L. REV. 1, 6 (2011). While Professor Adams acknowledges helpful suggestions on the article from Richard Marcus, the Reporter for Rule 37(e), then under development, the article is predicated on use of inherent authority as the source of authority for spoliation sanctions. *See id.* at 1, 6, 13-14.

⁷⁶ *Id.* at 52 & n.300 (quoting *Grazier ex rel. White v. City of Philadelphia*, 328 F.3d 120, 127 (3d Cir. 2003) (counsel advocacy is inherently more effective than an instruction, since it is unlikely that the court instruction can anticipate all the myriad of possible alternative inferences).

⁷⁷ *Id.* at 53 (citing *Boyd v. California*, 494 U.S. 370, 384 (1990)) (“[a]rguments of counsel are usually billed in advance to the jury as matters of argument, not evidence”).

⁷⁸ *Id.* at 54 & n.315 (The standard “can be said to be not merely weak or unfounded, but unfair and prejudicial.”) (citation omitted).

⁷⁹ No. 19 Civ. 225 (CM), 2020 WL 5628051, at *3 (S.D.N.Y. Sept. 21, 2020).

⁸⁰ No. C 17-00939 WHA, 2018 WL 646701, at *22 (N.D. Cal. Jan 30, 2018).

simply have to draw its own [conclusions] without a specific ‘adverse inference’ instruction from the Court.”⁸¹

However, the final version of the Committee Note provides that a court may provide guidance “to assist [the jury] in its evaluation of [the testimony and] argument.”⁸² It emphasizes, however, that the jury may only be told that it may “consider that evidence[] along with all the other evidence in the case.”⁸³

The intent is to distinguish the instruction from one available upon a showing of “intent to deprive.”⁸⁴ A court may not instruct the jury “that the destroyed evidence [was] *unfavorable*” to the party that lost it.⁸⁵ In *Montgomery v. Iron Rooster-Annapolis, LLC*, the Magistrate Judge suggested that the trial judge *could* instruct the jury as to whether the missing evidence would have been favorable to the moving party.⁸⁶ That is a bridge too far.⁸⁷

Even if the instruction does not explicitly permit the jury to draw an adverse inference, however, a jury is likely to view such instruction as having an equivalent weight. In *Haley v. Kolbe & Kolbe Millwork Co.*, the court noted that it saw “little difference between an adverse . . . instruction and an instruction that plaintiffs ‘breached their duty to preserve evidence.’”⁸⁸

In *Mueller v. Taylor Swift*, the court had “little doubt” that a jury receiving evidence about spoliation would draw their own adverse inferences whether the court instructs it or not.⁸⁹

⁸¹ U.S. *ex. rel.* Koch v. Koch Indus., Inc., 197 F.R.D. 463, 486 (N.D. Okla. 1998) (permitting jury to learn of destruction of computer tapes and its impact on plaintiffs’ proof).

⁸² Committee Note, *supra* note 6, at Subdivision (e)(1).

⁸³ *Id.* at Subdivision (e)(2).

⁸⁴ *Id.* (“[c]are must be taken, however, to ensure that curative measures . . . do not have the effect of measures that are permitted under subdivision (e)(2) only on a finding of intent to deprive”).

⁸⁵ Storey v. Effingham Cty., CV415-149, 2017 WL 2623775, at *5 & n.5 (S.D. Ga. June 16, 2017).

⁸⁶ Civil No. RDB-16-3760, 2017 WL 1902699, at *2 (D. Md. May 9, 2017), *report and recommendation adopted*, Civil Action No. RDB-16-3760, 2017 WL 4868918, at *1 (D. Md. May 26, 2017).

⁸⁷ See Robert Keeling, *Sometimes, Old Rules Know Best: Returning to Common Law Conceptions of the Duty to Preserve in the Digital Information Age*, 67 CATH. U. L. REV. 67, 97 n.230 (2018) (*Iron-Rooster* left “the door open for instructing the jury to draw an adverse inference”).

⁸⁸ No. 14-cv-99-bbc, 2014 WL 6982330, at *2 (W.D. Wis. Dec. 10, 2014).

⁸⁹ Civil Action No. 15-cv-1974-WJM-KLM, 2017 WL 3058027, at *6 (D. Colo. July 19, 2017).

While it may well be true that jurors may draw their own adverse inferences⁹⁰ that does not mean they should be *instructed* to do so. Instructions come “dressed in the authority of the court” giving them more weight than if merely argued by counsel.⁹¹ It may be best to let the jury “draw its own conclusions” from the loss or destruction involved based on counsel advocacy.⁹²

E. Missing Evidence Instructions

A traditional “missing evidence” instruction is used when evidence available to a party at the time of trial is not produced. It does not require a finding of culpable intent. The Committee Note to Rule 37(e) acknowledges that its requirements do not limit the use of such instructions.⁹³

In *Mali v. Fed. Ins.*, the Second Circuit permitted a jury to infer that a photograph which had not been produced at trial “would have been unfavorable” to the non-producing party without requiring a finding of culpability.⁹⁴ It described its instruction as “no more than an explanation of the jury’s fact-finding powers” which was not intended as a sanction.⁹⁵

Some have suggested that the *Mali* instruction may be used when a party fails to take reasonable steps to preserve ESI but no finding of intent to deprive is made.⁹⁶ In *Tchatat v. O’Hara*, for example, the District Judge, citing *Mali*, stated that it would entertain use of a permissive adverse-inference instruction “not as

⁹⁰ See, e.g., Tadler & Kelston, *supra* note 17, at *23 (“the jury might make an adverse inference on its own, based on the arguments and evidence presented”).

⁹¹ Arch Ins. v. Broan-Nutone, LLC, 509 Fed. Appx. 453, 459 (6th Cir. 2012).

⁹² Brown v. Albertsons, LLC, No. 2:16-cv-01991-JAD-PAL, 2017 WL 1957571, at *11 (D. Nev. May 11, 2017).

⁹³ Committee Note, *supra* note 6, at Subdivision (e)(2). “[S]ubdivision (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.”)

⁹⁴ 720 F.3d 387, 391 (2d Cir. 2013).

⁹⁵ *Id.* at 393.

⁹⁶ Cf. Scheindlin & Orr, *supra* note 41, at 1307 (the most “logical conclusion” is that the revised version of the Committee Note “still permits a *Mali*-type instruction to guide the jury’s consideration of spoliation . . . without requiring ‘intent to deprive.’” (citing SUMMARY OF COMMENTS ON PROPOSED RULE 37(E), AUGUST 2013 PUBLICATION 380, in COMMITTEE ON RULES OF PRACTICE AND PROCEDURE (May 29-30, 2014) (public comments by N.Y. City Bar Association supporting use of jury instructions and citing *Mali*, 720 F.3d at 391-94.)).

a punishment” for misconduct but as an example of reasoning process known as circumstantial evidence.⁹⁷

On appeal after a jury verdict, the Second Circuit affirmed the denial of the use of an adverse inference because the issues “overlapped with the merits” without commenting on (or confirming use of) the alternative instruction based on *Mali*.⁹⁸

As Judge Grimm has pointed out, one should be cautious about adopting *Mali* for lost ESI cases, since the court was acting under its inherent authority and it relied on the “common law evidentiary doctrines, such as missing witness instructions, since there was no specific rule to deal with the situation.”⁹⁹

F. Evaluation

Authorizing the court to inform the jury about spoliation necessarily permits it to second guess judicial determinations that spoliation has, in fact, occurred. While this is unacceptable to some,¹⁰⁰ it is consistent with the Seventh Amendment and does not limit court discretion on whether to involve the jury.

The greater policy concern, however, is whether it unnecessarily risks a revival of *Residential Funding*.¹⁰¹ Juries may draw adverse inferences even though not instructed they may do so. As was noted during the Dallas Public Hearing, admitting spoliation evidence “could become an avenue for preserving the existing sanctions regime under another name, and could

⁹⁷ No. 14 Civ. 2385 (LGS), 2017 WL 3172715, at *11 (S.D.N.Y. July 25, 2017) (citing *Mali*, 720 F.3d at 393) (refusing a traditional adverse inference instruction because it would usurp the function of the jury to deal with allegations of malicious prosecution).

⁹⁸ 795 Fed. Appx. 34, 37 (2d Cir. 2019).

⁹⁹ Comments, Hon. Paul W. Grimm to Author, Dec. 8, 2020 (on file with author) (the “missing witness” instruction has its own set of requirements if which must be met if it is to withstand appellate scrutiny).

¹⁰⁰ *Cf.* *Brookshire Bros. Ltd. v. Aldridge*, 438 S.W.3d 9, 20 (Tex. 2014) (“the trial court, rather than the jury, must determine whether a party spoliated evidence and, if so, impose the appropriate remedy”); *Scheidlin & Orr*, *supra* note 41, at 1309 (“We respectfully disagree with the Texas Supreme Court that juries are institutionally incapable of drawing reasoned conclusions about how evidence was lost or destroyed”).

¹⁰¹ *See generally* *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99 (2d Cir. 2002); *2015 Civil Rules Package*, *supra* note 16, at 39 (great care is required to ensure this does not result).

undermine the core purpose of requiring [intent to deprive] before sanctions may be awarded.”¹⁰²

The risk is real. In *Rothman v. City of New York*, the court observed that “the only reason for telling the jury” of the spoliation would be to ask them to infer that the contents were favorable to the moving party.¹⁰³

IV. CONDITIONAL INFERENCES

According to the Committee Note, courts may issue conditional adverse-inference instructions whose use depends on the jury having found that an “intent to deprive” exists.¹⁰⁴ The Note does not explain why courts should depart from the normal practice of making the assessment themselves.¹⁰⁵

The Amended Rule provides, moreover, that “*the court . . . only upon finding that the party acted with the intent to deprive . . . may*” permit or require an adverse-inference instruction.¹⁰⁶ Nonetheless, the Committee Note interpretation has been treated as authoritative.¹⁰⁷

There must be a preliminary determination by the court that a reasonable jury could find the condition to be satisfied based on the evidence available.¹⁰⁸ In *Gipson v. Mgmt. & Training Corp.*, the District Court indicated it would consider allowing the jury to

¹⁰² Comm. on Rules of Practice and Procedure, Report of Advisory Committee on Civil Rules; Summary of Comments on Proposed Rule 37(e), Aug. 2013 Publication, 372 (May 2014).

¹⁰³ No. 19 Civ. 225 (CM), 2020 WL 5628051, at *3 (S.D.N.Y. Sept. 21, 2020).

¹⁰⁴ Committee Note, *supra* note 6.

¹⁰⁵ *See id.* Cf. Wm. Grayson Lambert, *Keeping the Inference in the Adverse Inference Instruction: Ensuring the Instruction is an Effective Sanction in Electronic Discovery Cases*, 64 S.C.L. REV. 681, 701-02 & n.140 (2013) (a jury should not be instructed that they may draw an adverse inference if it finds bad faith conduct because “[t]he risk that the jury will draw the inference when it is unwarranted is too severe to allow the jury to make initial decisions about whether the inference should be in play”).

¹⁰⁶ Committee Note, *supra* note 6, at Subdivision (e) (emphasis added).

¹⁰⁷ Reliance on a Committee Note is a common practice in the Supreme Court and throughout the federal judiciary. Adam N. Steinman, *The End of an Era? Federal Civil Procedure After the 2015 Amendments*, 66 EMORY L.J. 1, 42-43 (2016); *see also* *Sosa v. Carnival Corp.*, No. 18-20957-CIV-ALTONAGA/GOODMAN, 2019 WL 330865, at *3 (S.D. Fla. Jan. 25, 2019) (no authority mandates that the “judge, instead of a jury, [must] decide the intent to deprive issue”).

¹⁰⁸ Gregory P. Joseph, *Rule 37(e): The New Law of Electronic Spoliation*, 99 JUDICATURE 35, 40 (2015).

decide the intent issue at the charging conference “assuming there is sufficient trial evidence supporting it.”¹⁰⁹

This form of instruction makes effective use of evidence admitted as a curative measure. As one court suggested, “as the trial unfolds,” the jury may be “allowed to assess the evidence and, properly instructed, find the defendant acted intentionally.”¹¹⁰ The practice has been implicitly endorsed by the Eighth Circuit by virtue of its affirmation of the results in *Infogroup, Inc. v. DatabaseLLC*.¹¹¹

A. Background

In the highly influential *Rimkus Consulting Grp. v. Cammarata* decision, Judge Lee Rosenthal instructed the jury that it should decide whether the party had deleted emails and attachments to prevent their use in the litigation and, if so, it could infer that the contents would have been unfavorable to the defendants.¹¹²

The practice owes its intellectual roots to *Vodusek v. Bayliner Marine Corp.*, where the jury was permitted to draw an adverse inference if it found that the party or its agents had acted intentionally in causing the destruction of the evidence at issue.¹¹³ As the Court noted, rather than deciding the issue itself, the “district court provided the jury with appropriate guidelines for evaluating the evidence.”¹¹⁴

¹⁰⁹ No. 3:16-CV-624-DPJ-FKB, 2018 WL 736265, at *7 (S.D. Miss. Feb. 6, 2018).

¹¹⁰ *Franklin v. Howard Brown Health Ctr.*, No. 17 C 8376, 2018 WL 4784668, at *7 (N.D. Ill. Oct. 4, 2018), *report and recommendation adopted*, 1:17 C 8376, 2018 WL 5831995 (N.D. Ill. Nov. 7, 2018).

¹¹¹ See 956 F.3d 1063, 1067 (8th Cir. 2020).

¹¹² 688 F. Supp. 2d 598, 620, 645 (S.D. Tex. 2010) (the adverse-inference instruction is warranted to level the evidentiary playing field and sanction the improper conduct). See also *Phan v. Costco Wholesale Corp.*, No. 19-cv-05713-YGR, 2020 WL 5074349, at *4 (N.D. Cal. Aug. 24, 2020) (“You may consider whether one party intentionally concealed or destroyed evidence. If you decide that a party did so, you may decide that the evidence would have been unfavorable to that party.”).

¹¹³ 71 F.3d 148, 157 (4th Cir. 1995).

¹¹⁴ *Id.* (alluding to Seventh Amendment considerations).

As a practical matter, it relieves courts of having to make tough calls that may be second-guessed by appellate courts.¹¹⁵

B. Intent to Deprive

An “intent to deprive” involves not merely an intent to perform an act that destroys ESI, but one that was done to deprive another party of the use of the evidence.¹¹⁶ It “significantly limits a court’s discretion” to impose harsh sanctions for loss or destruction of ESI.¹¹⁷

As noted by the Sixth Circuit, “[a] showing of negligence or even gross negligence will not do the trick.”¹¹⁸ It requires courts (or, in this case, the jury) to place heavy reliance on circumstantial evidence. In *Colonies Partners, L.P. v. Cty. of San Bernardino*, for example, the court found that the requisite intent was evident from the “timing and circumstances of the text message and email deletions.”¹¹⁹

It is not enough, however, that the party failed to take reasonable steps; if that were sufficient, it would “render meaningless the separate ‘intent to deprive’ requirement” of Subdivision (e)(2).¹²⁰

C. Examples

In *Woods v. Scissons*, after informing the jury about the existence of video footage that should have been preserved, the jury was to be “instructed that it may consider that evidence along with all other evidence in reaching its decision.”¹²¹ If it should

¹¹⁵ The same colleague that is skeptical of the trend towards limiting judicial responsibility (*see supra*, note 7) has noted to the Author that this may explain the growing popularity of the option to overwork trial courts.

¹¹⁶ *Leidig v. BuzzFeed, Inc.*, 16 Civ. 542 (VM) (GWG), 2017 WL 6512353, at *11 (S.D.N.Y. Dec. 19, 2017).

¹¹⁷ *Flair Airlines, Ltd. v. Gregor, LLC*, No. 18-CV-2023, 2018 WL 8445779, at *3 (N.D. Ill. Dec. 14, 2018), *report and recommendation adopted*, No. 18 C 2023, 2019 WL 1465736, at *3 (N.D. Ill. April 3, 2019) (sanctions “not warranted”).

¹¹⁸ *Applebaum v. Target Corp.*, 831 F.3d 740, 745 (6th Cir. 2016).

¹¹⁹ No. 5:18-cv-00420-JGB (SHK), 2020 WL 1496444, at *12 (C.D. Cal. Feb. 27, 2020).

¹²⁰ *Fashion Exch., LLC v. Hybrid Promotions, LLC*, 14-CV-1254 (SHS) (OTW), 2019 WL 6838672, at *6 (S.D.N.Y. Dec. 16, 2019).

¹²¹ No. CV-17-08038-PCT-GMS, 2019 WL 3816727, at *7 (D. Ariz. Aug 14, 2019).

conclude, however, that the video was “destroyed . . . and [the party] acted with the intent to deprive,” it may “assume that the video footage would have been favorable” to the moving party.¹²²

The court explained that this would allow the “determination of intent to be made on a more fully developed evidentiary record,” was no more than necessary to cure prejudice, and was “in harmony with the Advisory Committee Notes.”¹²³

In *Spencer v. Luanda Bay Boys*, the court decided that it would permit the jury to hear evidence and argument concerning what was destroyed.¹²⁴ The trial court would be able to give an adverse-inference instruction or, “[a]lternatively,” the jury could be instructed it could infer from the loss that it was unfavorable if found that the party acted with an intent to deprive.¹²⁵

In *Epicor Software Corp. v. Alt. Tech. Sols., Inc.*, the court described the “intent” issue as “an open question” best suitable for resolution by the jury and decided to issue a conditional adverse-inference jury instruction “that is in accord with the language in the Committee Notes.”¹²⁶

Juries have also been identified for such use when the issue of intent was a “close” call and intertwined with the merits, as was the case in both *Cahill v. Dart*¹²⁷ and *BankDirect Capital Fin., LLC v. Capital Premium Fin., Inc.*¹²⁸

In *Coan v. Dunne*, the court could not conclude “by a preponderance of the evidence (much less by clear and convincing evidence)” that the party had failed to preserve email because of an intent to make it unavailable.¹²⁹ However, it was prepared to instruct the jury that if it concluded that the party acted with an

¹²² *Id.* at *6.

¹²³ *Id.* at *7 (quoting relevant text from Committee Note, *supra* note 6, at Subdivision (e)(2)).

¹²⁴ No. CV 16-02129-SJO (RAOx), 2017 WL 10518023, at *12 (C.D. Cal. Dec. 13, 2017).

¹²⁵ *Id.* (citing Committee Note, *supra* note 6, at Subdivision (e)(2)), *report and recommendation adopted in relevant part*, No. CV 16-02129-SJO (RAOx), 2018 WL 839862, at *2 (C.D. Cal. Feb. 12, 2018).

¹²⁶ No.: SACV 13-00448-CJC(JCGx), 2015 WL 12734011, at *2 (C.D. Cal. Dec. 17, 2015).

¹²⁷ No. 13-cv-361, 2016 WL 7034139, at *4 (N.D. Ill. Dec. 2, 2016) (spoliation issue intertwined with allegations of malicious prosecution).

¹²⁸ No. 15 C 10340, 2018 WL 1616725, at *12 (N.D. Ill. April 4, 2018).

¹²⁹ 602 B.R. 429, 441 (D. Conn. 2019).

intent to deprive, it could conclude that this was sufficient to establish liability with respect to the transactions at issue.¹³⁰

In *Sosa v. Carnival Corp.*, the court gave the moving party the choice of having the jury decide the issue of intent or merely having the jury advised that a video once existed, but “is no longer available.”¹³¹ It noted the risks to the party of choosing the option of placing the intent issue before the jury.¹³²

In *Univ. Accounting Serv. v. Schulton*, the jury was told that if you “do not first find” that the party acted with intent to deprive, “you may not draw any inference at all about the content of the lost information based on the fact of that deletion.”¹³³

D. Prejudice

The Committee Note states that a party typically seeking an adverse-inference jury instruction need not make a prior showing of prejudice.¹³⁴ However, the better practice is to do so. Should the jury asked to review the topic fail to find an “intent to deprive,” prejudice would not be presumed, raising the possibility that evidence and argument otherwise unavailable under the Rule may have been unfairly admitted.

Alternatively, the court could convene an advisory jury under Rule 52(a).¹³⁵ This would permit the court to make its own findings as to intent while receiving the benefit of a jury assessment without the risk of undue prejudice to the separate jury hearing the merits of the case.

¹³⁰ *Id.* at 442.

¹³¹ *Sosa v. Carnival Corp.*, No. 18-20957-CIV-ALTONAGA/GOODMAN, 2018 WL 6335178, at *21 (S.D. Fla. Dec. 4, 2018), *recon. denied*, No. 18-20957-CIV-ALTONAGA/GOODMAN, 2019 WL 330865 (S.D. Fla. Jan. 25, 2019).

¹³² *Sosa*, 2019 WL 330865 at *7 (if the evidence “happens to” convince the jury that there was no intent to deprive and that Carnival took reasonable steps, “then so be it”).

¹³³ No. 3:18-cv-1486-SI, 2020 WL 2393856, at *21-22 (D. Or. May 11, 2020) (reproducing jury instruction given at trial). *See also* *Univ. Accounting Serv., LLC v. Schulton*, No. 3:18-cv-1486-SI, 2019 WL 2404512, at *7 (D. Or. June 7, 2019) (describing the reasons for its decision prior to trial).

¹³⁴ *Schulton*, 2019 WL 2404512, at *7. According to the Committee Note if the jury finds intent to deprive, that finding is sufficient to presume that prejudice exists. Committee Note, *supra* note 6.

¹³⁵ *See* FED. R. CIV. P. 52(a).

V. CONCLUSION

The Amended Rule provides a uniform and rational framework for informing juries of a failure to take reasonable steps to preserve ESI.¹³⁶ In doing so, Rule 37(e) joins Rule 37(c)(1)(B) in relying on the jury to assess the importance of a failure to conform to a discovery standard by informing it of that fact.¹³⁷

A fair question, however, is whether doing so risks undermining the rejection of use of negligent conduct as a justification for issuing adverse-inference jury instructions. The Committee Note argues that it is sufficient to eschew instructing the jury that it may or must presume that the missing evidence was unfavorable.¹³⁸ That may not be enough. If a court instructs the jury with too much specificity on what ESI “may” be missing it risks implying that the *court* thinks it was unfavorable. That inference is best left for the jury to draw, if at all, based on all the evidence presented.¹³⁹

Avoiding unfairness or confusion while informing the jury is the responsibility of the trial court. For example, if the degree of prejudice to a fair resolution on the merits is unduly speculative, the court should not inform the jury or ask it to assess the intent involved in its loss. As emphasized in *Waymo LLC v. Uber Techs.*,

¹³⁶ Juries are also frequently asked to assess whether the party acted with sufficient culpability to justify an adverse-inference instruction.

¹³⁷ See FED. R. CIV. P. 37(c)(1)(B). Since 1993, Rule 37(c)(1) has allowed the jury to be informed of the failure to disclose information required by Rule 26(a) or 26(e)(1) without substantial justification. See *Amendments to Federal Rules of Civil Procedure and Forms*, 146 F.R.D. 401, 691-92 (1993) (“like spoliation of evidence” the court may allow the jury to be informed of the fact of nondisclosure). See also *Bonin v. Chadron Cmty. Hosp.*, 163 F.R.D. 565, 570 (D. Neb. 1995) (rejecting suggested instruction to ameliorate harm). In *DR Distributors, LLC v. 21 Century Smoking, Inc.*, ___F.Supp.3d___, 2021 WL 185082, at *4 (N.D. Ill. Jan. 19, 2021), the District court announced its intent to inform the jury under Rule 37(c)(1)(B) of the failure to provide certain documents as well as to instruct it that it may consider spoliation of ESI under Rule 37(e)(1). (citing Thomas Y. Allman, *Dealing with Prejudice: How Amended Rule 37(e) Has Refocused ESI Spoliation Measures*, 26 RICH. J.L. & TECH 1 (2020)).

¹³⁸ Committee Note, *supra* note 6.

¹³⁹ In *Mueller v. Swift*, Civil Action No. 15-cv-1974-WJM-KLM, 2017 WL 3058027, at *6 (D. Colo. July 19, 2017) (the court admitted the evidence *because* the jury would make its own assessment).

Inc., courts should not permit the “transform[ation]” of the trial on the merits into one on “litigation conduct (or misconduct).”¹⁴⁰

Ultimately, however, given the strong policy in favor of basing adjudications on a complete record, it is appropriate to admit evidence subject to court supervision. As Judge Stark explained in *GN Netcom, Inc. v. Plantronics, Inc.*, when case-dispositive measures are not warranted, a court can, with some struggle, provide a fair trial on the merits to both parties while informing the jury of spoliation and permitting it to assess its impact.¹⁴¹

¹⁴⁰ No. C 17-00939 WHA, 2018 WL 646701, at *22 (N.D. Cal. Jan. 29, 2018).

¹⁴¹ C.A. No. 12-1318-LPS, 2018 WL 273649, at *3 & n. 2 (D. Del. Jan. 3, 2018).