The Sedona Conference Journal

Volume 25 Forthcoming 2024

The Ubiquitous Role of the Specific "Intent to Deprive" Requirement of Amended Rule 37(e)(2)(B)

Thomas Y. Allman

April 2024

Recommended Citation:

Thomas Y. Allman, *The Ubiquitous Role of the Specific "Intent to Deprive" Requirement of Amended Rule 37(e)(2)(B)*, 25 SEDONA CONF. J. 137 (forthcoming 2024), https://thesedonaconference.org/publication/Intent_to_Deprive_Requirement_of_Amended_Rule_37e2B.

THE UBIQUITOUS ROLE OF THE SPECIFIC "INTENT TO DEPRIVE" REQUIREMENT OF AMENDED RULE 37(e)(2)(B)

"The Sedona Conference . . . accurately captures the critical concept." [1]

Thomas Y. Allman[2]

INTRODUCTION

On December 1, 2015, a completely revised Federal Rule of Civil Procedure 37(e) came into effect to provide a single, uniform standard for determining when measures would be available for the irrevocable loss of electronically stored information ("ESI") "that should have been preserved in the anticipation or conduct of litigation." Subdivision (e)(2) of the Amended Rule makes severe measures such as adverse inferences—or curative measures that are tantamount to a sanction—available only when a party has acted with "specific intent" to deprive another party of the use of ESI in the litigation. According to the advisory committee's note, Rule 37(e) "forecloses reliance on

1. Letter from Bradford A. Berenson, Vice President and Sr. Counsel, Response to the Federal Rules Advisory Committee by the General Electric Company to the Request to Bench, Bar and Public for Comments on Proposed Rules (Aug. 2013), at 11, *available at* https://downloads.regulations.gov/USC-RULES-CV-2013-0002-0599/attachment_1.pdf.

2. Copyright 2024 Thomas Allman. Tom is Chair Emeritus of Sedona Conference Working Group 1 (WG1) and a former General Counsel. He was a member of the E-Discovery Panel at the 2010 Duke Litigation Conference that advocated development of Amended Rule 37(e). *See, e.g.*, Thomas Y. Allman, *Preservation Rulemaking After the 2010 Litigation Conference*, 11 SEDONA CONF. J. 217, 223 (2010) (concerns about pre-rulemaking authority are "overblown"). The then-current version of Rule 37(e) dealt only with sanctions imposed under the Federal Rules.

inherent authority or state law" to determine when the listed measures should be used.[3]

The "intent to deprive" standard was recommended by the Steering Committee of the Sedona Conference Working Group One ("WG1")[4] during the public comment period as a substitute for the proposed requirement that a party's actions were "willful *or* in bad faith."[5] Sedona proposed a required showing of "specific intent" to deprive another party of relevant material evidence "prior to the imposition of sanctions and/or any curative measure that would be tantamount to a sanction."[6] The Discovery Subcommittee endorsed that approach after the final public hearing in Dallas, Texas.[7] It captures the critical understanding that allowing adverse inferences based on ordinary negligence "was a minority viewpoint that the advisory

3. Prelitigation variations in the federal approach were "largely the product" of common law regulation via inherent power. A. Benjamin Spencer, *The Preservation Obligation: Regulating and Sanctioning Pre-Litigation Spoliation in Federal Courts*, 79 FORDHAM L. REV. 2005, n.6 (2011) (the time is "ripe" for a uniform federal approach).

4. Response by The Sedona Conference Working Group 1 Steering Committee to Request to Bench, Bar and Public for Comments on Proposed Rules (Aug. 2013), at 13 (Nov. 26, 2013), *available at* https://downloads.regulations.gov/USC-RULES-CV-2013-0002-0346/attachment_1.pdf [hereinafter Sedona Comment].

5. It permitted an adverse-inference jury instruction "only" if the party's actions "caused substantial prejudice in the litigation and were willful or in bad faith." Preliminary Proposal, Rule 37(e)(1)(B)(1), Agenda Book, Advisory Committee on Civil Rules (April 10-11, 2014) at 393, *available at* https://www.uscourts.gov/sites/default/files/fr_import/CV2014-04.pdf [hereinafter Agenda Book].

6. Sedona Comment, *supra* note 4, at 13.

7. Discovery Subcommittee Meeting Notes, Dallas (Feb. 8, 2014) (discussing Sedona approach that focused on "a specific intent to deprive an opposing party of evidence"), Agenda Book, *supra* note 5, at 405.

committee and the Supreme Court explicitly rejected."[8] The Rules Committee subsequently conceded that the initial proposal was "not the best we can do."[9]

This essay acknowledges and celebrates the ubiquitous nature of the "specific intent" requirement, whether the finding is made by the court or the jury. While most courts decide disputes about intent for themselves, some turn to the jury as "a mechanism for resolving the intent to deprive issue" or as a curative measure under Subdivision (e)(1).[10] While there is a "proper" evidentiary aspect to lost information that does not require such a finding, such a finding is required when there is a plausible risk of overreaction to negligent conduct to ensure that the core policy of the Amended Rule is maintained. It is not beyond the ability of a reasonable jury to fairly process the evidence under those circumstances.

INTENT TO DEPRIVE

Spoliation of evidence involves the intentional, reckless, or negligent destruction, alteration, or failure to preserve evidence that is relevant to ongoing or anticipated litigation. Courts have long admitted evidence tending to show that a party destroyed evidence relevant to the dispute being litigated, permitting an inference (the "spoliation inference") that the destroyed evidence would have been unfavorable to the position of the

8. Steven Baicker-McKee, *Mountain or Molehill*?, 55 DUQ. L. REV. 307, 323 n.72 (2017).

9. Minutes, Civil Rules Advisory Committee (April 10-11, 2014) at 18, *available at* https://www.uscourts.gov/sites/default/files/fr_import/CV04-2014-min.pdf.

10. Doe v. Willis and Swift Trans., Case No. 8:21-cv-1576-VMC-CPT. 2023 WL 2918507, at *15 (M.D. Fla. Apr. 12, 2023).

offending party.[11] If the loss does not result from a "specific motive or intention" to keep information from another party, the "backbone" of the evidentiary logic supporting adverse inferences is lacking.[12] It permits courts and juries to acknowledge "new evidence created by the act of suppression itself," which serves as a "form of compensation in place of what the suppressed evidence would have shown."[13] It can fill in the gaps in proof on the merits.

Because of the Amended Rule, a court or jury may presume that missing ESI was "unfavorable" only if a party acted with an intent to deprive another party of the information's use in the litigation. The crucial element is not whether ESI was intentionally destroyed, but "rather the reason for the destruction."[14] The Rule rejects cases such as *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2nd Cir. 2002), that authorizes sanctions based on a finding of "negligence or gross negligence."[15] A showing of either "will not do the trick."[16] By clarifying that

11. Schmid v. Milwaukee Electric Tool, 13 F.3d 76, 78 (3rd Cir. 1994); *see also* Kenneth J. Withers, *Risk Aversion, Risk Management, and the "Overpreservation" Problem in Electronic Discovery*, 64 S.C. L. REV. 537, 547 (2013) (noting role of King's Bench decision in Armory v. Delamirie, (1722) 93 Eng. Rep 664 (K.B.); 1 Strange 506).

12. The "necessary showing of belief" in a weak case is lacking. John MacArthur Maguire & Robert C. Vincent, *Admissions Implied from Spoliation or Related Conduct*, 45 YALE L. J. 226, 235 (1935).

13. Dale A. Nance, *Missing Evidence*, 13 CARDOZO L. REV. 831, 876 (1991).

14. Hunting Energy Servs. v. Kavadas, Case No. 3:15-CV-228 JD, 2018 WL 4539818, at *11 (N.D. Ind. Sept. 20, 2018) (citing Bracey v. Grondin, 712 F.3d 1012, 1019 (7th Cir. 2013).

15. Committee Note. The First, Second, Sixth, Ninth, and in at least one circumstance, the D.C. circuits had all concluded that negligence could be sufficient. Gregory P. Joseph, *Rule 37(e): The New Law of Electronic Spoliation*, 99 JUDICATURE No. 3, at 1.

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

unintentional destruction of relevant ESI is not sufficient, the Amended Rule is "now aligned" with the Sedona Principles.[17] Courts that permitted adverse inferences for losses under those circumstances now routinely decline to impose such sanctions.[18]

The "intent to deprive" standard is "akin to" requiring a showing of bad faith but is defined "even more precisely."[19] The requirement is satisfied if "the evidence shows, or it is reasonable to infer, that a party purposely destroyed evidence to avoid its litigation obligations."[20] Courts often must rely on circumstantial evidence. The timing of the destruction, the method of deletion, the reason some evidence was preserved, and the existence of institutional policies on preservation can be relevant.[21] A lack of credible explanation for the conduct can be powerful circumstantial evidence that the party acted "with an intent to deprive."[22] In *Skanska USA Civil Southeast v. Bagelheads, Inc*., for example, there was "no cogent explanation, apart from bad faith" for the "systemic failure to make *any* effort to preserve cell

17. Thomas Y. Allman, *The Sedona Principles (Third edition): Continuity, Innovation, and Course Corrections*, 51 AKRON L. REV. 889, 913–14 & nn.171 &180 (2017). Principle 14 provides that a breach of duty to preserve ESI may be addressed by "remedial measures, sanctions or both," but sanctions are available only if a party acted with intent to deprive. *Id*. at 918.

18. John J. Jablonski, *Not-So-New E-Discovery Amendments Are Making A Lasting Impression*, LEGAL BACKGROUNDER, Vol. 35, No. 10 (Apr. 24, 2020).

19. Advisory Committee on Civil Rules Report to the Standing Committee (May 2, 2014) at 42, *available at* https://www.uscourts.gov/sites/default/files/fr_import/ST2014-05.pdf.

20. Facebook, Inc. v. OnlineNIC Inc., Case No. 19-CV-07071-SI (SVK), 2022 WL 2289067, at *6 (N.D. Cal. Mar 28, 2022).

21. Laub v. Horbaczewski, Case No. CV 17-6210-JAK (KS), 2020 WL 9066078 (C.D. Cal. July 22, 2020).

22. Ala. Aircraft Indus, Inc. v. Boeing Co., 319 F.R.D. 730, 746 (N.D. Ala. 2017) ("blatantly, irresponsible behavior").

phone data" until at least seven months after a litigation hold was in place (emphasis in original). [23]

The intent of corporate parties is determined by a nuanced version of respondeat superior.[24] In *Decker v. Target*, the court concluded that Target had acted with intent to deprive because it had failed to properly instruct the employees who did not retain the missing ESI.[25] In *Moody v. CSX Transportation,* it was the "stunningly derelict" failure of various employees that justified the conclusion that the failure to preserve critical ESI involved an intent to deprive.[26] In *Government Employees Health Association v. Actelion Pharmaceuticals*, however, there was no intent to deprive because it was "just as likely" that the approval of the deletion at issue was the result of "inattention."[27]

MEASURES AVAILABLE[28]

There is a wide spectrum of "measures" available when the predicate requirements of the Amended Rule are met. The ESI must have been irrevocably lost because the party failed to take reasonable steps to preserve ESI that "should have been preserved." A predicate showing of prejudice is also required

23. 75 F.4th 1290, 1302 (11th Cir. 2023) (affirming bench trial ruling).

24. Charles Yablon, *Byte Marks: Making Sense of new F.R.C.P. 37(e),* 69 FLA. L. REV. 571, 585, 587 (2017).

25. Case No. 1:16-cv-00171-JNP-BCW, 2018 WL 4921534, at *4 (D. Utah Oct. 10, 2018) ("Target is the party that destroyed the records").

26. 271 F. Supp. 3d 410, 425–26, 431–32 (W.D.N.Y. 2017).

27. 343 F.R.D. 474, 484–85 (D. Md. 2023) (noting that the evidence did not demonstrate by "clear and convincing evidence or even a preponderance of the evidence" that the actions were done with intent to deprive).

28. The Rules Committee deliberately used the term "measures" to emphasize that spoliation involves a continuum of responses that are not adequately differentiated by labels.

because Rule 37(e) applies only if relevant evidence has been lost.[29] This makes sense for a number of reasons, not the least of which is the lack of prejudice in the loss of irrelevant ESI.[30] To qualify for the very specific and severe measures under Subdivision (e)(2), however, the movant must "additionally show that" the party "acted with an intent to deprive."[31]

SUBDIVISION (e)(2)

When a party has lost ESI while acting with an intent to deprive, Subdivision (e)(2) authorizes severe measures such as permissive or mandatory adverse inference jury instructions as well as dismissals or defaults. A typical permissive jury instruction permits the jury, upon a factual finding by the court of spoliation, to presume that the missing ESI was unfavorable to one party and/or favorable to the other. As the Chair of the Discovery Subcommittee explained, the task involved "is inference, not the rebuttable presumption of evidence law."[32]

In *GN Netcom v. Plantronics*, for example, a jury was instructed that it could "presume that the lost evidence would have been relevant and helpful to GN's case and/or would have been harmful to Plantronics's case." The court had determined that intent to deprive existed since a corporate executive had

29. Polk v. General Motors LLC, Case No. 3:20-v-549-MMH-LLL, 2024 WL 326624 at *21 (M.D. Fla. Jan. 29, 2024) (because of the prejudice "some sanction or curative measure is warranted").

30. Snider v. Danfoss, LLC, 15 CV 4748, 2017 WL 2973464, at *4 (N.D. Ill. July 12, 2017).

31. Su v. U.S. Postal Serv., Case No. 3:23-cv-05007-RJB, 2024 WL 21670, at *4 (W.D. Wash. Jan. 2, 2024).

32. Minutes, Civil Rules Advisory Committee (April 10-11, 2014) at 24, lines 983–88 988 (quoting remarks of Hon Paul Grimm, Chair of Discovery Subcommittee), *available at* https://www.uscourts.gov/sites/default/files/fr_import/CV04-2014-min.pdf.

deleted an unknown number of emails, urged others to do the same, and the company was unwilling to pay a nominal fee to an expert to fully assess the spoliation.[33] In *Kelley v. BMO Harris Bank*, the court instructed the jury that it could assume that the contents of destroyed email backup tapes would have been adverse or detrimental to BMO.[34]

However, the Committee Note acknowledges that a court may conclude that the "intent finding should be made by a jury."[35] While this includes the predicate finding necessary for dismissals or defaults,[36] the focus is on framing the appropriate instruction for a jury that will be deciding the merits at trial.[37] The Note provides that "the 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."[38]

---

33. C.A. No. 12-1318-LPS, 2017 WL 4417810, at *3 (D. Del. Oct. 5, 2017) (Final Instruction), *rev'd on other grounds*, 930 F.3d 76, 89 (3rd Cir. 2019) (excluded expert testimony "could have changed the outcome of the case").

34. Case No. 19-cv-1756 (WMW), 2023 WL 4145827, at *1 (D. Minn. June 23, 2023) (Jury Instruction No. 9) (Doc. 349, Nov. 8, 2022).

35. FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment.

36. Some courts may choose to delay deciding on whether such measures are available until the jury decides.

37. The Rules Committees subsequently received a related analysis of the topic that concluded that if the Rule 37 proposal were to preclude the option of submitting factual issues such as culpability to the jury in any capacity, it would "change the way some courts have handled adverse inference instructions in some cases." Memorandum, Andrea L. Kuperman, General Counsel, Rules Committees, Allocating Fact-Finding Roles for Sanctions Imposed Under Inherent Authority, May 9, 2014, at 46 (citing, inter alia, Rimkus Consulting Grp. v. Cammarata, 688 F. Supp.2d 598, 607 (S.D. Tex. 2010).

38. The Note was updated to conform to the changes in the Amended Rule after the text was finalized.

The court in *DR Distributors v. 21 Century Smoking* explained that relying on the jury is appropriate if there is enough admissible evidence for a reasonable person to conclude that the defendants "intended to destroy this ESI" as well as to find that they did not.[39] Any spoliation-related evidence easily "clears the baseline relevance hurdle to admissibility of Federal Rules of Evidence 401 and 402."[40] The trial judge plays a "limited, screening role."[41] In *Modern Remodeling v. Tripod Holdings*, for example, the court admitted evidence of resetting a laptop and planned to instruct the jury that it could determine if it was done to deprive the other party of the evidence and determine the impact it might have had on the merits of the claims or defenses.[42] The movant must first persuade the jury, however, that the party acted with the intent to deprive the opposing party of the ESI's use in the litigation.[43]

In *Alabama Aircraft Industries v. Boeing*, the Eleventh Circuit agreed that permitting the jury to infer the lost information was unfavorable if it found Boeing deleted it with intent to deprive "correctly stated the law" and did not mislead the jury. It was instructed that it was "for you to decide what force and effect to give it in light of all the evidence in this case," because it was "the judge of the facts as to . . . what happened to these

39. 513 F. Supp. 3d 839, 981 (N.D. Ill. Jan. 1, 2021).

40. The Sedona Conference, *Commentary on ESI Evidence and Admissibility, Second Edition*, 22 SEDONA CONF. J. 83, 176 & n.213 (2021).

41. Joseph, *supra* note 15, at 40.

42. Civil Action No. CCB-19-1397, 2021 WL 3852323, at *15 (D. Md. Aug. 27, 2021). The jury returned a substantial verdict in favor of the movant after a three-week trial, and the district judge found no basis for a new trial under Rule 59. 2022 WL 21782160 (D. Md. June 10, 2022)

43. EEOC v. GMRI, Inc., Case No. 15-20561-CIV-LENARD/GOODMAN, 2017 WL 5068372, at *3 (S.D. Fla. Nov. 1, 2017) ("if the jury were to agree" it may infer from the loss of ESI that it was unfavorable).

electronic documents, and why it happened." [44] Panels in the Fourth[45] Fifth,[46] Eighth[47] and Eleventh Circuits[48] have acknowledged appropriate use of this option as have numerous district courts, as is reflected in the decisions collected in Appendix A.

Regardless of whether the court or the jury makes the intent finding, the jury receiving a permissive form of jury instruction is permitted to determine what the absent evidence would show.[49] This involves an exercise of the jury's *discretion* to draw inferences as warranted by the evidence.[50] In *Infogroup v. DatabaseUSA*, the Eighth Circuit agreed that the combination of a permissive inference "with the other evidence" was sufficient for the jury to find the movant had proven the claims at issue.[51] In *In re Google Play Store Antitrust Litigation*,[52] the court opted to give a permissive adverse inference jury instruction rather than impose a case-termination measure because "this antitrust case

44. Case No. 20-11141, 2022 WL 433457, at *16 n.19 (11th Cir. 2022) (per curiam).

45. Lee v. Belvac Prod. Mach., Inc., Case No. 20-1805, 2022 WL 4996507, at *3-4 (4th Cir. Oct. 4, 2022) (per curiam).

46. Van Winkle v. Rogers, 82 F.4th 370 (5th Cir. 2023) (involving loss of tangible evidence).

47. Infogroup Inc. v. DatabaseLLC, 956 F.3d 1063, 1067 (8th Cir. 2020).

48. *Alabama Aircraft*, 2022 WL 433457, at *6 & *16 n.19 (11th Cir. Feb. 14, 2022) (per curiam).

49. Deerpoint Grp., Inc. v. Agrigenix, LLC, Case No. 1:18-cv-00536-AWI-BAM, 2022 WL 16551632, at *22-24 (E.D. Cal. Oct. 31, 2022) (the "precise" wording will be determined by the trial judge).

50. Arch Ins. Co. v. Broan-NuTone, LLC, 509 F. App'x 453, 459 (6th Cir. 2012) (while the jury has such discretion without it, a permissive jury instruction comes "dressed in the authority of the court, giving it more weight than if merely argued by counsel alone").

51. 963 F.3d 1063, 1067 (8th Cir. 2020).

52. 664 F. Supp. 3d 981 (N.D. Cal. 2023).

will not be decided on the basis of lost Chat Communications."[53] Courts are reluctant to shortcut the ability to present the merits of a case unless the pretrial conduct has "clearly and irremediably precluded a fair trial."[54]

SUBDIVISION (e)(1)

Subdivision (e)(1) permits a court, upon finding prejudice to another party from the loss of information, "to order measures no greater than necessary to cure the prejudice" involved. This includes "informing the jury" of the circumstances of the loss, which has become particularly attractive.[55] In *Storey v. Effingham County*, involving carelessness in the handling surveillance videos, the court planned to allow the party to present evidence and argument regarding the failure to preserve and instructed the jury to consider this "along with all the other evidence in the case in making its decision."[56] In *Franklin v. Howard Brown Health Center*, the District Judge planned to allow the parties to present evidence and argument to the jury regarding the failure to preserve evidence and then to consider "appropriate jury instructions" at trial.[57]

---

53. Instruction No. 13, Permissive Inference, Case 3:20-cv-05671-JD, Coc. 592, Filed Dec. 6, 2023, at 17.

54. Saul v. Tivoli Sys., 97 Civ. 2386 (DC)(MHD), 2001 U.S. Dist. LEXIS 9873, at *54-55 (S.D.N.Y. July 17, 2001) (noting the "accepted judicial policy" favoring resolution of cases on their merits and the Seventh Amendment right to a jury trial).

55. Thomas Y. Allman, *Dealing with Prejudice: How Amended Rule 37(e) Has Refocused ESI Spoliation Measures*, 26 RICH. J.L. & TECH 1, *78, Appendix (2020) (collecting cases).

56. CV-415-149, 2017 WL 2623775, at *5 (S.D. Ga. June 16, 2017).

57. Case No. 1:17 C 8376, 2018 WL 5831995, at *1 (Nov. 7, 2018).

Parties typically are permitted to "argue for whatever inference they hope the jury will draw."[58] This includes arguments that the missing ESI "contains information unfavorable" to the party that lost it.[59] The Committee Note also permits the court to instruct the jury that it may consider the evidence of the circumstances of the loss, along with all the other evidence in the case, in making its decisions.[60] In *EPAC Technologies v. Harper-Collins Christian Publishing*, for example, the jury was informed that a party had negligently failed to preserve data that "may have shown" certain information relevant to the merits and that it could "give this whatever weight you deem appropriate as you consider all the evidence presented at trial." The Sixth Circuit approved the instruction because it was no greater than necessary to cure the prejudice. [61]

However, a Court may *not* instruct the jury that it may presume from the loss alone that the missing evidence was unfavorable to the party that lost it.[62] (emphasis added). The jury

58. Best Value Auto Parts Distribs., Inc. v. Quality Collision Parts, Inc., No. 19-12291, 2021 WL 2201170 at *4 (E.D. Mich. May 31, 2021) ("Let the jury decide"). The court observed that the non-moving party could "argue that the jurors should not draw any inference from his conduct."

59. Atta v. Cisco Sys., Inc., Civil Action File No. 1:18-cv-1558-CC-JKL, 2020 WL 7384689, at *9 (N.D. Ga. Aug. 3, 2020).

60. FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment.

61. 810 F. App'x 389, 403 (6th Cir. 2020)

62. FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment (jury instructions are appropriate "to assist [the jury] in its evaluation" other than instructions to which subdivision (e)(2) applies"). *But see* HiQ Labs, Inc. v LinkedIn Corp., 639 F. Supp. 3d 944, 979–80 (N.D. Cal. 2022) and Phoenix Process Equip. Co. v. Capital Equip. & Trading Corp., Civil Action No. 3:16-CV-024-CHB, 2022 WL 3094320, at *18 (W.D. Ky. July 18, 2022), *aff'd* 2022 WL 3088102, at *2 (W.D. Ky. Aug.3, 2022).

may not "attach independent significance" to the lost ESI[63] by authorizing remedies that are *de facto* Rule 37(e)(2) measures.[64] Without a predicate "intent to deprive" finding, the "jury might make an adverse inference on its own from negligent conduct based on the arguments and evidence presented."[65] The Discovery Subcommittee had concluded that "we want to bar a presumption from the loss of information alone, but also to allow inferences from all the evidence, including the failure to preserve."[66]

The Sedona Conference urged that the Amended Rule should require a finding of "specific intent to deprive" *both* when a "sanction" was to be imposed *and/or* if a curative measure was "tantamount" to a sanction.[67] The Discovery Subcommittee agreed[68] and the Committee Note was revised to state:

> "Care must be taken, however, to ensure that curative measures under subdivision (e)(1) do not have the *effect* of measures that are permitted under subdivision (e)(2) only on a finding of intent

63. Whitesell Corp. v. Electrolux Home Prods., Inc., CV 103-050, 2022WL 3372761, at *5 (S.D. Ga. Aug. 16, 2022) (excluding an argument that was "akin to an adverse inference instruction").

64. Gov't Emps. Health Ass'n v. Actelion Pharms. Ltd., 343 F.R.D. 474, 487 (D. Md. 2023).

65. Ariana J. Tadler and Henry J. Kelston, *What You Need to know About the New Rule 37(e),* 52-JAN-TRIAL 20, 24 n.15 (Jan. 2016) (such a result could "undermine" the heightened level of culpability required for adverse inferences).

66. Discovery Subcommittee Call Notes (Mar. 12, 2014) at 3, Agenda Book, *supra* note 5, 444–45.

67. Sedona Comment, *supra* note 4, at 13.

68. Discovery Subcommittee Call Notes (Mar. 4, 2014) at 2-3, Agenda Book, *supra* note 5, 438 (the Note should "make it clear" measures requiring intent to deprive could not be employed as "curative" measure").

> to deprive another party of the lost information's use in the litigation." [69] (emphasis added)

As a result, some courts admonish the jury that it should not "speculate" as to what the ESI might have included or "which party (if any) it might have supported."[70] However, a better approach is to accept the possibility that the jury may choose to draw inferences but make it clear that the jury may infer from the loss of information that it was unfavorable "only if the jury first finds that the party acted" with intent to deprive, as suggested by the Committee Note.[71] That was the path chosen by Judge Johnston in *Hollis v. CEVA Logistics U.S.*, for example, where the jury was instructed:

> "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." [72]

"Because of the difficulty to establish intent," the court decided to leave "that determination to the jury" and to instruct the jury that it could consider the circumstances surrounding

---

69. FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment.

70. Gov't Emps. Health Ass'n v. Actelion Pharms. Ltd., 343 F.R.D. 474, 487 (D. Md. 2023).

71. FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment.

72. 603 F. Supp. 3d 611, 625–26 n.1 (N.D. Ill. 2022) ("The instruction is patterned after the suggested language in the Advisory Committee Notes").

the loss as a curative measure under Subdivision (e)(1).[73] Providing an additional admonition that it could presume the video was unfavorable only if it also found intent to deprive is especially useful when there is a plausible likelihood that the jury may overreact to negligent conduct by drawing adverse inferences. If it concludes that the party acted with intent to deprive after an admonition, however, subdivision (e)(2) is satisfied.[74] A jury should not be "left to roam at large with only its untutored instincts to guide it."[75]

INTENT FACT-FINDING

Rule 37(e)(2) places the responsibility on the *court* to decide if a party has acted with a specific "intent to deprive." The finding "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 instruction at trial."[76] Some argue that by virtue of "experience and training," courts have superior expertise relative to resolving questions "about the plausibility of excuses" for the failure to produce evidence.[77] Most courts probably agree with the district judge in *Mannion v. Ameri-Can Freight Systems* that "when a party seeks sanctions" under Rule

73. *Id.* 624 (citing Allman, *supra* note 55, at 64–66). The case was settled after the jury was instructed but before it commenced its deliberations.

74. MGA Ent., Inc., v. Harris, Case No. 2:20-cv-11548-JVS-AGR, 2023 WL 2628225, at *8 (C.D. Cal. Jan. 5, 2023).

75. Carter v. Kentucky, 450 U.S. 288, 301, 303 (1981) ("while no judge can prevent jurors from speculating" about a party's motivation, a judge can "use the unique power of the jury instruction to reduce that speculation to a minimum").

76. FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment.

77. Nance, *supra* note 13, at 879.

37(e), the judge "acts as the factfinder concerning any underlying factual disputes."[78]

The Committee Note acknowledges, however, that courts may decide to permit the jury to assess intent and suggests an appropriate form of instruction which is "distinguishable from the typical adverse inference instruction under Rule 37(e)(2)."[79] There was ample precedent for that practice prior to amending the Rule, as noted in Appendix B. A properly instructed jury is just as capable as a judge in setting aside personal preferences when fully informed about the governing legal principles.[80]

The issue is not whether there is a constitutional right to a trial by jury on the predicate findings—there is none[81]—but whether the court considers it appropriate to rely on the jury under the specific circumstances involved.[82] After all, intent is a "prototypical function" of a jury when there is "evidence from which the jury could make such a finding."[83] Juries are as competent as courts to assess the motivation involved in the failure to take reasonable steps to preserve ESI. As noted in *Modern*

---

78. CV-17-03262-PHX-DWL, 2020 WL 417492, at *4 (D. Ariz. Jan. 27, 2020) ("judges, not juries" should be the ones deciding whether to impose spoliation sanctions).

79. Poindexter v. W. Reg. Jail, Civil Action No. 3:18-1511, 2021 WL 1169383, at *4 (S.D.W. Va. Mar. 26, 2021) (the jury may be the "proper factfinder for a spoliation issue in some instances").

80. Alexandra C. Lahav, *The Jury and Participatory Democracy*, 55 WM. & MARY L. REV. 1029, 1056 (2014).

81. Rossbach v. Montefiore Med. Ctr., 81 F.4th 124, 138 n.8 (2nd Cir. 2023) ("a motion for sanctions" under Rule 37 does not "implicate the Seventh Amendment's jury trial guarantee.") (collecting cases).

82. Baicker-McKee, *supra* note 8, at 320 ("while the vast majority" of judges decide the issue, the Seventh Amendment is an "important consideration in deciding whether to involved the jury").

83. Hunting Energy Servs. v. Kavadas, Case No. 3:15-CV-228 JD, 2018 WL 4539818, at *10-11 (N.D. Ind. Sept. 20, 2018).

Remodeling v. Tripod Holdings, a jury is "perfectly capable of comprehending" for example, what is involved in a laptop reset to factory settings and a cloud-based storage system without the need for expert testimony.[84]

In *Ayers v. Heritage-Chrystal Clean,* the court explained that it did not "believe the fact-finding role on this [intent] issue should be completely taken from the jury."[85] In *Woods v. Scissons,* the court decided it would be best to "allow the determination of intent to be made on a more fully developed evidentiary record" in harmony with the "Advisory Committee Note."[86] In *Amann v. Office of the Utah Attorney General*, the issue of intent "turned on questions of the parties' motives" and witness credibility that could not be separated from the merits.[87] In *Manning v. Safelite Fulfillment*,[88] a district judge relied on the jury because it was "an available option suggested by the Advisory Committee notes to Rule 37(e) and used by other courts where intent to deprive presents a close question."[89]

However, the availability of the option "does not indicate that district courts should freely give [the intent] issue to the

---

84. Civil Action No. CCB-19-1397, 2021 WL 5234698, at *4 (D. Md. Nov. 9, 2021)

85. Case No. 1:20-cv-5076, 2022 WL 2355909, at *5 & n.2 (N.D. Ill. June 1, 2022) (the Court "believes that Ayers intentionally deleted the ESI but does not believe it was done with the intention of depriving [the other party] of the ESI (*i.e.*, it was not done in bad faith")).

86. No. CV-17-08038-PCT-GMS, 2019 WL 3816727, at *6-7 (D. Ariz. Aug. 14, 2019). *Id.*

87. Case No. 2:18-cv-00341-JNP-DAO, 2023 WL 7218696, at *8 & n.5 (D. Utah Nov. 2, 2023) (noting "the wisdom" of the jury trial).

88. 17-2824 (RMB/MJS), 2021 WL 3542808, at *4 (D.N.J. Aug. 11, 2021) (reserving judgment as to sanctions(s) pending the jury's intent finding, quoting process outlined in the Committee Notes).

89. Mark S. Sidoti and Kevin H. Gilmore, *The Resurgence of Electronic Evidence Spoliation Sanctions*, 333 N.J. LAWYER 28, 33 (Dec. 2021).

jury."[90] It may be unnecessary and counterproductive. Admitting evidence of spoliation in the middle of the trial can be disruptive and confusing, and the court is required to prevent misleading of the jury or permitting undue prejudice.[91] As famously explained in *Waymo v. Uber Technologies*, spoliation testimony should not be allowed "to consume the trial to the point that it becomes a distraction from the merits."[92] There was no reason to involve the jury in *Microvention v. Balt USA* where the party had an "abundant opportunity to present evidence on the issue of intent in the context of a pretrial motion."[93]

CONCLUSION

In keeping with traditional principles, the determination of an appropriate measure for spoliation, if any, is confined to the sound discretion of the trial judge and is assessed on a case-by-case basis. The Advisory Rules Committee was surely correct in adopting The Sedona Conference recommendation that a party must have acted with "specific intent" to deprive before imposing sanctions or permitting use of curative measures "that would be tantamount to a sanction."

---

90. Van Winkle v. Rogers, 82 F.4th 370, 379 (carefully stressing that the "need to do so in this case stemmed" from the specific circumstantial evidence regarding the timing of the loss and the inability to explain the reasons for the conduct leading to failure to preserve the highly relevant evidence).

91. *In re* Delta/Airtran Baggage Fee Antitrust Litig., Civil Action 1:09-md-2089-TCB, 2015 WL 4635729, at *14 (N.D. Ga. Aug. 3, 2015) (excluding evidence of alleged spoliation at trial "under Rule 403 of the Federal Rules of Evidence").

92. Case No. C 17-00939 WHA, 2018 WL 646701, at *18 (N.D. Cal. Jan. 20, 2018) ("Omnibus Order").

93. Case No. 8:20-cv-02400-JLS-KES, 2023 WL 7634109, at *1 (C.D. Cal. Nov. 13, 2023).

APPENDIX A

The following decisions involve consideration of the use of conditional forms of adverse inference jury instruction based on or inspired by the "intent to deprive" requirement of Amended Federal Rule of Civil Procedure 37(e) and the 2015 advisory committee's note.

Malibu Media, LLC v. Harrison, Cause No. 1:12-cv-1117-WTL-MJD, 2015 WL 3545250, at *6 (S.D. Ind. June 8, 2015) (citing Seventh Circuit Federal Civil Jury Instruction No. 1.20 Spoliation/Destruction of Evidence).

Epicor Software Corp. v. Alternative Tech. Sols., Inc., Case No.: SACV 13-00448-CJC (JCGx), 2015 WL 12734011, at *2 (C.D. Cal. Dec. 17, 2015).

Evans v. Quintiles Transnational Corp., Civil Action No.:4:13-cv-00987-RBH, 2015 WL 9455580, at *5, *10 (D.S.C. Dec. 23, 2015).

Cahill v. Dart, No. 13-cv-361, 2016 WL 7034139, at *4 (N.D. Ill. Dec. 2, 2016).

Gambrell v. Wilkinson CGR Cahaba Lakes, LLC, No. 2:13-cv-02146-HGD, 2017 WL 1196862, at *6 (N.D. Ala. Mar. 31, 2017).

EEOC v. GMRI, Inc., Case No. 15-20561-CIV-Lenard/Goodman, 2017 WL 5068372, at *31 (S.D. Fla. Nov. 1, 2017).

Spencer v. Lunada Bay Boys, Case No. CV-16-02129-SJO (RAOx), 2017 WL 10518023, at *12 (C.D. Cal. Dec. 13, 2017), *recomm. adopted*, 2018 WL 839862, at *1 (C.D. Cal. Feb. 12, 2018).

Gibson v. Mgmt. & Training Corp., C.A. No. 3:16-CV-624-DPJ-FKB, 2018 WL 736265, at *7 (S.D. Miss. Feb. 6, 2018).

BankDirect Capital Fin., LLC v. Capital Premium Fin., Inc., No. 15 C 10340, 2018 WL 1616725, at *12 (N.D. Ill. April 4, 2018).

Hunting Energy Servs., Inc. v. Kavadas, Case No. 3:15-CV-228 JD, 2018 WL 4539818, at *10–11 (N.D. Ind. Sept. 20, 2018).

Lexpath Techs. Holdings, Inc. v. Welch, 744 F. App'x 74, at n.2 (3rd Cir. July 30, 2018) (alluding to "proper division of fact-finding labor").

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

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).

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).

Woulard v. Greenwood Motor Lines, Inc., Civil No. 1:17cv231-HSO-JCG, 2019 WL 3318467, at *5 (S.D. Miss. Feb. 4, 2019).

NuVasive, Inc. v. Kormanis, Case No. 1:18CV282, 2019 WL 1171486, at *13–14 (M.D.N.C. Mar. 13, 2019).

Coan v. Dunne, 602 B.R. 429, 442 (D. Conn. April 16, 2019).

Woods v. Scissons, No. CV-08038-PCT-GMS, 2019 WL 3816727 (D. Ariz. Aug. 14, 2019).

University Accounting Serv., LLC v. Schulton, Case No. 3:18-cv-1486-SI, 2020 WL 2393856, at *22 (D. Ore. May 11, 2020) ("Final Jury Instruction 12B").

Phan v. Costco Wholesale Corp., Case No. 19-cv-05713-YGR, 2020 WL 5074349 (N.D. Cal. Aug. 24, 2020) (utilizing CACI 204).

Aramark Mgmt., LLC v. Borquist, Case No. 8:18-cv-01888-JLS-KESx, 2021 WL 863746 (C.D. Cal. Mar. 8, 2021).

Poindexter v. Western Reg'l Jail, C.A. No. 3:18-1511, 2021 WL 1169383, at *4 (S.D.W. Va. Mar. 26, 2021) (refusing request but acknowledging *Vodesek v. Bayliner*), *vacated in part*, 2021 WL 1169383 (4th Cir. Mar. 26, 2021) (per curiam).

Kadribasic v. Wal-Mart, Inc., Civil Action No. 1:19-cv-03498-SDG, 2021 WL 1207468, at *5 (N.D. Ga. Mar. 30, 2021) (refusing recommendation of magistrate judge that jury decide intent).

Root v. Montana Dep't of Corrections, CV 19-164-BLG-SPW-TJC, 2021 WL 1597922, at *4 (D. Mont. April 23, 2021) (ignoring request).

Van Dam v. Town of Guernsey, Case No. 20-CV-60-SWS, 2021 WL 2942769 at *4 (D. Wyo. June 4, 2021).

Manning v. Safelite Fulfillment, Inc., Case No. 17-2824 (RMB/MJS), 2021 WL 3542808, at *4, n.8 (D.N.J. Aug. 11, 2021).

Modern Remodeling, Inc. v. Tripod Holdings, LLC, Civil Action No. CCB-19-1397, 2021 WL 3852323, at *13-14 (D. Md. Aug. 27, 2021).

Cornejo v. EMJB, Inc., SA-19-CV-01265-ESC, 2021 WL 4526703, at *5 (W.D. Tex. Oct. 4, 2021) (relying on prior 5th Circuit decisions without mention of Rule 37(e).

Mkrtchyan v. Sacramento Cty., No. 2:17-cv-2366 TLN KJN, 2021 WL 5284322, at *10 (E.D. Cal. Nov. 12, 2021).

Alabama Aircraft Indus. v. Boeing, No. 20-11141, 2022 WL 433457, at *6, *16 & n.19 (11th Cir. Feb. 14, 2022) (per curiam).

Stevens v. Brigham Young Univ.-Idaho, Case No. 4:16-cv-00530-BLW, 588 F. Supp. 3d 1117, at *15 (D. Idaho 2022).

Plymale v. Cheddars Casual Café Inc., Case No.: 7:20-CV-102 (WLS), 2022 WL 988313, at *7 (M.D. Ga. March 31, 2022).

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

Hollis v. CEVA Logistics U.S., Inc., 603 F. Supp. 3d 611, 625–26 (N.D. Ill. May 19, 2022) ("Factual Findings and Jury Instruction").

Ayers v. Heritage-Crystal Clean, LLC, Case No. 1:20-cv-5076, 2022 WL 2355909, at *4 (N.D. Ill. June 1, 2022).

Meta Platforms, Inc. v. BrandTotal Ltd., 605 F. Supp. 3d 1218, 2022 WL 1990225, at *8 (N.D. Cal. June 6, 2022).

Drips Holdings, LLC v. Teledrip, LLC, Case No. 5:19-cv-2789, 2022 WL 4545233, at *3 (N.D. Ohio Sept. 29, 2022) (refusing request).

Dish Network LLC. v. Jadoo TV, Inc., Case No. 20-cv-01891-CRB (LB), 2022 WL 11270394, at *4 (N.D. Cal. Oct. 19, 2022)

LKQ Corp. v. Gen. Motors Co., No 20 CO 02753, 2022 WL 14634800, at *7, *9 (N.D. Ill. Oct 25, 2022).

Tyson v. Dep't of Energy & Envtl. Prot., No. 3:21-cv-736 (JAM), 2022 WL 16949396, at *4–5 (D. Conn. Nov. 15, 2022).

Tripp v. Walmart, Inc., Case No. 8:21-cv-510-WFJ-SPF, 2023 WL 399764 (M.D. Fla. Jan. 25, 2023).

Pable v. Chicago Transit Auth., No. 19 CV 7868, 2023 WL 2333414, at *31 & n. 17 (N.D. Ill. Mar. 2, 2023) (refusing request).

Doe v. Willis, Case No: 8:21-cv-1576-VMC-CPT, 2023 WL 2918507, at *15 (M.D. Fla. April 12, 2023).

SRS Acquiom Inc. v PNC Fin. Servs. Grp., Inc., Civil Action No. 19-cv-02005-DDD-SKC, 2023 WL 6461234 (D. Colo. Sept. 8, 2023).

Van Winkle v. Rogers, 82 F.4th 370, 379 (5th Cir. Sept. 15, 2023) (analogous result involving tangible evidence).

Microvention, Inc. v. Balt USA, LLC, Case No. 8:20-cv-02400-JLS-KES, 2023 WL 7476521, at *3 (C.D. Cal. Oct. 5, 2023).

Amann v. Office of the Utah Attorney Gen., Case No. 2:18-cv-00341-JNP-DAO, 2023 WL 7218696, at *8 & n.5 (D. Utah Nov. 2, 2023).

Shiflett v. City of San Leandro, Case No. 21-cv-07802-LB, 2024 WL 536302, at *5, *7 (N.D. Cal. Feb. 10, 2024).

APPENDIX B

The following are pre-rule decisions permitting—but in one case openly questioning[94]—jury predicate findings as a condition of exercising authority to draw adverse inferences. Some "missing evidence" instructions—not listed here—permit a jury to draw adverse inferences upon findings of predicate conditions other than culpability. The Amended Rule "does not limit" the discretion of courts to give such a "traditional" missing evidence instruction that does not require a finding of culpability.[95] The Second Circuit approved such an instruction in *Zimmerman v. Associates First Capital Corp.*,[96] which was relied upon in *Zubulake v. UBS Warburg*.[97]

Wong v. Swier, 267 F.2d 749, 761 (9th Cir.1959) (an inference is proper only "if the jury [has] first found" the party tampered with the evidence).

Glover v. BIC Corp., 6 F.3d 1318, 1330, 1332 (9th Cir. 1993) (remanding for clarification of culpability standard).

Vodusek v. Bayliner Marine Corp., 71 F.3d 148, 155 (4th Cir. 1995) ("if you find" the predicate condition "you are permitted to . . . assume" the evidence "would have been unfavorable to the plaintiff's theory in the case").

---

94. Nucor Corp. v. Bell, 251 F.R.D. 191, 203–04 (D.S.C. 2008).

95. Rule 37(e) measures are distinct because they involve "a punitive attitude or opprobrium." Discovery Subcommittee Call Notes (Feb. 8, 2014) at 3–4, Agenda Book, *supra* note 5, 407–08. *Cf.* Mali v. Fed. Ins. Co. 720 F.3d 387, 391 (2nd Cir. 2013) (permitting jury to find a missing photograph unfavorable without a finding of culpability since not intended as a sanction).

96. 251 F.3d 376, 383 n.6 (2nd Cir. May 31, 2001) (permitting adverse inference because the destruction was intentional).

97. 229 F.R.D. 422, 439–40, n.120 (S.D.N.Y. 2004) ("if you find that UBS could have produced this evidence . . . you are permitted, but not required, to infer that the evidence would have been unfavorable to UBS").

Testa v. Wal-Mart Stores, Inc., 144 F.3d 173, 178 (1st Cir. 1998) (jury properly instructed it could (but need not) draw negative inference if it concluded that Wal-Mart had notice of potential lawsuit and document relevance).

Caparotta v. Entergy Corp., 168 F.3d 754, 760 (5th Cir. 1999) (Dissent).

Smith v. Borg-Warner Auto. Diversified Transmission Prods. Corp., No. IP 98-1609-C-T/G, 2000 WL 1006619, at *10 (S.D. Ind. July 19, 2000) (jury may infer information unfavorable "only if you find" it was willfully destroyed in bad faith).

Saul v. Tivoli Sys., 97 Civ. 2386 (DC)(MHD), 2001 U.S. Dist. LEXIS 9873, at *55 (S.D.N.Y. July 17, 2001) (trier of fact may infer documents were adverse if it concludes they were deliberately destroyed).

Golia v. The Leslie Fay Co., No. 01 Civ. 1111 (GEL), 2003 WL 21878788, at *11 (S.D.N.Y. Aug. 7, 2003) (the jury may "if they choose:" infer it was unfavorable and apply it determining the merits).

Crowley v. Chait, Civ. No. 85-2441 (HAA), 2004 WL 7338421, at *9 (D.N.J. Dec. 29, 2004) (jury may find infer lost documents were unfavorable if found to be relevant and could have been produced).

Duque v. Werner Enters., Inc., 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. & INSTR. § 104.27).

Nucor Corp. v. Bell, 251 F.R.D. 191, 203–04 (D.S.C. 2008) (it makes "little sense" to allow a party found to have acted intentionally to "re-argue the spoliation issue before the jury").

Rimkus Consulting Grp., Inc. v. Cammarata, 688 F. Supp. 2d 598, 620, 646, 643 & n.34 (S.D. Tex. 2010) (referencing 3 FED. JURY PRAC. AND INSTR. § 104.27).

Am. Family Mut. Ins. Co. v. Roth, No. 05 C 3839, 2009 WL 982788, at *10 (N.D. Ill. Feb. 20, 2009).

Socas v. The Northwestern Mut. Life Ins. Co., No. 07-02336-CIV, 2010 WL 3894142, at *9 (S.D. Fla. Sept. 30, 2010).

Union Pump Co. v. Centrifugal Tech. Inc., 404 F. App'x 899, 903–04) (5th Cir. Dec. 16, 2010).

Johnson v. Wells Fargo Home Mortg., 635 F.3d 401, 422 & n.2 (9th Cir. 2011)

Woodward v. Wal-Mart Stores East, No. 5:09-CV-428 (CAR), 801 F. Supp. 2d 1363, 1366 (M.D. Ga. 2011).

Hallmark Cards, Inc. v. Monitor Clipper Partners, LLC, No. 08-0840-CV-W-ODS, 2012 WL 3047164, at *6 (W.D. Mo. July 25, 2012) (referencing 3 FED. JURY PRAC. AND INSTR. § 104.27).

Hallmark Cards, Inc. v. Murley, 703 F.3d 456, 459, 460–62 (8th Cir. 2013).

Mali v. Fed. Ins. Co., 720 F.3d 387, 391 (2d Cir. 2013) (if you find the nonproduction has not been satisfactorily explained, you may infer it would have been unfavorable).

Swift Transp. Co. of Ariz. v. Angulo, 716 F.3d 1127, 1133 (8th Cir. June 17, 2013).

Quantlab Techs. Ltd. v. Godlevsky, Civil Action No. 4:09-cv-4039, 2014 WL 651944, at *25 (S.D. Tex. Feb. 19, 2014).