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The Adverse Inference Instruction After Revised Rule 37(e): An Evidence-Based Proposal

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THE ADVERSE INFERENCE INSTRUCTION AFTER REVISED RULE 37(E): AN EVIDENCE-BASED PROPOSAL

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INTRODUCTION

The subject of adverse inference jury instructions has received significant scholarly and judicial attention in recent years.[1] The adverse inference instruction has been called "'the oldest and most venerable remedy' for spoliation,"[2] and is perhaps the most common remedy in federal courts for the loss or destruction of evidence.[3] This is particularly true with respect to electronically stored information (ESI). "E-discovery sanctions are at an all-time high,"[4] and a study by the Federal Judicial Center found that

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1. *See, e.g.*, Carole S. Gailor, *In-Depth Examination of the Law Regarding Spoliation in State and Federal Courts*, 23 J. AM. ACAD. MATRIM. LAW. 71 (2010); 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 (2013); David C. Norton et al., *Fifty Shades of Sanctions: What Hath the Goldsmith's Apprentice Wrought?*, 64 S.C. L. REV. 459 (2013); Robert A. Weninger, *Electronic Discovery and Sanctions for Spoliation: Perspectives from the Classroom*, 61 CATH. U. L. REV. 775 (2012); Dan H. Willoughby, Jr. et al., *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L.J. 789 (2010); Jodi Kleinick & Mor Wetzler, *Navigating the Spoliation Case Law Divide*, N.Y. L.J., June 11, 2012, at S6; Matthew S. Makara, Note, *My Dog Ate My Email: Creating a Comprehensive Adverse Inference Instruction Standard for Spoliation of Electronic Evidence*, 42 SUFFOLK U. L. REV. 683 (2009); Lauren R. Nichols, Note, *Spare the Rod, Spoil the Litigator? The Varying Degrees of Culpability Required for an Adverse Inference Sanction Regarding Spoliation of Electronic Discovery*, 99 KY. L.J. 881 (2011).

2. Norton et al., *supra* note 1, at 467 (quoting United Med. Supply Co. v. United States, 77 Fed. Cl. 257, 263 (2007)).

3. *See id.* at 468 ("In a 2011 study by the Federal Judicial Center, the adverse inference instruction was the most common type of sanction granted . . . .").

4. Willoughby, Jr. et al., *supra* note 1, at 790.

adverse inference instructions were imposed in 57 percent of cases involving sanctions for the loss or destruction of ESI.[5]

The adverse inference instruction can serve multiple functions: punishing wrongful conduct, deterring future conduct, and restoring the adversary balance of the proceeding.[6] Unfortunately, much of the judicial and academic commentary has been muddied by a lack of clarity about the different purposes of the instruction. While punishment and deterrence are essentially case management functions, restoring the adversary balance is an evidentiary one.[7]

Most of the federal courts of appeals have focused on the punishment and deterrence purposes of the instruction and fashioned standards based on the spoliator's level of mental culpability. However, the circuits employ widely divergent approaches with respect to the level of culpability required. About half the circuits require a showing of bad faith before imposing a jury instruction.[8] On the other end of the spectrum, some circuits permit an adverse inference instruction even in cases of ordinary negligence.[9] Several circuit courts take an intermediate approach requiring

5. *See* Norton et al., *supra* note 1, at 468. However, sanctions for discovery violations remain rare. One survey found only 230 federal cases imposing sanctions from 1987 through 2009. *See* Willoughby, Jr. et al., *supra* note 1, at 789, 849–60. Given the vast number of cases pending in federal courts in any given year, the statistics suggest that an adverse inference instruction is only imposed in a tiny fraction of cases. *See* JUDICIAL BUSINESS OF THE UNITED STATES COURTS: ANNUAL REPORT OF THE DIRECTOR (2013), *available at* http://www.uscourts.gov/Statistics/JudicialBusiness/2013.aspx (reporting 284,604 civil cases filed in federal district courts in 2013 alone).

6. *See* Nation-Wide Check Corp. v. Forest Hills Distrib., Inc., 692 F.2d 214, 218 (1st Cir. 1982) ("The adverse inference is based on two rationales, one evidentiary and one not. The evidentiary rationale is nothing more than the common sense observation that a party who has notice that a document is relevant to litigation and who proceeds to destroy the document is more likely to have been threatened by the document than is a party in the same position who does not destroy the document. . . . The other rationale for the inference has to do with its prophylactic and punitive effects. Allowing the trier of fact to draw the inference presumably deters parties from destroying relevant evidence before it can be introduced at trial.").

7. *See* Kronisch v. United States, 150 F.3d 112, 126 (2d Cir. 1998) (stating that an adverse inference instruction serves the remedial purpose, "insofar as possible, of restoring the prejudiced party to the same position [it] would have been in absent the wrongful destruction of evidence by the opposing party").

8. *See, e.g.*, Bracey v. Grondin, 712 F.3d 1012, 1018 (7th Cir. 2013) ("In this circuit, when a party intentionally destroys evidence in bad faith, the judge may instruct the jury to infer the evidence contained incriminatory content."); Hallmark Cards, Inc. v. Murley, 703 F.3d 456, 461 (8th Cir. 2013) ("[W]e conclude that a district court must issue explicit findings of bad faith and prejudice prior to delivering an adverse inference instruction."); United States v. Nelson, 481 F. App'x 40, 42 (3d Cir. 2012) (noting that "where there is no showing that the evidence was destroyed in order to prevent it from being used by the adverse party, a spoliation instruction is improper"); Dalcour v. City of Lakewood, 492 F. App'x 924, 937 (10th Cir. 2012) (both permissive and mandatory adverse inference instructions require showing of bad faith). *But see* Reiff v. Marks, 511 F. App'x 220, 224 (3d Cir. 2013) (applying standard of "actual suppression or withholding of the evidence" with no discussion of bad faith (quoting Brewer v. Quaker State Oil Rig Corp., 72 F.3d 326, 334 (3d Cir. 1995))).

9. *See* Grosdidier v. Broad. Bd. of Governors, Chairman, 709 F.3d 19, 27 (D.C. Cir. 2013), *cert. denied*, 134 S. Ct. 899 (2014) (noting that "the spoliation inference was appropriate in light of the duty of preservation notwithstanding the fact that the destruction

more than negligence—i.e., knowledge or recklessness—but less than bad faith.[10]

On May 29, 2014, the Standing Committee on Rules of Practice and Procedure (the "Standing Committee") approved an amendment to Federal Rule of Civil Procedure 37(e) that sets out a standard for imposing various sanctions—including adverse inference instructions—for the loss or destruction of ESI.[11] While the new rule will resolve the circuit split on the required level of culpability on the part of the spoliating party,[12] it does not adequately address the evidentiary purpose of the instruction, which is *remedial*, not punitive. In many ways, the adverse inference instruction is ill-suited for use as a punishment, particularly compared to other sanctions available to judges.[13] A financial sanction—like an award of attorneys' fees—punishes the wrongdoer without distorting the evidentiary balance. Because the adverse inference instruction can affect the relative strength of the parties' positions in a lawsuit, the focus should be on prejudice and restoring the proper evidentiary balance to the greatest extent possible.

The new rule permits the imposition of an adverse inference instruction "only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation."[14] This high standard of mental culpability deprives judges of an important tool for combating unfairness in many cases involving the loss of evidence. However, it has not gutted the adverse inference instruction completely. The Advisory Committee Note to the new rule indicates that the rule "would not prohibit a court from allowing the parties to present evidence to the jury concerning

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was negligent"); Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 108 (2d Cir. 2002) (finding "culpable state of mind" factor satisfied by a showing of negligence).

10. *See* Stocker v. United States, 705 F.3d 225, 235 (6th Cir. 2013) ("The requisite 'culpable state of mind' may be established through a 'showing that the evidence was destroyed knowingly, even if without intent to breach a duty to preserve it . . . .'" (quoting Beaven v. U.S. Dep't of Justice, 622 F.3d 540, 554 (6th Cir. 2010))); Gomez v. Stop & Shop Supermarket Co., 670 F.3d 395, 399 (1st Cir. 2012) (requiring "notice of a potential claim and of the relevance to that claim of the destroyed evidence"); Vulcan Materials Co. v. Massiah, 645 F.3d 249, 259 (4th Cir. 2011) (requiring "willful conduct"); Vodusek v. Bayliner Marine Corp., 71 F.3d 148, 156 (4th Cir. 1995) (requiring proof that the spoliator "knew the evidence was relevant to some issue at trial and that his willful conduct resulted in its loss or destruction").

11. For the full text of the Rule, see *infra* notes 44–46 and accompanying text.

12. *See* JUDICIAL CONFERENCE OF U.S., REPORT OF ADVISORY COMMITTEE ON CIVIL RULES 308 (May 2, 2014), *in* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE (May 29–30, 2014) [hereinafter MAY 2 REPORT], *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2014-05.pdf ("Resolving this circuit split with a more uniform approach to lost ESI remains a primary objective of the Advisory Committee. The Advisory Committee is satisfied that the new proposed rule will resolve the circuit split.").

13. The arsenal of sanctions includes "evidence preclusion, witness preclusion, disallowance of certain defenses, reduced burden of proof, removal of jury challenges, limiting closing statements, supplemental discovery, [] additional access to computer systems . . . [,] payments to bar associations to fund educational programs, participation in court-created ethics programs, referrals to the state bar, payments to the clerk of court, and barring the sanctioned party from taking additional depositions prior to compliance with the court's discovery order." Willoughby, Jr. et al., *supra* note 1, at 803–05.

14. MAY 2 REPORT, *supra* note 12, at 318.

the loss and likely relevance of information and instructing the jury that it may consider that evidence . . . in making its decision."[15] Yet the new rule gives no guidance on when judges should give such an instruction, what it should say, whether threshold findings are necessary, or who bears the burden of proof on those findings. In fact, the Advisory Committee Note acknowledges that the new rule consciously declines to assign the burden of proving prejudice, leaving the decision entirely to the court in every case.[16] The focus of this Article is to identify what remains of the adverse inference jury instruction after the new Rule 37(e) takes effect, and how judges can most effectively utilize it. In light of the important evidentiary effects of the instruction, we have synthesized our conclusions into a proposed evidentiary rule.

I. FORMS OF THE INSTRUCTION

The adverse inference jury instruction can take a variety of forms, as outlined in 2010 in *Pension Committee of University of Montreal Pension Plan v. Banc of America Securities, LLC*[17]:

> In its most harsh form . . . a jury can be instructed that certain facts are deemed admitted and must be accepted as true. At the next level . . . a court may impose a mandatory presumption. Even a mandatory *presumption*, however, is considered to be rebuttable.
>
> The least harsh instruction *permits* (but does not require) a jury to *presume* that the lost evidence is both relevant and favorable to the innocent party. If it makes this presumption, the spoliating party's rebuttal evidence must then be considered by the jury, which must then decide whether to draw an adverse inference against the spoliating party. This sanction still benefits the innocent party in that it allows the jury to consider both the misconduct of the spoliating party as well as proof of prejudice to the innocent party.[18]

Many courts and commentators discuss the adverse inference instruction without distinguishing between its various forms. As a result, they conclude that the instruction is a severe and outcome-determinative sanction.[19]

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15. *Id.* at 322; *see also* Mali v. Fed. Ins. Co., 720 F.3d 387, 392–93 (2d Cir. 2013).

16. *See* MAY 2 REPORT, *supra* note 12, at 321 ("The rule does not place a burden of proving or disproving prejudice on one party or the other. . . . The rule leaves judges with discretion to determine how best to assess prejudice in particular cases.").

17. 685 F. Supp. 2d 456 (S.D.N.Y. 2010).

18. *Id.* at 470–71.

19. *See* Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 219–20 (S.D.N.Y. 2003) ("In practice, an adverse inference instruction often ends litigation—it is too difficult a hurdle for the spoliator to overcome. The *in terrorem* effect of an adverse inference is obvious. When a jury is instructed that it may 'infer that the party who destroyed potentially relevant evidence did so out of a realization that the [evidence was] unfavorable,' the party suffering this instruction will be hard-pressed to prevail on the merits. Accordingly, the adverse inference instruction is an extreme sanction and should not be given lightly." (quoting Linnen v. A.H. Robins Co., No. 97-2307, 1999 WL 462015, at *11 (Mass. Super. Ct. June 16, 1999))); Brookshire Bros., Ltd. v. Aldridge, 438 S.W.3d 9, 23 (Tex. 2014) (calling the instruction "among the harshest sanctions a trial court may utilize to remedy an act of spoliation" and noting that it can be "tantamount to a death-penalty sanction"); MAY 2

Yet judges have substantial flexibility in selecting the language to employ, and the effects of different instructions may vary dramatically.[20] Even the permissive inference can take multiple forms, prompting one commentator to opine that "[n]early fifty shades of adverse inference instructions have emerged."[21] Some courts inform the jury that spoliation has occurred but allow the jury to infer the likely contents of the evidence and decide what weight to accord that inference.[22] Others allow the jury to determine whether spoliation has occurred in the first place.[23]

The Second Circuit addressed the distinction between various forms of the adverse inference instruction this past year in *Mali v. Federal Insurance Co.*[24] In *Mali*, plaintiffs brought suit against their insurance company seeking indemnification under a fire policy for the destruction of their barn.[25] Although plaintiffs represented that they had no photographs of the second floor of the barn, one of plaintiffs' witnesses indicated that she had seen such a photograph.[26] The insurance company moved for an adverse inference instruction as a sanction for withholding the photograph.[27] The trial judge instructed the jury as follows:

> In this case, evidence has been received which the Defendant contends shows that a photograph exists or existed of the upstairs of what had been referred to as the barn house, but no such photograph has been produced. If you find that the Defendant has proven by a preponderance of the evidence, one, that this photograph exists or existed, two, that the photograph was in the exclusive possession of the Plaintiffs, and, three, that the non-production of the photograph has not been satisfactorily explained, then you may infer, though you are not required to do so, that if the photograph had been produced in court, it would have been unfavorable to the Plaintiffs. You may give any such inference, whatever force or effect as you think is appropriate under all the facts and circumstances.[28]

REPORT, *supra* note 12, at 310 (calling the adverse inference instruction a "very severe measure[]" and explicitly curtailing its use more than any other measure except default judgment or dismissal).

20. *See* Weninger, *supra* note 1, at 787 (noting that "how the judge frames the instruction can significantly influence the severity of the sanction").

21. Norton et al., *supra* note 1, at 491.

22. *See id.* at 460–61.

23. *See id.* ("'There is inconsistency in how courts deal with the division of fact-finding labor' when issuing an adverse inference instruction. . . . [M]any courts imposing an adverse inference instruction as a sanction allow the jury to reassess the evidence and determine whether spoliation occurred at all. Other courts . . . inform the jury that a sanctionable loss or destruction of evidence occurred and then allow the jury to infer that the lost evidence was relevant to the case and would have been prejudicial to the spoliating party." (quoting Nucor Corp. v. Bell, 251 F.R.D. 191, 202 (D.S.C. 2008))).

24. 720 F.3d 387 (2d Cir. 2013).

25. *Id.* at 389.

26. *Id.* at 390.

27. *Id.* at 391.

28. *Id.*

On appeal, the Second Circuit affirmed the standard it promulgated in 2002 in *Residential Funding Corp. v. DeGeorge Financial Corp.*[29] for any adverse inference instruction imposed as a sanction.[30] However, it noted that "the words 'adverse inference instruction' can be used to describe at least two different sorts of instructions"[31]: "[those] given as a sanction for misconduct and [those] that simply explain[] to the jurors inferences they are free to draw in considering circumstantial evidence."[32] The court noted that the trial judge in *Mali* had not imposed the adverse inference as a sanction, nor did he "direct the jury to accept any fact as true . . . [or] draw any inference against the Plaintiffs."[33] Because the judge "left the jury in full control of all fact finding,"[34] there was no need to make the predicate factual findings set out in *Residential Funding.* In other words, *Mali* recognized the distinction between a permissive and a mandatory adverse inference instruction and the need for two separate standards.[35]

II. THE NEW RULE 37(E) AND WHAT REMAINS OF THE ADVERSE INFERENCE INSTRUCTION

The recently approved Rule 37(e) has gone through multiple formulations. On August 15, 2013, the Judicial Conference Advisory Committee on Civil Rules published a proposed revision to Rule 37(e) (the "Published Rule") and invited public comment.[36] The Published Rule

29. 306 F.3d 99 (2d Cir. 2002).
30. *See id.*
31. *Mali*, 720 F.3d at 392.
32. *Id.* at 393–94.
33. *Id.* at 393.
34. *Id.*
35. The Sixth Circuit has agreed with the reasoning in *Mali*, noting that instructions that permit the jury to decide whether wrongful spoliation has occurred are "simply a formalization of what the jurors would be entitled to do even in the absence of a specific instruction." West v. Tyson Foods, Inc., 374 F. App'x 624, 635 (6th Cir. 2010).
36. *See* MAY 2 REPORT, *supra* note 12, at 324–25. The full text of the Published Rule follows:

> (e) Failure to Preserve Discoverable Information.
> (1) *Curative measures; sanctions*. If a party failed to preserve discoverable information that should have been preserved in the anticipation or conduct of litigation, the court may: (A) permit additional discovery, order curative measures, or order the party to pay the reasonable expenses, including attorney's fees, caused by the failure; and (B) impose any sanction listed in Rule 37(b)(2)(A) or give an adverse-inference jury instruction, but only if the court finds that the party's actions: (i) caused substantial prejudice in the litigation and were willful or in bad faith; or (ii) irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation. (2) *Factors to be considered in assessing a party's conduct*. The court should consider all relevant factors in determining whether a party failed to preserve discoverable information that should have been preserved in the anticipation or conduct of litigation, and whether the failure was willful or in bad faith. The factors include: (A) the extent to which the party was on notice that litigation was likely and that the information would be discoverable; (B) the reasonableness of the party's efforts to preserve the information; (C) whether the party received a request to preserve information, whether the request was clear and reasonable, and whether the person who made it and the party consulted in good faith about the scope of preservation; (D) the

applied where a party "failed to preserve discoverable information that should have been preserved in the anticipation or conduct of litigation."[37] The rule separated permissible judicial responses into two categories. A court could "permit additional discovery, order curative measures, or order the party to pay the reasonable expenses, including attorney's fees" without any finding of culpability on the part of the spoliating party or prejudice suffered by the innocent party.[38] However, adverse inference jury instructions and other serious sanctions were only permitted upon a showing of "substantial prejudice" and "willful[ness] or . . . bad faith," or upon a finding that the innocent party was "irreparably deprived . . . of any meaningful opportunity to present or defend against the claims in the litigation."[39]

In anticipation of its April 2014 meeting, the Advisory Committee released a revised version of the proposed Rule 37(e) (the "April Proposal").[40] The April Proposal came after the close of the comment period for the proposed amendments to the Federal Rules of Civil Procedure, which engendered an unprecedented 2345 comments in response to the Published Rule announced in August 2013.[41] In contrast to the Published Rule, the April Proposal was limited to the loss or destruction of ESI and divided discovery remedies into three categories. Subsection (e)(1)

> proportionality of the preservation efforts to any anticipated or ongoing litigation; and (E) whether the party timely sought the court's guidance on any unresolved disputes about preserving discoverable information.

Id.

37. *Id.* at 324.

38. *Id.*

39. *Id.*

40. *See* DISCOVERY SUBCOMMITTEE REPORT RULE 37(E) 372–81 (Apr. 10–11, 2014), *in* ADVISORY COMMITTEE ON CIVIL RULES [hereinafter APRIL 10 REPORT], *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2014-04.pdf. The April Proposal read:

> *(e) Failure to Preserve Electronically Stored Information*. If a party failed to preserve electronically stored information that should have been preserved in the anticipation or conduct of litigation, the court may:
>
> (1) Order measures no greater than necessary to cure the loss of information, including permitting additional discovery; requiring the party to produce information that would otherwise not be reasonably accessible; and ordering the party to pay the reasonable expenses caused by the loss, including attorney's fees. (2) Upon a finding of prejudice to another party from loss of the information, order measures no greater than necessary to cure the prejudice. (3) Only upon a finding that the party acted with the intent to deprive another party of the information's use in the litigation: (A) presume that the lost information was unfavorable to the party; (B) instruct the jury that it may or must presume the information was unfavorable to the party; or (C) dismiss the action or enter a default judgment.
>
> [(4) In applying Rule 37(e), the court should consider all relevant factors, including: (A) the extent to which the party was on notice that litigation was likely and that the information would be relevant; (B) the reasonableness of the party's efforts to preserve the information; (C) the proportionality of the preservation efforts to any anticipated or ongoing litigation; and (D) whether, after commencement of the action, the party timely sought the court's guidance on any unresolved disputes about preserving discoverable information.]

Id. at 383–84.

41. *See* MAY 2 REPORT, *supra* note 12, at 331.

described "curative measures," or "measures no greater than necessary to cure the loss of information," which could be imposed by the court without any finding of culpability or prejudice.[42] Permissible "curative measures" included "permitting additional discovery; requiring the party to produce information that would otherwise not be reasonably accessible; and ordering the party to pay the reasonable expenses caused by the loss, including attorney's fees."[43] Subsection (e)(2) described other remedies that could be imposed by the court upon a finding of prejudice, again regardless of the spoliator's intent. The Discovery Subcommittee Note indicated that subsection (e)(2) was intended to include remedies like preclusion of evidence and deeming certain facts admitted.[44] Subsection (e)(3) addressed terminating sanctions and adverse inference instructions, which were permitted "[o]nly upon a finding [by the court] that the party acted with the intent to deprive another party of the information's use in the litigation."[45] After finding "intent to deprive," "[a court could] instruct the jury that it may or must presume the [lost] information was unfavorable to the party" that caused its loss or destruction.[46]

The Discovery Subcommittee Note clarified that subsection (e)(3) would not:

> prohibit a court, in an appropriate case, from allowing the parties to present evidence and argument to the jury concerning the loss of information. Nor would it bar a court from instructing a jury that it may determine from evidence presented during the trial—as opposed to inferring from the loss of information alone—whether lost information was favorable or unfavorable to positions in the litigation.[47]

The real distinction then between a jury instruction imposed under subsection (e)(3) as opposed to subsection (e)(2) was who would hear evidence about the circumstances of the loss or destruction and make a finding of culpability. Therefore, a variation on the permissive instruction in *Mali*, leaving all fact-finding to the jury, might still have been available without the need to demonstrate "intent to deprive."

On May 2, 2014, following its April meeting, the Advisory Committee recommended adoption of yet another version of proposed Rule 37(e),[48] which the Standing Committee approved on May 29, 2014 (the "Approved Rule"). The Approved Rule again requires a finding of "intent to deprive" before a mandatory or permissive adverse inference jury instruction may be imposed.[49] The full text of the Approved Rule is as follows:

> (e) Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or

42. *Id.* at 375.
43. *Id.*
44. *Id.* at 376.
45. *Id.* at 377.
46. *Id.*
47. *Id.* at 390.
48. *See id.* at 318.
49. *Id.*

> conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court may: (1) upon finding prejudice to another party from loss of the information, order measures no greater than necessary to cure the prejudice; or (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation: (A) presume that the lost information was unfavorable to the party; (B) instruct the jury that it may or must presume the information was unfavorable to the party; or (C) dismiss the action or enter a default judgment.[50]

The language in the Advisory Committee Note addressing adverse inference instructions differs somewhat from the previous draft, which permitted a court to inform the jury that it could "determine from evidence presented during the trial—as opposed to inferring from the loss of information alone—whether lost information was favorable *or* unfavorable to positions in the litigation."[51] The new Note states simply that a court may instruct the jury that it may "consider [evidence of spoliation] . . . in making its decision."[52] It is unclear whether the language change is merely stylistic or intended to restrict the form of jury instructions permitted. However, the most logical conclusion is that the new Note still permits a *Mali*-type instruction to guide the jury's consideration of spoliation evidence without requiring "intent to deprive."[53]

The Advisory Committee purports to have "preserve[d] a broad range of trial court discretion for dealing with lost ESI"[54] and notes that "[t]here is no all-purpose hierarchy of the severity of various [curative] measures; the severity of given measures must be calibrated in terms of their effect on the particular case."[55] Yet, the Approved Rule does exactly the opposite with respect to the adverse inference jury instruction, precluding its use in all but the most limited circumstances.

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50. *Id.*

51. APRIL 10 REPORT, *supra* note 40, at 390 (emphasis added).

52. MAY 2 REPORT, *supra* note 12, at 322. The Note clarifies that a court may still give "the jury instructions to assist in its evaluation of [spoliation] evidence or argument, other than instructions to which subdivision (e)(2) applies." *Id.* at 321.

53. *See* SUMMARY OF COMMENTS ON PROPOSED RULE 37(E), AUGUST 2013 PUBLICATION 371, *in* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE (May 29–30, 2014), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2014-05.pdf (comment of John Rosenthal noting that the Published Rule is "bereft of a standard or guidance as to when and under what circumstances to grant [permissive instructions], likely producing years of litigation about what the rule means"); *id.* at 380 (comment of New York City Bar Association's committee on federal courts noting that "[i]f it is permissible as a 'curative measure' to allow the jury to hear evidence about the loss of information and to allow counsel to argue to the jury about it, it is hard to understand why the court cannot properly give a jury instruction to guide its consideration of that evidence." (citing Mali v. Fed. Ins. Co., 720 F.3d 387, 391–94 (2d Cir. 2013)).

54. MAY 2 REPORT, *supra* note 12, at 308–09 ("The public comments and this analysis highlighted the wide variety of situations faced by trial courts and litigants when information is lost, and strongly underscored the need to preserve broad trial court discretion in fashioning curative remedies. The revised rule proposal therefore retains such discretion.").

55. *Id.* at 321.

Nonetheless, some discretion still remains for the trial judge in determining when to submit evidence of spoliation to the jury pursuant to subsection (e)(1) without finding "intent to deprive," although this option is only addressed in the Advisory Committee Note rather than in the Approved Rule.[56] In light of this omission, an evidentiary rule could provide much-needed guidance.[57] The following sections discuss the considerations that should shape an evidentiary rule on *Mali*-type adverse inference instructions and presents a proposed model rule consistent with Approved Rule 37(e).

A. Predicate Factual Findings

The question of when evidence of spoliation should be presented to the jury is ultimately a question of institutional competency. Many courts and commentators have expressed concern that juries are unduly swayed by any suggestion of impropriety and are not fair fact-finders in the context of spoliation allegations.[58] The Texas Supreme Court recently noted that adverse inference jury instructions "can unfairly skew a jury verdict, resulting in a judgment that is based not on the facts of the case, but on the conduct of the parties during or in anticipation of litigation."[59] The court suggested that the risk of jury overreaction is actually worse when "evidence regarding the spoliating conduct is presented to a jury" than if the judge instructs the jury as a matter of law that wrongdoing has occurred.[60] Other courts have expressed concern about conserving judicial resources

56. *See supra* notes 52–53 and accompanying text.

57. *See* Brookshire Bros., Ltd. v. Aldridge, 438 S.W.3d 9, 38–39 (Tex. 2014) (Guzman, J., dissenting) ("The spoliation of evidence, as the Court notes, is both an evidentiary concept, as well as a particularized form of discovery abuse. Thus, spoliation issues are particularly well-suited to redress via the rulemaking process. . . . [T]he rulemaking process can ultimately yield clarity and uniformity not otherwise attainable when this process is eschewed in favor of judicially-crafted rules.").

58. *See* Henning v. Union Pac. R.R. Co., 530 F.3d 1206, 1219–20 (10th Cir. 2008) (opining that the adverse inference "'brands one party as a bad actor' and 'necessarily opens the door to a certain degree of speculation by the jury, which is admonished that it may infer the presence of damaging information in the unknown contents of an erased audiotape'" (quoting Morris v. Union Pac. R.R., 373 F.3d 896, 900–01 (8th Cir. 2004))); Mosaid Techs. Inc. v. Samsung Elecs. Co., 224 F.R.D. 595, 600 (D.N.J. 2004) (expressing concern that an adverse inference jury instruction "would elevate [the evidence] to an arguably unjustified level of importance and create a potentially insurmountable hurdle for defendants"); James T. Killelea, Note, *Spoliation of Evidence Proposals for New York State*, 70 BROOK. L. REV. 1045, 1060–62 (2005) (noting that some "commentators fear that juries will be unduly influenced by destruction of evidence and will unfairly penalize litigants," and that "the evidence of spoliation [can] inform[] and influence[] a jury's decision as much, if not more so, than the underlying facts of the claim itself").

59. *Brookshire Bros.*, 438 S.W.3d at 17 ("The instruction is an important remedy, but its use can affect the fundamental fairness of the trial in ways as troubling as the spoliating conduct itself.").

60. *Id.* at 13.

and the possibility that allowing parties to present evidence of spoliation will turn into a "trial within a trial."[61]

In our opinion, these concerns are somewhat overblown. We respectfully disagree with the Texas Supreme Court that juries are institutionally incapable of drawing reasoned conclusions about how evidence was lost or destroyed. While it is true that trial courts typically resolve evidentiary matters,[62] evaluating competing factual scenarios and determining a party's intent are exactly the type of functions that juries routinely perform. In the words of Judge William Young: "Few things seem more appropriately the province of a jury than the inference of a [party's] mental state."[63] After hearing both the allegations of spoliation and any innocent explanations, jurors are perfectly capable of using their common sense to decide the likely contents of the lost evidence. As the Sixth Circuit recently noted, "a permissive adverse inference instruction does not guarantee anyone a windfall; it leaves the decision in the hands of the jury."[64] In fact, sometimes "a missing piece of evidence like a photograph or video [is] irreplaceable," and even an adverse inference instruction will not fully compensate the innocent party.[65] In many cases, "a picture is indeed worth a thousand words."[66] Nonetheless, any instruction to the jury must be carefully crafted. While the jury is surely capable of drawing inferences regarding the content of lost evidence—and thereby curing any prejudice caused to the innocent party—the jury must not use evidence of spoliation to *punish* the spoliating party absent proof of "intent to deprive."[67]

Moreover, concerns about unfairly inflaming the jury or wasting judicial resources can be addressed by permitting the judge to exercise a limited gatekeeping role through predicate factual findings, while still leaving the

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61. *See* Technical Sales Assocs. v. Ohio Star Forge Co., No. 07 Civ. 11745, 2009 WL 1212809, at *1 (E.D. Mich. May 1, 2009) (calling dispute over spoliation allegations "the sideshow which eclipses the circus").

62. *See Brookshire Bros.*, 438 S.W.3d at 20 ("It is well-established that evidentiary matters are resolved by the trial court.").

63. SEC v. EagleEye Asset Mgmt., 975 F. Supp. 2d 151, 159 (D. Mass. 2013).

64. Flagg v. City of Detroit, 715 F.3d 165, 178 (6th Cir. 2013).

65. *Brookshire Bros.*, 438 S.W.3d at 17.

66. *Id.* In one recent district court case, *Simms v. Deggeller Attractions, Inc.*, No. 12 Civ. 00038, 2013 WL 49756 (W.D. Va. Jan. 2, 2013), plaintiffs sued for injuries sustained on defendants' roller coaster ride. *Id.* at *1. Defendants alleged that one of the plaintiffs caused the accident when his hat lodged in the equipment, while plaintiffs contended that many other customers on the ride were also wearing hats. *Id.* at *1–2. The amusement park routinely took photographs on the rides for customer purchase and deleted them at a later time. *Id.* at *5. When the police and plaintiffs asked to see the photographs two days after the accident, however, the photographs had already been deleted. *Id.* The district court denied sanctions partially because it concluded that plaintiffs could use eyewitness testimony instead. *Id.* at *6. Unfortunately, the court did not fully appreciate the difference in evidentiary quality between photographic evidence and eyewitness testimony. Eyewitness testimony is subject to attack based on memory, bias, veracity, or even eyesight. *Simms* exemplifies a factual scenario in which a picture is indeed worth a thousand words.

67. Subsection (e)(2) lists remedies that appear to be punitive in nature, including dismissal, default, and certain forms of adverse inference jury instructions. Under subsection (e)(2), therefore, it *can* be appropriate for juries to punish the spoliating party by drawing an adverse inference—but only if there is proof of "intent to deprive."

inference-drawing function to the jury consistent with subsection (e)(1) of the Approved Rule.[68] As with any form of sanction for lost evidence, the moving party must show that the opposing party lost or destroyed relevant evidence within its control that it had a duty to preserve.[69] The Approved Rule also requires the court to make a predicate finding of prejudice before imposing a permissive adverse inference instruction pursuant to subsection (e)(1).[70] However, the Rule expressly declines to specify which party bears the burden of proving prejudice, which may create confusion and inconsistency when the Approved Rule goes into effect.[71] Who bears the burden of proving or disproving prejudice is a key question in the context of spoliation because it is often difficult for either party to demonstrate the nature and content of evidence that is no longer available. Some courts have addressed this quandary by employing a burden-shifting regime based on the level of mental culpability of the spoliator.

B. Burden Shifting

Mental culpability is irrelevant in and of itself to any potential rule of evidence because the sole concern from an evidentiary perspective is remedying the prejudice caused to the innocent party by the loss of relevant and irreplaceable evidence. However, mental culpability can be useful as a *proxy* for the contents of the missing evidence and therefore the likelihood of prejudice.[72] The Second Circuit explained the interplay between culpability and prejudice in *Residential Funding*. The court concluded that "[w]here a party destroys evidence in bad faith, that bad faith alone is sufficient circumstantial evidence from which a reasonable fact finder could conclude that the missing evidence was unfavorable to that party."[73]

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68. These concerns are also ameliorated by Federal Rule of Evidence 403, which gives judges the discretion to limit the evidence presented to prevent "unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." FED. R. EVID. 403.

69. MAY 2 REPORT, *supra* note 12, at 311.

70. *Id.* at 312.

71. The Advisory Committee Note acknowledges that the Approved Rule "does not say which party bears the burden of proving prejudice. . . . Under the proposed rule, each party is responsible for providing such information and argument as it can; the court may draw on its experience in addressing this or similar issues, and may ask one or another party, or all parties, for further information." *Id.*; *see also id.* at 321 ("The rule does not place a burden of proving or disproving prejudice on one party or the other. . . . The rule leaves judges with discretion to determine how best to assess prejudice in particular cases.").

72. *See* Shira A. Scheindlin & Kanchana Wangkeo, *Electronic Discovery Sanctions in the Twenty-First Century*, 11 MICH. TELECOMM. & TECH. L. REV. 71, 88–89 (2004) ("[C]ourts have been less concerned with proof of prejudice when faced with willful or bad faith conduct. . . . In cases where one or the other of these elements is less pronounced, there appears to be a sliding scale between the two. That is, the more prejudice there is, the less willfulness courts require before sanctioning a party for e-discovery violations, and vice versa."); *see also* Drew D. Dropkin, *Linking the Culpability and Circumstantial Evidence Requirements for the Spoliation Inference*, 51 DUKE L.J. 1803, 1826 (2002) ("As the culpability of the spoliating party increases (from innocence to bad faith conduct), the intuitive appeal of the . . . assumption underlying the inference increases. . . . [T]he spoliator's state of mind serves as a proxy for the contents of the evidence . . . .").

73. Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 109 (2d Cir. 2002).

Certainly, evidence lost accidentally gives rise to no particular inference about its contents, and evidence destroyed in bad faith gives rise to the strong inference that the evidence was unfavorable to the destroying party. Between the two extremes, however, the answer is less clear. Some courts and commentators believe that negligent acts cannot give rise to any legitimate presumption about the contents of the evidence.[74] Others believe that even negligence is sufficient to indicate that the evidence was more likely favorable to the other party.[75]

Regardless of whether negligence is sufficient to justify a conclusive inference, it is sufficient to shift the burden of proof. Many courts "recognize the unseemliness of insisting that a victim of spoliation show prejudice when the wrongdoer has deprived that victim of the ability to make such a showing"[76] and have concluded that "the risk that the evidence would have been detrimental rather than favorable should fall on the party responsible for its loss."[77] Only when the evidence is lost without fault, such as through an Act of God, is it fair to place the burden of proving prejudice on the moving party. Thus, once the moving party makes a threshold showing that relevant evidence was lost despite a duty to preserve, which is effectively a showing of at least negligence,[78] the alleged spoliator bears the burden of rebutting prejudice—either by showing that

74. *See, e.g.*, United States v. Laurent, 607 F.3d 895, 902 (1st Cir. 2010) (noting that "ordinarily, *negligent* destruction would not support the logical inference that the evidence was favorable to the defendant"); Aramburu v. Boeing Co., 112 F.3d 1398, 1407 (10th Cir. 1997) ("Mere negligence in losing or destroying records is not enough because it does not support an inference of consciousness of a weak case."); Vodusek v. Bayliner Marine Corp., 71 F.3d 148, 156 (4th Cir. 1995) ("An adverse inference about a party's consciousness of the weakness of his case, however, cannot be drawn merely from his negligent loss or destruction of evidence."); Makara, *supra* note 1, at 684 (noting that some courts feel that "without a showing of willful spoliation, there is no indication of consciousness of unfavorable evidence, [and therefore] non-willful spoliation . . . cannot sustain an inference that a negligent spoliator destroyed evidence because it would have hurt the spoliator's case").

75. *See, e.g.*, Nation-Wide Check Corp. v. Forest Hills Distribs., Inc., 692 F.2d 214, 218–19 (1st Cir. 1982) (addressing the "common sense" notion that a party "who proceeds to destroy the document is more likely to have been threatened by the document than is a party in the same position who does not destroy the document," and that the "abandonment of potentially useful evidence is, at a minimum, an indication that [the spoliator] believed the records would not *help* his side of the case"); Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 75 (S.D.N.Y. 1991) ("[The] sanction [of an adverse inference] should be available even for the negligent destruction of documents if that is necessary to further the remedial purpose of the inference. It makes little difference to the party victimized by the destruction of evidence whether that act was done willfully or negligently. The adverse inference provides the necessary mechanism for restoring the evidentiary balance."); 2 WIGMORE ON EVIDENCE § 291, at 228 (Little Brown & Co. 1923) ("The failure or refusal to produce a relevant document, or the destruction of it, is evidence from which alone its contents may be inferred to be unfavorable to the possessor . . . .").

76. Weninger, *supra* note 1, at 798–99.

77. *Turner*, 142 F.R.D. at 75; *accord* Norton et al., *supra* note 1, at 465 ("[H]ow does a party show that something it never saw, read, or possessed was likely relevant to its claims or defenses?").

78. *See* Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 220 (S.D.N.Y. 2003) ("Once the duty to preserve attaches, any destruction of documents is, at a minimum, negligent.").

the lost evidence would not have helped the innocent party or that an adequate replacement exists.

C. A Separate Standard for ESI?

One consideration in devising any rule on sanctions is how to fairly address technological advancements, particularly the proliferation of ESI. In developing the Approved Rule, the Advisory Committee concluded that ESI is inherently different from other forms of evidence and merits a different standard for spoliation sanctions than that applied to other forms of evidence.[79] It is beyond dispute that ESI is increasing at an exponential rate and has fundamentally changed the practice of discovery. "One industry expert reported to the Advisory Committee that there will be some 26 billion devices on the Internet in six years—more than three for every person on earth."[80] Many commentators believe the standard for sanctions based on destruction of electronic information should be more lenient than the standard for destruction of tangible things.[81] They argue that ESI is often automatically modified or deleted[82] and worry that "litigants [will] feel forced to decide between needlessly preserving excessive amounts of electronically stored information at great burden and expense or later having to compromise lawful claims or defenses."[83]

However, the concern that electronic discovery will lead to a proliferation of sanctions has not come to pass. Sanctions in any form are extremely rare.[84] One 2004 survey found that "[i]n no [federal] case did a judge sanction a party for the routine recycling of backup tapes where the party did not know (or should not have known) of its obligation to retain discoverable information."[85]

Moreover, while the volume of ESI has increased, so has storage capacity. In many cases a party must take affirmative steps to *delete* information rather than retain it. "As a result of new technology and the accompanying exponential increase in electronically stored data, document retention policies are now the rule rather than the exception."[86] Jurors are often more familiar with technological advances than judges, and the difficulty of preserving electronic information, or the ease of accidentally deleting it, is something the average layperson is capable of evaluating on a

79. MAY 2 REPORT, *supra* note 12, at 311.

80. *Id.* at 309.

81. *See, e.g.*, Thomas Y. Allman, *Defining Culpability: The Search for a Limited Safe Harbor in Electronic Discovery*, 2 FED. CTS. L. REV. 65, 70 (2007) ("[A]ssumptions about how potential evidence is lost in the world of tangible things do not necessarily apply in an electronic environment.").

82. *See* MAY 2 REPORT, *supra* note 12, at 311 ("ESI is . . . deleted or modified on a regular basis, frequently with no conscious action on the part of the person or entity that created it."); *see also id.* at 314 ("ESI is more easily lost than tangible evidence. . . .").

83. Nichols, *supra* note 1, at 902.

84. *See* Willoughby, Jr. et al., *supra* note 1, at 789.

85. Scheindlin & Wangkeo, *supra* note 72, at 95.

86. Brookshire Bros., Ltd. v. Aldridge, 438 S.W.3d 9, 37 (Tex. 2014) (Guzman, J., dissenting).

case-by-case basis. Therefore, the fact that most evidence is now electronically stored does not necessitate a separate, more lenient standard for the imposition of adverse inference instructions.

D. Flexibility and Judicial Discretion

A final question implicating the respective roles of judge and jury is whether the court *must* submit evidence of spoliation to the jury once the predicate findings have been satisfied. The answer, in our opinion, is yes. Because a central purpose of an evidentiary rule is to provide guidance and consistency, the instruction should be mandatory instead of discretionary. If the rule stated only that a judge "may" impose a permissive adverse inference instruction even when the predicate requirements are found, the optional nature of the rule would gut its effectiveness.

In *Chin v. Port Authority of New York & New Jersey*,[87] the Second Circuit affirmed the district court's decision not to give an adverse inference jury instruction even though the defendant may have been grossly negligent in failing to preserve evidence.[88] The court noted that "a finding of gross negligence merely permits, rather than requires, a district court to give an adverse inference instruction."[89] This unbounded discretion amounts to no standard at all and leads to a lopsided regime of judicial review. A district court's decision to impose a jury instruction is more easily reversible than the decision to refrain. Because the majority of sanctions for destruction of evidence are imposed on defendants, one-sided judicial review on balance disadvantages plaintiffs.[90] As the Sixth Circuit recently noted:

> When the requirements for an adverse inference instruction are met, the district court *should* issue an instruction. . . . Although the district court's findings receive deferential review . . . presumably its judgment *should* be upset if the movant clearly met all three prongs and yet an instruction was not granted.[91]

While the imposition of an instruction should be mandatory where the predicate findings are met, it is also important to preserve some degree of judicial discretion. The judge should be able to prevent highly prejudicial evidence from reaching the jury where it would exacerbate the evidentiary imbalance rather than equalize it.[92] While Federal Rule of Evidence 403

87. 685 F.3d 135 (2d Cir. 2012).
88. *See id.* at 161.
89. *Id.* at 162.
90. *See* Willoughby, Jr. et al., *supra* note 1, at 803 ("Defendants are sanctioned for e-discovery violations nearly three times more often than plaintiffs. In our survey, defendants were sanctioned 175 times, plaintiffs were sanctioned fifty-three times, and third parties were sanctioned twice. The three-to-one ratio of defendant sanctions to plaintiff sanctions has generally held steady over the last ten years, even as the number of sanction cases and sanction awards has greatly increased.").
91. Flagg v. City of Detroit, 715 F.3d 165, 177 (6th Cir. 2013) (emphasis added).
92. *See* Anderson v. Beatrice Foods Co., 900 F.2d 388, 395 (1st Cir. 1990) ("[T]he judge should take pains neither to use an elephant gun to slay a mouse nor to wield a cardboard

addresses these concerns, a balancing test could further minimize the risk of unfairly inflaming the jury. Therefore, proof of the loss of evidence should not be presented to the jury if the potential for unfair prejudice to the alleged spoliator substantially outweighs the benefit of a jury instruction to the innocent party. The court is the gatekeeper and is tasked with applying this proposed balancing test.

E. Proposed Federal Rule of Evidence

Having discussed the threshold issues, we present the following rule, more for the purpose of stimulating discussion than as an actual rule-making proposal:

> (a) *Prima Facie Showing.* To make a prima facie showing for a permissive adverse inference instruction, the moving party must demonstrate by a preponderance of the evidence that the opposing party: (1) lost or destroyed relevant evidence, (2) within that party's control, (3) as to which there existed a duty to preserve at the time of the loss or destruction.
>
> (b) *Prejudice.* The non-moving party may rebut a prima facie showing by demonstrating by a preponderance of the evidence that: (1) the lost or destroyed evidence would not have been beneficial to the moving party's case, or (2) a satisfactory replacement to the lost or destroyed evidence is available.
>
> (c) *Burden Shifting.* If the non-moving party cannot demonstrate lack of prejudice but can show that the evidence was lost or destroyed without fault, then the burden shifts to the moving party to affirmatively demonstrate prejudice as defined in (b).
>
> (d) *Balancing Test.* If the moving party carries its burden, the circumstances of destruction and the likely contents of the missing evidence shall be decided by the jury pursuant to a permissive adverse inference instruction, unless the risk of unfair prejudice to the non-moving party substantially outweighs the benefit of the instruction to the moving party.
>
> (e) *Definition.* A permissive adverse inference jury instruction is one that implies no fault or wrongdoing by the alleged spoliator, but simply explains that the jury is free to draw any inference it decides is warranted regarding the circumstances of destruction and the likely contents of the evidence, and to accord that inference whatever weight it deems appropriate.

CONCLUSION

The Approved Rule 37(e) is a laudable attempt to resolve inconsistency among the circuits in the use of adverse inference jury instructions. Unfortunately, the Approved Rule discounts the important remedial

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sword if a dragon looms. Whether deterrence or compensation is the goal, the punishment should be reasonably suited to the crime.").

function of the instruction and imposes strict limits without regard for the instruction's many forms. Trial courts have other sanctions at their disposal more appropriate for punishment and deterrence. When it comes to the adverse inference instruction, evidentiary concerns should be primary.

One form of the instruction remains available to trial courts without the need to meet the Approved Rule's strict "intent to deprive" standard. Specifically, courts may issue a *Mali*-type permissive instruction that leaves all factual findings, including the question of whether spoliation occurred, to the jury. In our opinion, courts should not balk at presenting evidence of spoliation to the jury in appropriate cases, including where one party's negligent failure to preserve evidence has harmed the other party's case and no adequate replacement is available. While some courts and commentators have expressed concern that juries will be unfairly swayed by the suggestion of impropriety, juries are frequently asked to evaluate competing factual theories and to use their common sense to decide which is most plausible. Trial courts retain the discretion pursuant to Federal Rule of Evidence 403 to exclude evidence that would unfairly inflame the jury or waste judicial resources. Moreover, the predicate finding of prejudice ensures that evidence of spoliation will only be presented in cases where the loss of evidence has affected the fairness of the proceedings.

The Approved Rule gives no guidance on when courts should employ a *Mali*-type instruction and which party bears the burden of proving or disproving prejudice. These omissions may breed confusion and inconsistency in lower courts rather than clarity. Our hope is that our suggested evidentiary rule can serve as a standard to guide trial courts in the use of permissive instructions after the Approved Rule takes effect.[***]

[***] Editor's Note: As evidenced in a September 2014 Standing Committee report published after the writing of this Article, the Standing Committee made minor stylistic changes to the Advisory Committee proposal in May instead of approving it in full. Specifically, the Standing Committee moved the word "may" in the language of the rule and made small changes to the Committee Note. These changes do not affect the analysis in this Article. JUDICIAL CONFERENCE OF U.S., SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE, Appx. B-56 to B-57 (Sept. 2014), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2014.pdf. The Judicial Conference approved the Standing Committee's proposal with the changes noted above in September 2014. The current text of the rule is as follows:

> (e) Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court: (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may: (A) presume that the lost information was unfavorable to the party; (B) instruct the jury that it may or must presume the information was unfavorable to the party; or (C) dismiss the action or enter a default judgment.