

FAILURE OF POLICE TO PRESERVE NOTES¹
(effective May 27, 2011)²

You have heard testimony that _____ failed to preserve (his/her/their) original notes in this case. Law enforcement officers are required to preserve contemporaneous notes of their interviews and observations at the scene of a crime, even after producing their final reports. A defendant is entitled to test whether the officer has accurately recorded statements and observations that were made contemporaneously and also to test whether the final report and the officer's trial testimony are inaccurate because of some inconsistency with what the officer recorded at the scene. When the contemporaneous notes are not preserved, the defendant is deprived of this opportunity to test the accuracy of the contemporaneous notes, the final report, and the trial testimony.

[Insert Parties Contentions, If Any]

It is for you the jury to decide the credibility of the evidence presented. In evaluating the officer's credibility, you may infer that notes lost or destroyed by an officer before trial contained information unfavorable or inconsistent with that officer's trial testimony or final report. In deciding whether to draw this inference, you may consider all the evidence in the case, including any explanation given as to the circumstances under which the contemporaneous notes were lost or destroyed. In the end, however, the weight to be given to the testimony, and to the loss or destruction of the notes, is for you, and you alone, to decide.

¹ This charge must be requested by a defendant, and when given it should be molded, after conference with counsel, to the facts of the case. State v. W.B., 205 N.J. 588 (2011). Note that the Court stated in footnote 10 of W.B., "Every opportunity when contemporaneous notes are lost or destroyed does not necessitate an adverse inference charge." Id. at 608-09. The Court cited State v. P.S., 202 N.J. 232 (2010), for this proposition, but when the adverse inference charge may be deemed inapplicable is not entirely clear. The issue will have to be addressed on a case-by-case basis until the Court provides further guidance on the subject.

² In State v. W.B., 205 N.J. 588, 608-09 (2011), the Supreme Court held that the rule against destroying contemporaneous notes would not be effective until 30 days after the opinion, which is May 27, 2011. This charge is inapplicable to notes destroyed or lost before this date.