Agenda

Advisory Committee on Rules of Civil Procedure

June 22, 2016

4:00 to 6:00 p.m.

Scott M. Matheson Courthouse

450 South State Street

Judicial Council Room

Administrative Office of the Courts, Suite N31

Welcome and recognition of and appreciation for service to outgoing members Tim Shea, Lori Woffinden, Judge Lyle Anderson, and Steve Marsden.		Jonathan Hafen
Approval of minutes.	Tab 1	Jonathan Hafen
Rule 4(d)(1)(A). Personal Service. *Comments to proposed amendments.*	Tab 2	Nancy Sylvester
Rule 58C. Motion to renew judgment.	Tab 3	Judge Joseph Bean, Nancy Sylvester
Rule 35. Physical and mental examination of persons.	Tab 4	Trystan Smith, Judge James Blanch, Barbara Townsend
FRCP Rule 34(b)((2)(A)-(C) Requests for Production.	Tab 5	Nancy Sylvester
FRCP Rule 37(e) Failure to Preserve ESI	Tab 6	Nancy Sylvester, Paul Stancil

Committee Webpage: http://www.utcourts.gov/committees/civproc/

Meeting Schedule:

September 28, 2016

October 26, 2016

November 16, 2016

Tab 1

UTAH SUPREME COURT ADVISORY COMMITTEE
ON RULES OF CIVIL PROCEDURE

Meeting Minutes – May 25, 2016

Present:	Jonathan Hafen, Terri McIntosh, Judge Toomey, Trystan Smith, Steve Marsden, James Hunnicutt, Kent Holmberg, Rod Andreason, Amber Mettler, Sammi Anderson, Judge Blanch, Judge Furse, Leslie Slaugh
Telephone:	Lori Woffinden, Judge Pullan
Staff:	Nancy Sylvester, Heather Sneddon
Guest:	Zachary Meyers

I. Welcome and approval of minutes. [Tab 1] – Jonathan Hafen

Jonathan Hafen welcomed the committee and reported on the committee's presentation at the district judges' conference and the positive feedback received. Judge Pullan commented that the presentation was valuable and provided exceptional training for judges. Mr. Hafen noted that Judge Blanch's presentation on Rule 7 was particularly compelling.

With minor edits to the meeting minutes from April, Rod Andreason moved to approve them. The motion was seconded by James Hunnicutt and passed unanimously.

II. Rule 4(d)(1)(A), Personal Service. [Tab 2] – Zachary Meyers

Zachary Meyers, an associate at a small firm in Bountiful, presented to the committee. He does a lot of landlord/tenant work and has been speaking with Senator Fillmore regarding what he believes to be an unfair rule regarding service of process. Under Rule 4(d)(1)(A), service may be accomplished by leaving papers at the defendant's abode with a person of suitable age and discretion. In his experience, this rule does not provide due process. He reported that, many times, defendants are not receiving actual notice and defaults are entered without them having had an opportunity to respond. The problem is exacerbated in landlord/tenant cases where the tenant has only 3 days to respond to a summons. Mr. Meyers said that landlords take advantage of the rule by leaving summons and complaints with roommates, who oftentimes are not motivated to give the documents to the named defendant. Because the rules permit service in this matter, default judgments are difficult to get set aside. He suggested that this may even present constitutional due process concerns.

<u>Discussion</u>:

- Mr. Hafen raised the situation where a defendant is ducking service. Mr. Meyers responded that those defendants may be served through other means, including by mail or publication. Steve Marsden questioned why a roommate is not of suitable age or discretion, and why a roommate would not be motivated to tell the defendant about service. Mr. Meyers responded that many times, one roommate is not paying his/her share of the rent and does not want the others to know. Trystan Smith said that if the defendant did not receive notice in that situation, the defendant should be able to get the default set aside. Mr. Meyers reported that he has had situations where the default is not set aside because the landlord followed the rule, even if the defendant did not receive actual notice. The eviction is the greater punishment, however, because that goes on a tenant's credit report and the tenant often cannot rent again.

- Mr. Marsden asked why the 3-day notice posted on the door does not ameliorate the issue. Mr. Meyers said that one roommate will remove it from the door. And often the notice does not state what the lease violation is. Judge Blanch commented that he has not heard of this problem, and thinks that he would have if it was happening routinely. Mr. Marsden said that he thinks the requested solution is too big to address the rather narrow problem presented. Mr. Hunnicutt agreed, and said that he was opposed to it from a family law perspective. He would want input from landlord attorneys on it. Mr. Meyers said that he is mainly interested in addressing the rule from a landlord/tenant perspective, but believes there is an argument to be made that the rule is unfair generally. Terri McIntosh commented that the rule has been around for years, and asked whether Mr. Meyers had conducted any research regarding its constitutionality. Mr. Meyers said he had not. Ms. McIntosh proposed that he prepare something that is specific to landlord/tenant cases for the committee to consider; she is not inclined to change rules that have been around for years on both the state and federal level. Mr. Hafen suggested that Mr. Meyers also look at Rule 26.3.

- The committee advised Mr. Meyers that it will want to hear from attorneys on both sides with respect to his proposed rule change. Judge Blanch also commented that although these orders are more disruptive because of the eviction aspect, for that same reason, you can typically have greater confidence that the defendant knows about the lawsuit because it is the place from which the landlord is trying to remove the tenant. Rod Andreason suggested that it might be more fruitful for Mr. Meyers to discuss with Senator Fillmore the prospect of making it a misdemeanor to remove a 3-day notice from a door. Mr. Meyers said that the 3-day notice doesn't always give notice that there is going to be a lawsuit. Judge Blanch suggested that the legislature could prevent putting a 3-day notice up that does not give notice of a potential lawsuit. Mr. Hunnicutt commented that he would also like to know how this issue is addressed in other states.

- Mr. Hafen thanked Mr. Meyers for his time and input. The committee looks forward to receiving a narrower proposal from him.

III. Rule 7A, Motion for Order to Show Cause. [Tab 3] – Nancy Sylvester, James Hunnicutt

Nancy Sylvester informed the committee that the Code of Judicial Administration has a rule that covers motions for orders to show cause, but it only applies in the Fifth and Sixth Districts. Mr. Shea has suggested making it into a civil procedure rule. According to Judge Blanch's suggestion, she has added a note that the rule does not apply in criminal cases because those are governed by statute. Mr. Hunnicutt would also prefer that this rule not apply in domestic cases.

<u>Discussion</u>:

- Mr. Marsden suggested striking "personal knowledge" from line 5 in both places; it is a foundational aspect of an affidavit and declaration. Judge Blanch suggested that the note refer to the specific criminal statute: UCA § 77-18-1, *et seq*.

- The committee discussed the different contexts in which members have seen motions for orders to show cause, outside of the domestic arena, and whether problems exist such that a rule should be adopted. Judge Pullan commented that having a rule would help delineate the situations in which a motion for order to show cause is appropriate; he has seen motions inappropriately styled. Judge Blanch also commented that having a rule with guidelines on how to address violations of court orders would be helpful.

- The committee also discussed at length whether an initial hearing/meeting on a motion for order to show cause should be set, with a second evidentiary hearing scheduled later. Many committee members commented that an initial hearing is very helpful from an efficiency standpoint, as it often narrows the issues.

- Mr. Hafen and Ms. Sylvester raised the issue of the rule requiring the submission of a proposed order, which the committee discussed. Judge Blanch said that Rule 7 would likely need to be amended to identify motions for orders to show cause as an exception if proposed orders are to be submitted. Mr. Hunnicutt commented that motions for orders to show cause are filed all the time in domestic cases, and proposed orders are always submitted. Practitioners want it to be easy for the court or commissioner to enter, but each district handles these motions in their own way. Judge Pullan commented that contempt has developed in the caselaw, but in his experience, domestic attorneys are so used to how they handle these motions that domestic procedure is largely untethered from the caselaw. In his experience, the 3-step process is pretty consistent: an order was entered, the party knew about it, the failure to comply was willful, and the party seeking sanctions bears the burden of proof. The degree of proof defends on the sanction sought. Criminal sanctions require proof beyond a reasonable doubt; civil sanctions are based upon a preponderance of the evidence. The committee discussed further the practice of the domestic bar in the various districts.

- The majority in attendance were in favor of adopting a rule on motions for orders to show cause. Through further discussion of whether to include a proposed order, several members commented that it would be useful in this context, particularly if the order is simply to show up to the initial conference. Amber Mettler commented that she doesn't believe an amendment to Rule 7 would be necessary because under Rule 7A(c), a judge may act on the motion without requiring a response. Judge Blanch commented that the OSC nomenclature is also used with respect to judges' OSC calendars. The note should say that the rule doesn't have anything to do with the court's discretion to issue OSCs in cases that aren't being prosecuted.

- Judge Pullan commented that the committee should consult closely with the domestic bar on this rule, as it will be used in the domestic arena 90% of the time. Mr. Hunnicutt commented that the Second District is opposed to this approach; they follow a one-step process and prefer it. Several committee members commented on the usefulness of a rule that spells out what is required for these motions, particularly in arenas where they are not often used. Others commented that these motions have been filed since time immemorial; you learn how to do them by doing them and contacting the court clerks.

- Judge Blanch commented that the rule doesn't address the CJA—that would need to be amended to address what commissioners are permitted to do. Rule 108 would also need to be addressed. He doesn't believe the pushback from the domestic bar really goes to the rule—it has more to do with the interplay between the rule, the CJA and Rule 108, which is a separate issue. This rule helps people who don't routinely come to court to enforce orders by giving them a procedure to follow. The committee also discussed whether parties should specify what type of contempt they are seeking, whether it be criminal, civil, or both, and where that should be specified.

- Mr. Marsden suggested that the rule needs further study. Rule 70 also addresses this issue with respect to judgments requiring specific acts, and permits a finding of contempt in appropriate cases. The committee ought to figure out how this may butt up against Rule 37 procedure as well. He is not opposed to the rule, but it may be a big change. Judge Pullan commented that we also have a contempt statute, which adds another layer. Trystan Smith suggested that a subparagraph be added that the court may issue any other relief the court deems necessary at the first hearing. If the court wants an evidentiary hearing, it can proceed with that. Mr. Hafen asked whether that would solve the problem for commissioners. Mr. Hunnicutt commented that it may, but suggested that commissioners be invited to comment. Other committee members questioned whether that would defeat the purpose of the rule; if you don't have to file a response because the first hearing is just a scheduling hearing, but the judge is permitted to issue sanctions at that hearing, you may be prejudiced if you didn't file a response or put evidence in front of the judge. The committee also discussed the current practice in Third District in domestic cases, where commissioners certify the contempt decision to the judge, and the other rules that come into play in domestic cases.

- Mr. Hafen proposed that the rule be studied by a subcommittee over the summer, and that the subcommittee report back in September. Mr. Hunnicutt, Mr. Slaugh, and Judge Blanch agreed to serve on the committee and to invite ex officio members from other districts.

IV. Rule 7, Pleadings Allowed, Motions, Memoranda, Hearings, Orders. [Tab 4] – Nancy Sylvester

Ms. Sylvester reported that Brent Johnson has raised a concern regarding Rule 7 unfairly disadvantaging pro se litigants by setting response deadlines according to the filing rather than service date. Pro se litigants don't have the benefit of e-filing, so there is a delay with respect to service upon them. He proposed changing lines 39, 55, 78, and 81, to refer to "served" rather than "filed."

<u>Discussion</u>:

- Ms. Anderson commented that the committee just changed the rules to refer to the filed date to make them consistent. Ms. Sylvester confirmed that the 2013 amendments changed the rules from "served" to "filed." The committee discussed the reasons for the change and concluded that it was not a good idea to change them back.

V. Rule 34(b)(2)(A)-(C), Requests for Production. [Tab 5] – Nancy Sylvester, Paul Stancil

Mr. Sylvester discussed the email from Paul Stancil on what the committee should and should not consider changing with respect to Rule 34. The subcommittee thinks we should seriously consider confirming to subsections (b) and (c) of the federal rule. According to Mr. Stancil, requiring specificity for objections to Rule 34 requests, and declaring whether documents are being withheld on the basis of those objections, will help alleviate the problem with boilerplate objections.

<u>Discussion</u>:

- The committee discussed the meaning of Rule 34(b)(2)(C) and what it might look like in practice. Judge Furse explained that her expectation in federal court is that specific objections must describe whether documents are being withheld based on the objections. Mr. Marsden raised the issue of large corporate clients with thousands of employees and dozens of locations; he cannot identify whether specific documents are being withheld because he does not know if they exist. He should be able to object to the overbreadth of a request without having to conduct a search that is overbroad and unreasonable. Judge Pullan said that the comment to Federal Rule 34 may clarify the discussion. The committee reviewed and discussed the comment. Under the new rule, Ms. Anderson said that if you make an overbroad objection, you'll need to identify what documents or date ranges are relevant, and perhaps which locations you have searched for those documents. Mr. Marsden said that he should not have to explain the ins-and-outs of his larger corporate clients just so that the other side can write better requests. The committee discussed the practical implications of Mr. Marsden's comments. Judge Blanch said that, in some contexts, by describing what has been produced, it will be obvious what has not been produced. In other contexts, it will be unclear as to whether the producing party has withheld anything.

- Rod Andreason commented that the rule's language only requires that the producing party state that documents have been withheld. It does not require specifics as to which documents have been withheld. Mr. Smith said that the last sentence of the federal note would be helpful: "An objection that states the limits that have controlled the search for responsive and relevant materials qualifies as a statement that the materials have been 'withheld.'" Judge Pullan commented that the rule is designed to discourage objecting when you don't really have a good reason. Why object if you don't have anything to produce? Mr. Marsden responded that you waive the objection if you don't make it. Mr. Hafen said that the proposal is to remove that portion of the rule (line 36). Judge Furse commented that she would advise leaving that sentence in. Ms. Anderson commented that that's why people are raising so many objections. Mr. Anderson said that he would rather have too many objections upfront than an unlimited time period to make more objections. Mr. Marsden agreed.

- Judge Blanch raised the concern that lawyers may try to find objections and criteria that are reasonable on their face to preclude the discovery of a bombshell. Judge Pullan asked whether those with significant civil practices could live with a rule where they had to specifically identify categories of documents they were not disclosing based on their objections. Mr. Marsden said that it is much easier for him to say what he is producing and why, rather than explain what he is not producing. A date cut-off is one thing, but it is hard to identify what he has not looked for. Ms. Sylvester noted that, under the federal comments, any objection that states the limits of what has been searched qualifies as a statement that materials have been withheld. Several committee members favored adding the last sentence of the federal note to the state rule. Judge Furse suggested that the last two sentences of the note be added.

- Ms. McIntosh suggested that the committee consider smaller changes to Rule 34 to fine-tune what we already have. We just did significant discovery rule changes not too long ago. Judge Blanch commented that the federal rule is also brand new; it makes sense to see what the experience is in the federal system and then make sensible changes to our own rule along the way before we adopt the federal rule wholesale. Mr. Marsden agreed. Judge Blanch suggested that perhaps the best way to address changes is through a committee note rather than changes to the rule.

- Ms. McIntosh proposed adding the first sentence of Federal Rule 34(b)(2)(C) to line 36 of the state rule, right in front of "the party." Lines 32-39 would stay in, and lines 20-31 would come out. Mr. Slaugh also suggested including the last line of the federal note in a committee note. Ms. Anderson seconded Ms. McIntosh's motion. Mr. Hunnicutt commented that he liked the word "specificity" in line 24, and thinks that should be kept. Mr. Hafen suggested adding that to line 36, since lines 20-31 will not be added. Mr. Hunnicutt agreed. Ms. McIntosh renewed her motion with that amendment, and Ms. Anderson seconded. The motion passed unanimously. Rule 34 will be reviewed again next month with the foregoing amendments.

VI. Adjournment.

The meeting adjourned at 5:55 pm. The next meeting will be held on June 22, 2016 at 4:00pm at the Administrative Office of the Courts, Level 3.

Tab 2

COMMENTS TO URCP 4

Sara Bouley (r.e. wet signature)

Is the elimination of “copy of the complaint” in Rule 4(b)(I) and the elimination of “copy” in Rule 4(d)(1) in relation to the summons and complaint mean that under the proposed amended Rule 4 only complaints and summonses with wet signatures on them may be served on a defendant? If so, I’m opposed. Requiring wet signatures on the summons and complaint served on each defendant–as opposed to a copy of the electronically filed complaint and a copy of the original summons with a wet signature on it–eliminates the ability to email a copy of the summons and complaint to the process server to print out and serve, and would cause delay and increased costs for plaintiffs, not to mention silly lawsuits over the technical argument of whether a summons or complaint contained an original signature or a copy of the original signature.

> **Cheryl Buhler (reply to Sara Bouley)**
>
> Great point! I have the same concern. Service would become much more complicated, expensive and time consuming if we could no longer email documents to the process server, but instead had to send originals in the mail.

Nancy’s reply:

I have had court staff also express confusion and concern over this. This may be best addressed by a committee note stating, “The elimination of the words ‘copy of’ do not change the fact that a plaintiff will serve a copy of the summons and complaint under this rule. The change merely contemplates the increased use of electronic filing.”

Cheryl Buhler (r.e. typo)

There appears to be a typo at the end of proposed Rule 4(d)(3(D) where it references proof of service under Rule 4(f). I believe it was meant to reference Rule 4(e) Proof of Service as the proposed Rule 4 appears to eliminate subsection (f) in its entirety.

Nancy’s reply:

Ms. Buhler is correct. I have changed the reference on line 119 to Rule 4(e).

Dan Morse (r.e. fairness to plaintiffs in eliminating “at any time prior to trial”)

The civil procedures rules committee must be made entirely of the defense bar, because this is a complete over-reaction to the discussion of 4(b)(ii) in St. Jeor v. Kerr. It seems like sour grapes to change the rules if they don’t favor your large corporate clients. It is an insidious slippery slope to foreclose the rights of plaintiffs to follow the trail of evidence in their tort claims, which is what this proposed amendment would do. The proposed amendment should be withdrawn, deleted, and forgotten.

Nancy's reply:

Any time this committee changes a rule, there will always be a good argument that the change that now benefits one side will also now have a detrimental effect on the other. The Supreme Court through St. Jeor v. Kerr requested that this committee look at the fairness of allowing a plaintiff to serve subsequent defendants up to the time of trial. The sentence, "The court may allow a longer period of time for good cause shown" presumably addresses this commenter's concern about serving other, previously unknown defendants up to the point of trial. The committee likely already discussed the effect of this issue on tort plaintiffs, but it may be worth briefly revisiting whether this unduly burdens them.

Brent E. Johns (r.e. elimination of waiver of service)

The amended rule will require the preparation and filing of a summons in all cases including a stipulated divorce where the parties are in total agreement. Currently as part of the stipulation filed with the Court the practice is to simply waive service with no summons being prepared.

Nancy's reply:

This comment is answered by reference to paragraph (d)(3), but the committee may want to explore adding language addressing those situations in which no summons is required.

Silvan Warnick SL Co Constable (r.e. who may serve process)

Proposed Rule 4(d)(1) should address the issue that anyone interested in the action and not just a party to the action can not serve the process. A fathers son should not be able to serve the summons and complaint to the defendant that his dad is suing. It should also be served by an American citizen. It should read something like, The summons and complaint may be served by any US citizen 18 years of age or older at the time of service and not a party to or interested in the action or a party's attorney or agent. The person serving the process can not have any interest from the service or non service thereof.

> **Bruce M. Pritchett (reply to Silvan Warnick)**
>
> This seems sensible to me. Those who serve process under Rule 4 should have no interest in the case.

Nancy's reply:

Paragraph (d)(1), lines 38-41, was amended to read, "The summons and complaint may be served by any person 18 years of age or older at the time of service and not a party to the action or a party's attorney." This committee removed the language regarding service by a sheriff or constable. Arguably, this will affect the commenter's business. I could not find a discussion in the minutes regarding the removal of this *language. I recommend that the committee retain the language since there does not seem to be a compelling reason to remove it.*

Silvan Warnick SL Co Constable (r.e. small claims affidavit and refusal of service)

A small claims affidavit certified mail return receipt that is refused should be considered under the statute for refusal service.

Nancy's reply:

This is already covered by Rule 4. See UTAH R. SM. CL. P. RULE 3(a).

Bradley Nykamp (r.e. fairness to plaintiffs in eliminating "at any time prior to trial")

The proposed amendment seems like an overreaction. Why should responsible people be punished? The amendment favors being unavailable for service while those that are responsible and can be served would have to deal with the full weight of the issue. The person that is served later usually knows they have been dodging the issue and/or service so they are usually never surprised; why should those that avoid service get the benefit?

The change would have a dramatic impact on multiparty litigation. Under the new rule how could an attorney file a case unless he is sure he can serve all defendants right away? For example, case is filed against three parties, only one party is served. A default judgment is taken against the party that is served. The other two parties cannot be served; the 120 days expired. Pursuant to Rule 54 the Default Judgment is now a final judgment. The party that is served is now responsible for the entire obligation and the other two parties are now off the hook? Doesn't claim preclusion, and collateral estoppel cause major issues? What about cross-claims by the one defendant that is served, are they foreclosed from seeking contribution form the other two defendants? The Plaintiff and the Defendants are prejudiced because they are cut-off by what becomes a really short statute of limitations.

Judicial economy is not served because every attorney (with a multi-defendant case) would have to file a motion to extend time for good cause in order to protect the client.

My vote is to leave it the way it is. Thank you, for your consideration.

Nancy's reply:

See my reply above at the top of page 2. This goes back to the "good cause shown" language in paragraph (b). There is always alternative service under paragraph (d)(5), too, if the defendants are avoiding service or cannot be immediately ascertained through reasonable diligence.

David S. Head (r.e. fairness to plaintiffs in eliminating “at any time prior to trial”)

Defendants evading service of process is a problem that regularly happens. My concern with the change is that a deceptive defendant could avoid liability by merely evading service of process for 120 days.

Furthermore, at times, plaintiffs do not have sufficient information available at the start of a case to know all of the defendants, and the proposed rule would prevent claimants from obtaining relief from all of the pertinent defendants.

While I understand the policy concerns regarding defendants being served in case many years after the filing of the complaint, the proposed automatic dismissal seems too drastic of a response thereto, and would cause more harm than good.

Nancy’s reply:

See my last reply.

George Waddoups (r.e. fairness to plaintiffs in eliminating “at any time prior to trial”)

In thirty four years of practice, Rule 4, allowing service before trial has not been a significant issue from my perspective or the defense lawyers I interact with. Why make the change? There is no reason. It is there for good reason and necessary in some cases. I am concerned about the trend to change the rules when no real issue needs to be addressed. The recent change to Rule 26 is having the effect of complicating litigation, causing more motions, and effectively denying injured parties access to court because Rule 26 is substantially increases the cost of litigation. Many smaller cases are being denied access to attorneys because attorneys can no longer afford to take the cases. Whoever is making these changes, has not spent a lot of time handling a personal injury case load, and lacks knowledge of the high cost of experts. Rule 26 and other rule changes should make access to the courts easier and inexpensive, not the other way around.

Nancy’s reply:

See my last reply.

George Tait (r.e. elimination of waiver of service)

I like the waiver and have used it many times – I do not see where the waiver is encapsulated in the new rule. The process of service seems too complicated. Why not leave the rule the way it is?

Nancy’s reply:

The old waiver language was actually too complicated. The plaintiff spent too much time waiting to see if the defendant would waive service and then too much time *waiting for their now delayed reply (45 or 60 days versus 21). The new (d)(3) streamlines a process that was already happening informally. For example, the plaintiff or plaintiff's attorney calls up the defendant (or defendant's attorney) and asks if the defendant will accept service. If the defendant accepts under (d)(3), the parties can still work out an agreement about when the defendant's answer will be served, or it's due in 21 days under Rule 12. As a side note, Form 3A will need to be withdrawn if the Court eliminates paragraph (f) waiver.*

Ralph C. Petty (r.e. fairness to plaintiffs in eliminating "at any time prior to trial")

If the proposed Rule 4(b)(ii) provision is enacted, plaintiffs would be disproportionately harmed and all parties would be unreasonably restricted in reacting to the information that they glean through discovery. The 120 day restriction on service could impede the imposition of responsibility on liable parties and unreasonably limit the recovery of the injured. The proposed changes could artificially close the courthouse doors to parties unfortunate enough not to know of liable parties or where those liable parties are located. In some cases, the rule change could bring equal protection, due process, and open court constitutional challenges. The current timing of initial disclosures and discovery, accompanied by any delay, motion for protective order, or interruption in the most expeditious discovery, could easily push litigants past the 120 period. The existing rule has worked for many years and should not be so quickly abandoned.

Nancy's reply

See my reply at the bottom of page 3.

Bruce M. Pritchett (r.e. fairness to plaintiffs in eliminating "at any time prior to trial" and r.e. elimination of waiver of service)

I oppose the proposed changes. Requiring a plaintiff to serve all defendants within the initial 120-day period is unduly harsh and burdensome on plaintiffs. Not all defendants can be found or served within 120 days. Avoidance of service by defendants is still an unpleasantly common practice. The change in the rule seems arbitrary and not based on any well-founded reasons, at least none that are apparent from the St. Jeor case.

Relegating the rule to the discretion of trial judges means that some who are eager to clear cases from their dockets can take a plaintiff by surprise (essentially) by denying a motion for extension, and then a jurisdictional bar to the plaintiff's claim has been lowered forever.

This proposed change will increase, rather than decrease, gamesmanship and avoidance of service, and will burden the trial courts with a proliferation of motions for extension of time to serve defendants, where such motions would never have been necessary before.

The St. Jeor case involved a wrongful death claim based on asbestos exposure. Plaintiff served “a number of the named defendants” within 120 days, but the Kerr corporate defendant was not served until 5 years later. The Supreme Court actually found that service was proper under the rule, though it did refer the rule for further study.

It seems unlikely that the Kerr corporate defendant, who I believe is well-known in asbestos litigation, was in fact actually unaware of the litigation. It is not uncommon for defendants to “talk amongst themselves,” and no real prejudice seems to have been demonstrated.

Moreover, this was an interlocutory appeal that–no surprise–actually prolonged the delay of which the defendant nominally complained. It provides no persuasive basis for upsetting the well-established rules for the large majority of plaintiffs and defendants.

Allowing a court’s entire jurisdiction over evasive defendants to hang by such a slender thread also threatens the “open courts” that are guaranteed to the citizens of Utah by the Article 11 of the Utah Constitution.

Likewise, the removal of the “acceptance of service” provision from Rule 4 seems to be based on arbitrary and capricious impulses rather than compelling reasons, and none that are apparent from St. Jeor. The courts have long recognized that parties may waive a multiplicity of rights. Why should the right to service be any different?

Requiring formal service (rather than a simple acceptance of service, as is currently allowed) will increase the business of formal process servers, but that will also increase the expense to all plaintiffs, which runs contrary to the express goals of the 2011 revisions to the Rules, which were notably to reduce expense and wasted time.

Please, let the courts continue to reduce expense and disproportionate burden by allowing less costly and formal service of process: rejecting these expensive and burdensome changes to the rules.

Nancy’s reply

See my reply at the bottom of page 3 (r.e. “any time prior to trial”) and my reply at the bottom of page 4 (r.e. elimination of waiver of service).

John Ray (r.e. fairness to plaintiffs in eliminating “at any time prior to trial” and r.e. elimination of waiver of service)

The following comments are submitted on behalf of the Utah Association for Justice. The UAJ is an association of nearly 400 trial attorneys in the state committed to preserving access to justice. I am the president of the UAJ.

There are two proposed changes to Rule 4 that raise significant concerns. First, in the case of multiple defendants, the proposal is that all defendants be served within 120 days. Second, the Court proposes eliminating URCP Rule 4(f) on waiver of service. These changes should not be made.

120 day service requirement

This change should not be implemented. First, the rule increases the financial burden for plaintiffs. Many cases involve non-U.S. defendants. Service on these defendants often takes more than 120 days. Service upon a foreign defendant can take up to one year to complete because of treaties that require service to be made through diplomatic channels and the time required to have the complaint and summons translated. Some U.S. defendants are difficult to serve because the company executives are difficult to locate. Serving companies in liquidation often involves locating old executives. Finally, many individual defendants have moved. Plaintiffs must now expend resources to seek extensions with the court. Second, this change rewards defendants who are difficult to serve even though that difficulty is not the plaintiff's fault. Indeed, some defendants hide from service. As the rule is proposed, a plaintiff will be required to seek an extension for good cause. The rule allows the court to deny such a motion. Plaintiffs face the real possibility that for whatever reason the court may deny a requested extension, requiring the plaintiff to start over or be denied court access altogether because of the statute of limitations. The plaintiff should not be put in that position. Finally, the change seeks to remedy a problem that does not exist or is not significant. If the defendant believes it has been prejudiced because service was unreasonably delayed, it can always ask the court to quash service or sever the plaintiff's claims against it.

Rule 4(f)

This change should also not be implemented. First, Rule 4(f) provides significant savings to parties. Rule 4(f) allows a party to request a defendant to waive service by sending the party a copy of the complaint with a waiver of service. This type of service particularly saves time and money when many plaintiffs are involved, such as in a mass tort case, or when many defendants are involved, such as in a lien case. In addition, the present rule has "teeth" in that a defendant who unreasonably refuses to accept service is responsible for the expense of securing service. This expense can be substantial. The proposed substitute labeled "(d)(3) Acceptance of Service" makes acceptance of service purely voluntary. A defendant can refuse to accept service and face no penalty. The statement that "parties have a duty to avoid unnecessary expenses of serving the summons and complaint" are just mere words with no penalty. Second, there seems to be no reason to eliminate the waiver procedure as an option for service. Has the committee talked to plaintiff's lawyers about the change? This change actually increases the cost for plaintiffs with no real savings for defendants. In short, this change adds another barrier to plaintiffs' access to court.

Nancy's reply

See my reply at the bottom of page 3 (r.e. "any time prior to trial") and my reply at the bottom of page 4 (r.e. elimination of waiver of service).

Doug Cannon (r.e. fairness to plaintiffs in eliminating "at any time prior to trial" and r.e. elimination of waiver of service)

I am first concerned with the change to the 120 day service requirement. I have on a number of occasions been required to serve Chinese defendants along with U.S. defendants. Such service always takes from 9 months to a year because of treaty obligations. Under the present rule, I can serve the U.S. defendants and then proceed to serve the Chinese defendants without fear of a dismissal. Under the proposed rule, I will be required to see court approval for any extension. This new rule increases costs to my clients who are usually individuals. Moreover, there is always the risk the court will deny the motion. The committee might say that will never happen because you have good cause, but you cannot give me any guarantee. It seems the court has tools to deal with plaintiffs who delay service for bad faith reasons.

I also object to the change to Rule 4(f). I use this process particularly in the federal court. It saves time and it can be enforced. I am not sure why this change. Again, it increases cost for the plaintiffs without any real benefit to the other side.

Nancy's reply

See my reply at the bottom of page 3 (r.e. "any time prior to trial") and my reply at the bottom of page 4 (r.e. elimination of waiver of service).

Rule 4. Process.

(a) Signing of summons. The summons ~~shall~~ must be signed and issued by the plaintiff or the plaintiff's attorney. Separate summonses may be signed and ~~served~~ issued.

(b)~~(i)~~ Time of service. ~~In~~ Unless the summons and complaint are accepted, the summons and complaint in an action commenced under Rule 3(a)(1)~~, the summons together with a copy of the complaint shall~~ must be served no later than 120 days after ~~the filing of~~ the complaint is filed. ~~unless the~~ The court may allow~~s~~ a longer period of time for good cause shown. If the summons and complaint are not timely served, the action ~~shall~~ against the unserved defendant will be dismissed~~,~~ without prejudice on ~~application~~ motion of any party or ~~upon~~ on the court's own initiative.

~~(b)(ii) In any action brought against two or more defendants on which service has been timely obtained upon one of them,~~

~~(b)(ii)(A) the plaintiff may proceed against those served, and~~

~~(b)(ii)(B) the others may be served or appear at any time prior to trial.~~

(c) Contents of summons.

(c)(1) The summons ~~shall~~ must:

(c)(1)(A) contain the name and address of the court, ~~the address of the court,~~ the names of the parties to the action, and the county in which it is brought;~~. It shall~~

(c)(1)(B) be directed to the defendant~~,~~;

(c)(1)(C) state the name, address and telephone number of the plaintiff's attorney, if any, and otherwise the plaintiff's address and telephone number;~~. It shall~~

(c)(1)(D) state the time within which the defendant is required to answer the complaint in writing;~~, and shall~~

(c)(1)(E) notify the defendant that in case of failure to ~~do so~~ answer in writing, judgment by default will be ~~rendered~~ entered against the defendant;~~. It shall~~ and

(c)(1)(F) state either that the complaint is on file with the court or that the complaint will be filed with the court within ~~ten~~ 10 days ~~of~~ after service.

(c)(2) If the action is commenced under Rule 3(a)(2), the summons ~~shall~~ must also:

(c)(2)(A) state that the defendant need not answer if the complaint is not filed within 10 days after service; and ~~shall~~

(c)(2)(B) state the telephone number of the clerk of the court where the defendant may call at least 14 days after service to determine if the complaint has been filed.

(c)(3) If service is ~~made~~ by publication, the summons ~~shall~~ must also briefly state the subject matter and the sum of money or other relief demanded, and that the complaint is on file with the court.

(d) Methods of service. The summons and complaint may be served in any state or judicial district of the United States. Unless ~~waived in writing~~ service is accepted, service of the summons and complaint ~~shall~~ must be by one of the following methods:

(d)(1) Personal service. The summons and complaint may be served ~~in any state or judicial district of the United States by the sheriff or constable or by the deputy of either, by a United States Marshal or by the marshal's deputy, or~~ by any ~~other~~ person 18 years of age or older at the time of service and not a party to the action or a party's attorney. If the person to be served refuses to accept ~~a copy of the process~~ the summons and complaint, service ~~shall be~~ is sufficient if the person serving them ~~same shall~~ states the name of the process and offers to deliver ~~a copy thereof~~ them. Personal service ~~shall~~ must be made as follows:

(d)(1)(A) Upon any individual other than one covered by ~~sub~~paragraphs (d)(1)(B), (d)(1)(C) or (d)(1)(D) ~~below~~, by delivering ~~a copy of~~ the summons and ~~the~~ complaint to the individual personally, or by leaving ~~a copy~~ them at the individual's dwelling house or usual place of abode with ~~some~~ a person of suitable age and discretion who resides there ~~residing~~, or by delivering ~~a copy of the summons and the complaint~~ them to an agent authorized by appointment or by law to receive ~~service of~~ process;

(d)(1)(B) Upon ~~an infant (being a person~~ a minor under 14 years~~)~~ old by delivering ~~a copy of~~ the summons and ~~the~~ complaint to the ~~infant~~ minor and also to the ~~infant's~~ minor's father, mother, or guardian or, if none can be found within the state, then to any person having the care and control of the ~~infant~~ minor, or with whom the ~~infant~~ minor resides, or ~~in whose service~~ by whom the ~~infant~~ minor is employed;

(d)(1)(C) Upon an individual judicially declared to be incapacitated, of unsound mind, or incapable of conducting the ~~person's~~ individual's own affairs, by delivering ~~a copy of~~ the summons and ~~the~~ complaint to the ~~person~~ individual and to the guardian or conservator of the individual if one has been appointed; the ~~person's~~ individual's legal representative if one has been appointed, and, in the absence of ~~such~~ a guardian, conservator, or legal representative, to the ~~individual~~ person, if any, who has care, custody, or control of the ~~person~~ individual;

(d)(1)(D) Upon an individual incarcerated or committed at a facility operated by the state or any of its political subdivisions, by delivering ~~a copy of~~ the summons and ~~the~~ complaint to the person who has the care, custody, or control of the individual ~~to be served~~, or to that person's designee or to the guardian or conservator of the individual ~~to be served~~ if one has been appointed.~~, who shall, in any case,~~ The person to whom the summons and complaint are delivered must promptly deliver them ~~process~~ to the individual ~~served~~;

(d)(1)(E) Upon ~~any~~ a corporation not ~~herein~~ otherwise provided for in this rule, ~~upon~~ a limited liability company, a partnership, or ~~upon~~ an unincorporated association ~~which is~~ subject to suit under a common name, by delivering ~~a copy of~~ the summons and ~~the~~ complaint to an officer, a managing or general agent, or other agent authorized by appointment or ~~by~~ law to receive ~~service of~~ process and~~, if the agent is one authorized by statute to receive service and the statute so requires,~~ by also mailing ~~a copy of~~ the summons and ~~the~~ complaint to the defendant, if the agent is one authorized by statute to receive process and the statute so requires. If no ~~such~~ officer or agent can be found within the state, and the defendant has, or advertises or holds itself out as having, ~~an office or~~ a place of business within the state or elsewhere, or does business within this state or elsewhere, then upon the person in charge of ~~such office or~~ the place of business;

(d)(1)(F) Upon an incorporated city or town, by delivering ~~a copy of~~ the summons and ~~the~~ complaint as required by statute, or in the absence of a controlling statute, to the recorder;

(d)(1)(G) Upon a county, by delivering ~~a copy of~~ the summons and ~~the~~ complaint as required by statute, or in the absence of a controlling statute, to the county clerk ~~of such county~~;

(d)(1)(H) Upon a school district or board of education, by delivering ~~a copy of~~ the summons and ~~the~~ complaint as required by statute, or in the absence of a controlling statute, to the superintendent or ~~business~~ administrator of the board;

(d)(1)(I) Upon an irrigation or drainage district, by delivering ~~a copy of~~ the summons and ~~the~~ complaint as required by statute, or in the absence of a controlling statute, to the president or secretary of its board;

(d)(1)(J) Upon the state of Utah or its department or agency~~, in such cases as by law are authorized to be brought against the state,~~ by delivering ~~a copy of~~ the summons and ~~the~~ complaint to the attorney general and any other person or agency required by statute to be served; and

(d)(1)(K) Upon ~~a department or agency of the state of Utah, or upon any~~ a public board, commission or body~~, subject to suit,~~ by delivering ~~a copy of~~ the summons and ~~the~~ complaint as required by statute, or in the absence of a controlling statute, to any member of its governing board, or to its executive employee or secretary.

(d)(2) Service by mail or commercial courier service.

(d)(2)(A) The summons and complaint may be served upon an individual other than one covered by paragraphs (d)(1)(B) or (d)(1)(C) by mail or commercial courier service in any state or judicial district of the United States provided the defendant signs a document indicating receipt.

(d)(2)(B) The summons and complaint may be served upon an entity covered by paragraphs (d)(1)(E) through (d)(1)(I) by mail or commercial courier service in any state or judicial district of the United States provided defendant's agent authorized by appointment or by law to receive service of process signs a document indicating receipt.

(d)(2)(C) Service by mail or commercial courier service shall be complete on the date the receipt is signed as provided by this rule.

(d)(3) Acceptance of service.

(d)(3)(A) Duty to avoid expenses. All parties have a duty to avoid unnecessary expenses of serving the summons and complaint.

(d)(3)(B) Acceptance of service by party. Unless the person to be served is a minor under 14 years old or an individual judicially declared to be incapacitated, of unsound mind, or incapable of conducting the individual's own affairs, a party may accept service of a summons and complaint by signing a document that acknowledges receipt of the summons and complaint.

(d)(3)(C) Acceptance of service by attorney for party. An attorney may accept service of a summons and complaint on behalf of the attorney's client by signing a document that acknowledges receipt of the summons and complaint.

(d)(3)(D) Effect of acceptance, proof of acceptance. A person who accepts service of the summons and complaint retains all defenses and objections, except for adequacy of service. Service is effective on the date of the acceptance. Filing the acceptance of service with the court constitutes proof of service under Rule 4(e).

(d)(~~3~~4) Service in a foreign country. Service in a foreign country ~~shall~~ must be made as follows:

(d)(~~3~~4)(A) by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;

(d)(~~3~~4)(B) if there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:

(d)(~~3~~4)(B)(i) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction;

(d)(~~3~~4)(B)(ii) as directed by the foreign authority in response to a ~~letter rogatory or~~ letter of request issued by the court; or

(d)(~~3~~4)(B)(iii) unless prohibited by the law of the foreign country, by ~~delivery to the individual personally of a copy of~~ delivering the summons and ~~the~~ complaint to the individual personally or by any form of mail requiring a signed receipt, ~~to be~~ addressed and dispatched by the clerk of the court to the party to be served; or

(d)(~~3~~4)(C) by other means not prohibited by international agreement as may be directed by the court.

(d)(~~4~~5) Other service.

(d)(~~4~~5)(A) ~~Where~~ If the identity or whereabouts of the person to be served are unknown and cannot be ascertained through reasonable diligence, ~~where~~ if service upon all of the individual parties is impracticable under the circumstances, or ~~where~~ if there ~~exists~~ is good cause to believe that the person to be served is avoiding service ~~of process~~, the party seeking service ~~of process~~ may file a motion ~~supported by affidavit requesting an order allowing~~ to allow service ~~by publication or~~ by some other means. ~~The~~ An affidavit or declaration supporting ~~affidavit shall~~ the motion must set forth the efforts made to identify, locate, ~~or~~ and serve the party ~~to be served~~, or the circumstances ~~which~~ that make it impracticable to serve all of the individual parties.

(d)(~~4~~5)(B) If the motion is granted, the court ~~shall~~ will order service of ~~process~~ the complaint and summons by means reasonably calculated, under all the circumstances, to apprise the

~~interested~~ named parties ~~of the pendency~~ of the action ~~to the extent reasonably possible or practicable~~. The court's order ~~shall also~~ must specify the content of the process to be served and the event ~~or events as of which service shall be deemed complete~~ upon which service is complete. Unless service is by publication, a copy of the court's order ~~shall~~ must be served ~~upon the defendant~~ with the process specified by the court.

(d)(~~4~~5)(C) ~~In any proceeding where~~ If the summons is required to be published, the court ~~shall~~, upon the request of the party applying for ~~publication~~ service by other means, must designate ~~the newspaper in which publication shall be made. The newspaper selected shall be~~ a newspaper of general circulation in the county ~~where such~~ in which publication is required ~~to be made~~.

(e) Proof of service.

(e)(1) ~~If service is not waived, the~~ The person effecting service ~~shall~~ must file proof ~~with the court. The proof of service must state~~ of service stating the date, place, and manner of service, including a copy of the summons. ~~Proof of service made pursuant to paragraph (d)(2) shall include a receipt signed by the defendant or defendant's agent authorized by appointment or by law to receive service of process.~~ If service is made by a person other than by an attorney, ~~the~~ sheriff, ~~or~~ constable, ~~or by the deputy of either, by a~~ United States Marshal, or by the sheriff's, constable's or marshal's deputy, the proof of service ~~shall~~ must be ~~made~~ by affidavit or declaration under penalty of Utah Code Section 78B-5-705.

(e)(2) Proof of service in a foreign country ~~shall~~ must be made as prescribed in these rules for service within this state, or by the law of the foreign country, or by order of the court.

(e)(3) When service is made pursuant to paragraph (d)(~~3~~4)(C), proof of service ~~shall~~ must include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court.

(e)(~~3~~4) Failure to ~~make~~ file proof of service does not affect the validity of the service. The court may allow proof of service to be amended.

~~**(f) Waiver of service; Payment of costs for refusing to waive.**~~

~~(f)(1) A plaintiff may request a defendant subject to service under paragraph (d) to waive service of a summons. The request shall be mailed or delivered to the person upon whom service is authorized under paragraph (d). It shall include a copy of the complaint, shall allow the defendant at least 21 days from the date on which the request is sent to return the waiver, or 30 days if addressed to a defendant outside of the United States, and shall be substantially in the form of the Notice of Lawsuit and Request for Waiver of Service of Summons set forth in the Appendix of Forms attached to these rules.~~

~~(f)(2) A defendant who timely returns a waiver is not required to respond to the complaint until 45 days after the date on which the request for waiver of service was mailed or delivered to the defendant, or 60 days after that date if addressed to a defendant outside of the United States.~~

~~(f)(3) A defendant who waives service of a summons does not thereby waive any objection to venue or to the jurisdiction of the court over the defendant.~~

~~(f)(4) If a defendant refuses a request for waiver of service submitted in accordance with this rule, the court shall impose upon the defendant the costs subsequently incurred in effecting service.~~

Advisory Committee Notes

2016 Amendments

The elimination of the words “copy of” before summons and complaint do not change the fact that a plaintiff will serve a copy of the summons and complaint under this rule. The change merely contemplates the increased use of electronic filing methods.

Paragraph (d)(3) contemplates delivery and acceptance of the summons and complaint by various methods, including electronic delivery and signature.

Tab 3

RENEWAL OF JUDGMENT

U.C.A. 78B-6-1801 et. seq.

Prior to 2011, in order to renew a judgment, the creditor was required to file a completely new action, establishing a new case. When judgment entered, the court generally added the accrued interest to the judgment to establish a "new" or "renewed" judgment amount. The principal on the new judgment was larger in that it now included the accrued interest. The interest rate on the new judgment was the contractual rate, or the new statutory rate for the year of the renewal.

In 2011, the Utah Legislature passed the "Renewal of Judgment Act," U.C.A. §78B-6-1801 et. seq. which states, in pertinent part, as follows:

U.C.A. §78B-6-1802

A court of record may renew a judgment issued by a court if:

(1) a motion is filed within the original action;
(2) the motion is filed before the statute of limitations on the original judgment expires;
(3) the motion includes an affidavit that contains an accounting of the original judgment and all postjudgment payments, credits, and other adjustments which are provided for by law or are contained within the original judgment;
(4) the facts in the supporting affidavit are determined by the court to be accurate and the affidavit affirms that notice was sent to the most current address known for the judgment debtor;
(5) the time for responding to the motion has expired; and
(6) the fee required by Subsection 78A-2-301(1)(l) has been paid to the clerk of the court.

U.C.A. §78B-6-1803 – Notice

Notice of a motion for renewal of judgment is served in accordance with the Rules of Civil Procedure and opposition may be filed pursuant to the rules.

U.C.A. §78B-6-1804 – Date and Duration

> Upon granting a motion for the renewal of judgment, the court shall enter an order which renews the original judgment from the date of entry of the order or from the scheduled expiration date of the original order, whichever occurs first, for the same amount of time as the original judgment.

- Some states, including California, allow renewed judgments to include accrued interest in the new principal amount. As a result, many creditors frequently renew the same judgment in order to achieve the effect of compound interest, even though the original contract calls for simple interest. CCP §685.010 et. seq.

- Utah law appears to take a more conservative approach.

    - In *Gildea v. Wells Fargo Bank*, 2015 UT 11, the Utah Supreme Court held:

> But the Renewal of Judgment Act completely changed the landscape by creating a new mechanism for renewing a judgment. Parties seeking to renew a judgment now do so by filing "a motion ... *within the original action* " in which the judgment was first obtained. UTAH CODE § 78B–6–1802 (emphasis added).
> . . . . Indeed, the Act explains that if a district court grants a motion to renew a judgment, the district court's order serves to "renew[ ] the original judgment" for the same amount of time as the original judgment. *Id.* § 78B–6–1804.

    - In *Brady v. Park*, 2013 UT App 97, the Utah Court of Appeals held:

> Compound interest is defined as "interest paid on both the principal and the previously accumulated interest." *Black's Law Dictionary* 887 (9th ed. 2009). " 'Compound interest means interest on interest, in that accrued interest is added periodically to the principal, and interest is computed upon the new principal thus formed....' " *Mountain States Broadcasting Co. v. Neale*, 783 P.2d 551, 554 (Utah Ct.App.1989) (quoting 45 Am.Jur.2d *Interest and Usury* § 76 (1969)). ¶16.
>
> "Compound interest is not favored by the law." *Watkins & Faber v. Whiteley*, 592 P.2d 613, 616 (Utah 1979) (per curiam); *see also* *City of Hildale v. Cooke*, 2001 UT 56, ¶ 36, 28 P.3d 697 (noting that a trial court "properly follow[ed] our previous determination that the law disfavors compound interest."); *Christensen v. Munns*, 812 P.2d 69, 71 (Utah Ct.App.1991) (noting "the general disinclination of the courts to allow

> compound interest...." (citation and internal quotation marks omitted)). ¶17
>
> Accordingly, compound interest will be awarded only where "the parties expressly agreed to compound interest." *Mountain States Broadcasting*, 783 P.2d at 555. ¶17

The new Rule 58C states:

> **(a) Motion.** A judgment creditor may renew a judgment by filing a motion under Rule 7 in the original action before the statute of limitations on the original judgment expires. A copy of the judgment must be filed with the motion.
> **(b) Affidavit.** The motion must be supported by an affidavit:
>> (b)(1) accounting for the original judgment and all post-judgment payments. credits. and other adjustments provided for by law or contained in the original judgment; and
>> (b)(2) affirming that notice was sent to the most current address known for the judgment debtor, stating what efforts the creditor has made to determine whether it is the debtor's correct address.
>
> **(c) Effective date of renewed judgment.** If the court grants the motion, the court will enter an order renewing the original judgment from the date of entry of the order or from the scheduled expiration date of the original judgment, whichever occurs first. The statute of limitations on the renewed judgment runs from the date the order is signed and entered.

The most common practice for collection company plaintiffs is to add accrued interest to the principal for the renewed judgment, just as was done under the former procedure when a new case was filed. Under the new procedure set forth in UCA §78B-6-1801 et. seq., I think that is error resulting in compounded interest in the same case. Prohibiting the addition of accrued interest to a new principal amount would also prevent plaintiffs from re-filing motions to renew in order to compound interest more frequently although the filing fee set forth in UCA §78A-2-301(1)(l) would likely discourage frequent filers.

For the above-stated reasons, where the renewal of judgment is in the same, original case, Rule 58C should specifically disallow accrued interest to be added to the principal when renewing a judgment, however, the accrued interest may be renewed as well, but stated as a separate amount. In the alternative, the new Rule 58C should explicitly state that accrued interest shall (should) be included in the new principal amount. We just need clear direction.

Rule 58C. Motion to renew judgment.

(a) Motion. A judgment creditor may renew a judgment by filing a motion under Rule 7 in the original action before the statute of limitations on the original judgment expires. A copy of the judgment must be filed with the motion.

(b) Affidavit. The motion must be supported by an affidavit:

(b)(1) accounting for the original judgment and all post-judgment payments, credits, and other adjustments provided for by law or contained in the original judgment; and

(b)(2) affirming that notice was sent to the most current address known for the judgment debtor, stating what efforts the creditor has made to determine whether it is the debtor's correct address.

(c) Effective date of renewed judgment. If the court grants the motion, the court will enter an order renewing the original judgment from the date of entry of the order or from the scheduled expiration date of the original judgment, whichever occurs first. The statute of limitations on the renewed judgment runs from the date the order is signed and entered.

Advisory Committee Note

The Renewal of Judgment Act (Utah Code Sections 78B-6-1801 through 78B-6-1804) allows a domestic judgment to be renewed by motion, and Section 78B-5-302 governs domesticating a foreign judgment, which can then be renewed by motion. The statute of limitations on an action for failure to pay a judgment is governed by Section 78B-2-311.

Tab 4

Administrative Office of the Courts

Chief Justice Matthew B. Durrant
Utah Supreme Court
Chair, Utah Judicial Council

Daniel J. Becker
State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

MEMORANDUM

To: Civil Rules Committee
From: Nancy Sylvester Nancy J. Sylvester
Date: June 16, 2016
Re: Rule 35 Report

At its April meeting, the committee discussed Rule 35 and how it interacts with an expert's report under Rule 26. The committee heard from both Peter Summerill (personal injury plaintiffs' attorney) and David Bridge (insurance defense attorney) on this issue. A subcommittee consisting of Trystan Smith, Judge James Blanch, and Barbara Townsend then met to study it and craft language that would be a compromise between the disparate interests of the plaintiffs' and defense bars. The areas they grappled with were whether to impose a time frame on issuing the Rule 35 report and whether the report may also be considered an expert report under Rule 26.

The subcommittee recommends a 28 day turn around on the medical report. The subcommittee's note at lines 41 to 52 then discusses the interplay between the Rule 26 and Rule 35 reports. The note in essence says the Rule 35 report is not a Rule 26 expert report and does not have the same requirements attached. But it could count as both if the party elects to include the same expert disclosures.

Rule 35. Physical and mental examination of persons.

(a) Order for examination. When the mental or physical condition or attribute of a party or of a person in the custody or control of a party is in controversy, the court may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or control. The order may be made only on motion for good cause shown. All papers related to the motion and notice of any hearing ~~shall~~ must be served on a nonparty to be examined. The order ~~shall~~ must specify the time, place, manner, conditions, and scope of the examination and the person by whom the examination is to be made. The person being examined may record the examination by audio or video means unless the party requesting the examination shows that the recording would unduly interfere with the examination.

(b) Report. The party requesting the examination ~~shall~~ must disclose a detailed written report of the examiner~~,~~ within 28 days after the examination, setting out the examiner's findings, including results of all tests performed~~made~~, diagnoses, and other matters that would routinely be included in an examination record generated ~~report~~ by a medical professional. ~~conclusions.~~ If the party requesting the examination wishes to call the examiner as an expert witness, the party ~~shall~~ must disclose the examiner as an expert as required by Rule ~~26(a)(3)~~ 26(a)(4).

(c) Sanctions. If a party or a person in the custody or under the legal control of a party fails to obey an order entered under paragraph (a), the court on motion may take any action authorized by Rule ~~37(e)~~ 37(b), except that the failure cannot be treated as contempt of court.

Advisory Committee Notes

Rule 35 has been substantially revised. A medical examination is not a matter of right, but should only be permitted by the trial court upon a showing of good cause. Rule 35 has always provided, and still provides, that the proponent of an examination must demonstrate good cause for the examination. And, as before, the motion and order should detail the specifics of the proposed examination.

The parties and the trial court should refrain from the use of the phrase "independent medical examiner," using instead the neutral appellation "medical examiner," "Rule 35 examiner," or the like.

The ~~C~~committee has determined that the benefits of recording generally outweigh the downsides in a typical case. The amended rule therefore provides that recording shall be permitted as a matter of course unless the person moving for the examination demonstrates the recording would unduly interfere with the examination.

Nothing in the rule requires that the recording be conducted by a professional, and it is not the intent of the committee that this extra cost should be necessary. The committee also recognizes that recording may require the presence of a third party to manage the recording equipment, but this must be done without interference and as unobtrusively as possible.

The former requirement of Rule 35(c) providing for the production of prior reports on other examinees by the examiner was a source of great confusion and controversy. It is the ~~C~~committee's view that this provision is better eliminated, and in the amended rule there is no longer an automatic requirement for the production of prior reports of other examinations. ~~Medical examiners will be treated as other expert witnesses are treated, with the required disclosure under Rule 26 and the option of a report or a deposition.~~

A report must be provided for all medical examinations under this rule. The Rule 35 report is expected to include the same type of content and observations that would be included in a medical record generated by a competent medical professional following an examination of a patient, but need not otherwise include the matters required to be included in a Rule 26(a)(4) expert report. If the medical examiner is going to be called as an expert witness at trial, then the designation and disclosures under Rule 26(a)(4) also are required, and the opposing party has the option of requiring, in addition to the Rule 35(b) report, the expert's report or deposition under Rule 26(a)(4)(C). Nothing in these rules would preclude a party who furnishes a report under Rule 35 from also including within it the expert disclosures required under Rule 26(a)(4), in order to avoid the potential need to generate a separate Rule 26 (a)(4) report later if the opposing party elects a report rather than a deposition. But submitting such a combined report will not limit the opposing party's ability to elect a deposition if the Rule 35 examiner is designated as an expert.

Tab 5

Administrative Office of the Courts

Chief Justice Matthew B. Durrant
Utah Supreme Court
Chair, Utah Judicial Council

Daniel J. Becker
State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

MEMORANDUM

To: Civil Rules Committee
From: Nancy Sylvester Nancy J. Sylvester
Date: May 26, 2016
Re: Rule 34

At the May meeting, the committee took up a proposed change to Rule 34(b)(2) based on the 2015 federal amendments to the same paragraph. The committee expressed concerns about adopting the federal amendments since the rule had so recently been amended. At the recommendation of Terrie McIntosh, the committee instead determined that it should keep paragraph (b)(2) as is, but look at whether adding some of the federal language made sense.

The committee added a specificity requirement in line 23 and in lines 24-25 a portion of federal rule 34(b)(2)(C) dealing with the basis for an objection to production. The committee additionally determined that the following sentence from the federal note added some needed clarification in lines 25-26: "An objection that states the limits that have controlled the search for responsive and relevant materials qualifies as a statement that the materials have been withheld." The committee's requested amendments are in the attached draft.

Rule 34. Production of documents and things and entry upon land for inspection and other purposes.

(a) Scope.

(a)(1) Any party may serve on any other party a request to produce and permit the requesting party to inspect, copy, test or sample any designated discoverable documents, electronically stored information or tangible things (including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained, translated, if necessary, by the respondent into reasonably usable form) in the possession or control of the responding party.

(a)(2) Any party may serve on any other party a request to permit entry upon designated property in the possession or control of the responding party for the purpose of inspecting, measuring, surveying, photographing, testing, or sampling the property or any designated discoverable object or operation on the property.

(b) Procedure and limitations.

(b)(1) The request shall identify the items to be inspected by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable date, time, place, and manner of making the inspection and performing the related acts. The request may specify the form or forms in which electronically stored information is to be produced.

(b)(2) The responding party shall serve a written response within 28 days after service of the request. The responding party shall restate each request before responding to it. The response shall state, with respect to each item or category, that inspection and related acts will be permitted as requested, or that the request is objected to. If the party objects to a request, the party must state the reasons for the objection with specificity. Any reason not stated is waived unless excused by the court for good cause. An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection that states the limits that have controlled the search for responsive and relevant materials qualifies as a statement that the materials have been withheld. The party shall identify and permit inspection of any part of a request that is not objectionable. If the party objects to the requested form or forms for producing electronically stored information—or if no form was specified in the request—the responding party must state the form or forms it intends to use.

(c) Form of documents and electronically stored information.

(c)(1) A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

(c)(2) If a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable.

(c)(3) A party need not produce the same electronically stored information in more than one form.

Advisory Committee Notes

The 2016 amendments to paragraph (b)(2) adopt the specificity requirement in the 2015 amendments to Federal Rule of Civil Procedure 34(b)(2)(B), as well as some clarifying language from the federal note.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title V. Disclosures and Discovery (Refs & Annos)

Federal Rules of Civil Procedure Rule 34

Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering Onto Land, for Inspection and Other Purposes

Currentness

(a) In General. A party may serve on any other party a request within the scope of Rule 26(b):

(1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control:

(A) any designated documents or electronically stored information--including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations--stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or

(B) any designated tangible things; or

(2) to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

(b) Procedure.

(1) ***Contents of the Request.*** The request:

(A) must describe with reasonable particularity each item or category of items to be inspected;

(B) must specify a reasonable time, place, and manner for the inspection and for performing the related acts; and

(C) may specify the form or forms in which electronically stored information is to be produced.

(2) ***Responses and Objections.***

(A) *Time to Respond.* The party to whom the request is directed must respond in writing within 30 days after being served or -- if the request was delivered under Rule 26(d)(2) -- within 30 days after the parties' first Rule 26(f) conference. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(B) *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request, including the reasons. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.

(C) *Objections.* An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest.

(D) *Responding to a Request for Production of Electronically Stored Information.* The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form--or if no form was specified in the request--the party must state the form or forms it intends to use.

(E) *Producing the Documents or Electronically Stored Information.* Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:

(i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;

(ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and

(iii) A party need not produce the same electronically stored information in more than one form.

(c) Nonparties. As provided in Rule 45, a nonparty may be compelled to produce documents and tangible things or to permit an inspection.

CREDIT(S)

(Amended December 27, 1946, effective March 19, 1948; March 30, 1970, effective July 1, 1970; April 29, 1980, effective August 1, 1980; March 2, 1987, effective August 1, 1987; April 30, 1991, effective December 1, 1991; April 22, 1993, effective December 1, 1993; April 12, 2006, effective December 1, 2006; April 30, 2007, effective December 1, 2007; April 29, 2015, effective December 1, 2015.)

ADVISORY COMMITTEE NOTES

1937 Adoption

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In England orders are made for the inspection of documents, *English Rules Under the Judicature Act (The Annual Practice,* 1937) O. 31, r.r. 14, et seq., or for the inspection of tangible property or for entry upon land, O. 50, r. 3. Michigan provides for inspection of damaged property when such damage is the ground of the action. Mich.Court Rules Ann. (Searl, 1933) Rule 41, § 2.

Practically all states have statutes authorizing the court to order parties in possession or control of documents to permit other parties to inspect and copy them before trial. See Ragland, *Discovery Before Trial* (1932) Appendix, p. 267, setting out the statutes.

Compare [former] Equity Rule 58 (Discovery--Interrogatories--Inspection and Production of Documents--Admission of Execution or Genuineness) (fifth paragraph).

1946 Amendment

Note. The changes in clauses (1) and (2) correlate the scope of inquiry permitted under Rule 34 with that provided in Rule 26(b), and thus remove any ambiguity created by the former differences in language. As stated in *Olson Transportation Co. v. Socony-Vacuum Oil Co.,* E.D.Wis.1944, 8 Fed.Rules Serv. 34.41, Case 2, "* * * Rule 34 is a direct and simple method of discovery." At the same time the addition of the words following the term "parties" makes certain that the person in whose custody, possession, or control the evidence reposes may have the benefit of the applicable protective orders stated in Rule 30(b). This change should be considered in the light of the proposed expansion of Rule 30(b).

An objection has been made that the word "designated" in Rule 34 has been construed with undue strictness in some district court cases so as to require great and impracticable specificity in the description of documents, papers, books, etc., sought to be inspected. The Committee, however, believes that no amendment is needed, and that the proper meaning of "designated" as requiring specificity has already been delineated by the Supreme Court. *See Brown v. United States,* 1928, 48 S.Ct. 288, 276 U.S. 134, 143, 72 L.Ed. 500 ("The subpoena * * * specifies * * * with reasonable particularity the subjects to which the documents called for related."); *Consolidated Rendering Co. v. Vermont,* 1908, 28 S.Ct. 178, 207 U.S. 541, 543-544, 52 L.Ed. 327 ("We see no reason why all such books, papers and correspondence which related to the subject of inquiry, and were described with reasonable detail, should not be called for and the company directed to produce them. Otherwise, the State would be compelled to designate each particular paper which it desired, which presupposes an accurate knowledge of such papers, which the tribunal desiring the papers would probably rarely, if ever, have.").

1970 Amendment

Rule 34 is revised to accomplish the following major changes in the existing rule: (1) to eliminate the requirement of good cause; (2) to have the rule operate extrajudicially; (3) to include testing and sampling as well as inspecting or photographing tangible things; and (4) to make clear that the rule does not preclude an independent action for analogous discovery against persons not parties.

Subdivision (a). Good cause is eliminated because it has furnished an uncertain and erratic protection to the parties from whom production is sought and is now rendered unnecessary by virtue of the more specific provisions added to Rule 26(b) relating to materials assembled in preparation for trial and to experts retained or consulted by parties.

The good cause requirement was originally inserted in Rule 34 as a general protective provision in the absence of experience with the specific problems that would arise thereunder. As the note to Rule 26(b)(3) on trial preparation materials makes clear, good cause has been applied differently to varying classes of documents, though not without confusion. It has often been said in court opinions that good cause requires a consideration of need for the materials and of alternative means of obtaining them, i.e., something more than relevance and lack of privilege. But the overwhelming proportion of the cases in which the formula of good cause has been applied to require a special showing are those involving trial preparation. In practice, the courts have not treated documents as having a special immunity to discovery simply because of their being documents. Protection may

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be afforded to claims of privacy or secrecy or of undue burden or expense under what is now Rule 26(c) (previously Rule 30(b)). To be sure, an appraisal of "undue" burden inevitably entails consideration of the needs of the party seeking discovery. With special provisions added to govern trial preparation materials and experts, there is no longer any occasion to retain the requirement of good cause.

The revision of Rule 34 to have it operate extrajudicially, rather than by court order, is to a large extent a reflection of existing law office practice. The Columbia Survey shows that of the litigants seeking inspection of documents or things, only about 25 percent filed motions for court orders. This minor fraction nevertheless accounted for a significant number of motions. About half of these motions were uncontested and in almost all instances the party seeking production ultimately prevailed. Although an extrajudicial procedure will not drastically alter existing practice under Rule 34--it will conform to it in most cases--it has the potential of saving court time in a substantial though proportionately small number of cases tried annually.

The inclusion of testing and sampling of tangible things and objects or operations on land reflects a need frequently encountered by parties in preparation for trial. If the operation of a particular machine is the basis of a claim for negligent injury, it will often be necessary to test its operating parts or to sample and test the products it is producing. *Cf.* Mich.Gen.Ct.R. 310.1(1) (1963) (testing authorized).

The inclusive description of "documents" is revised to accord with changing technology. It makes clear that Rule 34 applies to electronics data compilations from which information can be obtained only with the use of detection devices, and that when the data can as a practical matter be made usable by the discovering party only through respondent's devices, respondent may be required to use his devices to translate the data into usable form. In many instances, this means that respondent will have to supply a print-out of computer data. The burden thus placed on respondent will vary from case to case, and the courts have ample power under Rule 26(c) to protect respondent against undue burden or expense, either by restricting discovery or requiring that the discovering party pay costs. Similarly, if the discovering party needs to check the electronic source itself, the court may protect respondent with respect to preservation of his records, confidentiality of nondiscoverable matters, and costs.

Subdivision (b). The procedure provided in Rule 34 is essentially the same as that in Rule 33, as amended, and the discussion in the note appended to that rule is relevant to Rule 34 as well. Problems peculiar to Rule 34 relate to the specific arrangements that must be worked out for inspection and related acts of copying, photographing, testing, or sampling. The rule provides that a request for inspection shall set forth the items to be inspected either by item or category, describing each with reasonable particularity, and shall specify a reasonable time, place, and manner of making the inspection.

Subdivision (c). Rule 34 as revised continues to apply only to parties. Comments from the bar make clear that in the preparation of cases for trial it is occasionally necessary to enter land or inspect large tangible things in the possession of a person not a party, and that some courts have dismissed independent actions in the nature of bills in equity for such discovery on the ground that Rule 34 is preemptive. While an ideal solution to this problem is to provide for discovery against persons not parties in Rule 34, both the jurisdictional and procedural problems are very complex. For the present, this subdivision makes clear that Rule 34 does not preclude independent actions for discovery against persons not parties.

1980 Amendment

Subdivision (b). The Committee is advised that, "It is apparently not rare for parties deliberately to mix critical documents with others in the hope of obscuring significance." *Report of the Special Committee for the Study of Discovery Abuse, Section of Litigation of the American Bar Association* (1977) 22. The sentence added by this subdivision follows the recommendation of the *Report.*

1987 Amendment

The amendment is technical. No substantive change is intended.

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1991 Amendment

This amendment reflects the change effected by revision of Rule 45 to provide for subpoenas to compel non-parties to produce documents and things and to submit to inspections of premises. The deletion of the text of the former paragraph is not intended to preclude an independent action for production of documents or things or for permission to enter upon land, but such actions may no longer be necessary in light of this revision.

1993 Amendment

The rule is revised to reflect the change made by Rule 26(d), preventing a party from seeking formal discovery prior to the meeting of the parties required by Rule 26(f). Also, like a change made in Rule 33, the rule is modified to make clear that, if a request for production is objectionable only in part, production should be afforded with respect to the unobjectionable portions.

When a case with outstanding requests for production is removed to federal court, the time for response would be measured from the date of the parties' meeting. See Rule 81(c), providing that these rules govern procedures after removal.

2006 Amendment

Subdivision (a). As originally adopted, Rule 34 focused on discovery of “documents” and “things.” In 1970, Rule 34(a) was amended to include discovery of data compilations, anticipating that the use of computerized information would increase. Since then, the growth in electronically stored information and in the variety of systems for creating and storing such information has been dramatic. Lawyers and judges interpreted the term “documents” to include electronically stored information because it was obviously improper to allow a party to evade discovery obligations on the basis that the label had not kept pace with changes in information technology. But it has become increasingly difficult to say that all forms of electronically stored information, many dynamic in nature, fit within the traditional concept of a “document.” Electronically stored information may exist in dynamic databases and other forms far different from fixed expression on paper. Rule 34(a) is amended to confirm that discovery of electronically stored information stands on equal footing with discovery of paper documents. The change clarifies that Rule 34 applies to information that is fixed in a tangible form and to information that is stored in a medium from which it can be retrieved and examined. At the same time, a Rule 34 request for production of “documents” should be understood to encompass, and the response should include, electronically stored information unless discovery in the action has clearly distinguished between electronically stored information and “documents.”

Discoverable information often exists in both paper and electronic form, and the same or similar information might exist in both. The items listed in Rule 34(a) show different ways in which information may be recorded or stored. Images, for example, might be hard-copy documents or electronically stored information. The wide variety of computer systems currently in use, and the rapidity of technological change, counsel against a limiting or precise definition of electronically stored information. Rule 34(a)(1) is expansive and includes any type of information that is stored electronically. A common example often sought in discovery is electronic communications, such as e-mail. The rule covers -- either as documents or as electronically stored information -- information “stored in any medium,” to encompass future developments in computer technology. Rule 34(a)(1) is intended to be broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and developments.

References elsewhere in the rules to “electronically stored information” should be understood to invoke this expansive approach. A companion change is made to Rule 33(d), making it explicit that parties choosing to respond to an interrogatory by permitting access to responsive records may do so by providing access to electronically stored information. More generally, the term used in Rule 34(a)(1) appears in a number of other amendments, such as those to Rules 26(a)(1), 26(b)(2), 26(b)(5)(B), 26(f), 34(b), 37(f), and 45. In each of these rules, electronically stored information has the same broad meaning it has under Rule 34(a)(1).

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References to "documents" appear in discovery rules that are not amended, including Rules 30(f), 36(a), and 37(c)(2). These references should be interpreted to include electronically stored information as circumstances warrant.

The term "electronically stored information" is broad, but whether material that falls within this term should be produced, and in what form, are separate questions that must be addressed under Rules 26(b), 26(c), and 34(b).

The Rule 34(a) requirement that, if necessary, a party producing electronically stored information translate it into reasonably usable form does not address the issue of translating from one human language to another. *See In re Puerto Rico Elect. Power Auth.*, 687 F.2d 501, 504-510 (1st Cir. 1989).

Rule 34(a)(1) is also amended to make clear that parties may request an opportunity to test or sample materials sought under the rule in addition to inspecting and copying them. That opportunity may be important for both electronically stored information and hard-copy materials. The current rule is not clear that such testing or sampling is authorized; the amendment expressly permits it. As with any other form of discovery, issues of burden and intrusiveness raised by requests to test or sample can be addressed under Rules 26(b)(2) and 26(c). Inspection or testing of certain types of electronically stored information or of a responding party's electronic information system may raise issues of confidentiality or privacy. The addition of testing and sampling to Rule 34(a) with regard to documents and electronically stored information is not meant to create a routine right of direct access to a party's electronic information system, although such access might be justified in some circumstances. Courts should guard against undue intrusiveness resulting from inspecting or testing such systems.

Rule 34(a)(1) is further amended to make clear that tangible things must -- like documents and land sought to be examined -- be designated in the request.

Subdivision (b). Rule 34(b) provides that a party must produce documents as they are kept in the usual course of business or must organize and label them to correspond with the categories in the discovery request. The production of electronically stored information should be subject to comparable requirements to protect against deliberate or inadvertent production in ways that raise unnecessary obstacles for the requesting party. Rule 34(b) is amended to ensure similar protection for electronically stored information.

The amendment to Rule 34(b) permits the requesting party to designate the form or forms in which it wants electronically stored information produced. The form of production is more important to the exchange of electronically stored information than of hard-copy materials, although a party might specify hard copy as the requested form. Specification of the desired form or forms may facilitate the orderly, efficient, and cost-effective discovery of electronically stored information. The rule recognizes that different forms of production may be appropriate for different types of electronically stored information. Using current technology, for example, a party might be called upon to produce word processing documents, e-mail messages, electronic spreadsheets, different image or sound files, and material from databases. Requiring that such diverse types of electronically stored information all be produced in the same form could prove impossible, and even if possible could increase the cost and burdens of producing and using the information. The rule therefore provides that the requesting party may ask for different forms of production for different types of electronically stored information.

The rule does not require that the requesting party choose a form or forms of production. The requesting party may not have a preference. In some cases, the requesting party may not know what form the producing party uses to maintain its electronically stored information, although Rule 26(f)(3) is amended to call for discussion of the form of production in the parties' prediscovery conference.

The responding party also is involved in determining the form of production. In the written response to the production request that Rule 34 requires, the responding party must state the form it intends to use for producing electronically stored information if the requesting party does not specify a form or if the responding party objects to a form that the requesting party specifies. Stating the intended form before the production occurs may permit the parties to identify and seek to resolve disputes before

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the expense and work of the production occurs. A party that responds to a discovery request by simply producing electronically stored information in a form of its choice, without identifying that form in advance of the production in the response required by Rule 34(b), runs a risk that the requesting party can show that the produced form is not reasonably usable and that it is entitled to production of some or all of the information in an additional form. Additional time might be required to permit a responding party to assess the appropriate form or forms of production.

If the requesting party is not satisfied with the form stated by the responding party, or if the responding party has objected to the form specified by the requesting party, the parties must meet and confer under Rule 37(a)(2)(B) in an effort to resolve the matter before the requesting party can file a motion to compel. If they cannot agree and the court resolves the dispute, the court is not limited to the forms initially chosen by the requesting party, stated by the responding party, or specified in this rule for situations in which there is no court order or party agreement.

If the form of production is not specified by party agreement or court order, the responding party must produce electronically stored information either in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable. Rule 34(a) requires that, if necessary, a responding party "translate" information it produces into a "reasonably usable" form. Under some circumstances, the responding party may need to provide some reasonable amount of technical support, information on application software, or other reasonable assistance to enable the requesting party to use the information. The rule does not require a party to produce electronically stored information in the form it which it is ordinarily maintained, as long as it is produced in a reasonably usable form. But the option to produce in a reasonably usable form does not mean that a responding party is free to convert electronically stored information from the form in which it is ordinarily maintained to a different form that makes it more difficult or burdensome for the requesting party to use the information efficiently in the litigation. If the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature.

Some electronically stored information may be ordinarily maintained in a form that is not reasonably usable by any party. One example is "legacy" data that can be used only by superseded systems. The questions whether a producing party should be required to convert such information to a more usable form, or should be required to produce it at all, should be addressed under Rule 26(b)(2)(B).

Whether or not the requesting party specified the form of production, Rule 34(b) provides that the same electronically stored information ordinarily need be produced in only one form.

2007 Amendment

The language of Rule 34 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The final sentence in the first paragraph of former Rule 34(b) was a redundant cross-reference to the discovery moratorium provisions of Rule 26(d). Rule 26(d) is now familiar, obviating any need to carry forward the redundant cross-reference.

The redundant reminder of Rule 37(a) procedure in the second paragraph of former Rule 34(b) is omitted as no longer useful.

2015 Amendment

Several amendments are made in Rule 34, aimed at reducing the potential to impose unreasonable burdens by objections to requests to produce.

Rule 34(b)(2)(A) is amended to fit with new Rule 26(d)(2). The time to respond to a Rule 34 request delivered before the parties' Rule 26(f) conference is 30 days after the first Rule 26(f) conference.

Rule 34(b)(2)(B) is amended to require that objections to Rule 34 requests be stated with specificity. This provision adopts the language of Rule 33(b)(4), eliminating any doubt that less specific objections might be suitable under Rule 34. The specificity of the objection ties to the new provision in Rule 34(b)(2)(C) directing that an objection must state whether any responsive materials are being withheld on the basis of that objection. An objection may state that a request is overbroad, but if the objection recognizes that some part of the request is appropriate the objection should state the scope that is not overbroad. Examples would be a statement that the responding party will limit the search to documents or electronically stored information created within a given period of time prior to the events in suit, or to specified sources. When there is such an objection, the statement of what has been withheld can properly identify as matters “withheld” anything beyond the scope of the search specified in the objection.

Rule 34(b)(2)(B) is further amended to reflect the common practice of producing copies of documents or electronically stored information rather than simply permitting inspection. The response to the request must state that copies will be produced. The production must be completed either by the time for inspection specified in the request or by another reasonable time specifically identified in the response. When it is necessary to make the production in stages the response should specify the beginning and end dates of the production.

Rule 34(b)(2)(C) is amended to provide that an objection to a Rule 34 request must state whether anything is being withheld on the basis of the objection. This amendment should end the confusion that frequently arises when a producing party states several objections and still produces information, leaving the requesting party uncertain whether any relevant and responsive information has been withheld on the basis of the objections. The producing party does not need to provide a detailed description or log of all documents withheld, but does need to alert other parties to the fact that documents have been withheld and thereby facilitate an informed discussion of the objection. An objection that states the limits that have controlled the search for responsive and relevant materials qualifies as a statement that the materials have been “withheld.”

Notes of Decisions (1424)

Fed. Rules Civ. Proc. Rule 34, 28 U.S.C.A., FRCP Rule 34
Including Amendments Received Through 2-1-16

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Tab 6

Administrative Office of the Courts

Chief Justice Matthew B. Durrant
Utah Supreme Court
Chair, Utah Judicial Council

Daniel J. Becker
State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

MEMORANDUM

To: Civil Rules Committee
From: Nancy Sylvester Nancy J. Sylvester
Date: April 22, 2016
Re: Rule 37

The 2015 amendments to Federal Rule of Civil Procedure 37(e) address failure to preserve electronically stored information. The committee determined at its March meeting that Utah should adopt the federal amendments. Utah's rule 37(e), though, addresses not only electronically stored information, but also other, non-electronically stored information. I have taken the federal language and merged it into Utah's language so that the rule continues to address the non-electronically stored information and now better addresses the electronically stored information.

The mission of the Utah judiciary is to provide the people an open, fair, efficient, and independent system for the advancement of justice under the law.

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Rule 37. Statement of discovery issues; Sanctions; Failure to admit, to attend deposition or to preserve evidence.

(a) Statement of discovery issues.

(a)(1) A party or the person from whom discovery is sought may request that the judge enter an order regarding any discovery issue, including:

(a)(1)(A) failure to disclose under Rule 26;

(a)(1)(B) extraordinary discovery under Rule 26;

(a)(1)(C) a subpoena under Rule 45;

(a)(1)(D) protection from discovery; or

(a)(1)(E) compelling discovery from a party who fails to make full and complete discovery.

(a)(2) Statement of discovery issues length and content. The statement of discovery issues must be no more than 4 pages, not including permitted attachments, and must include in the following order:

(a)(2)(A) the relief sought and the grounds for the relief sought stated succinctly and with particularity;

(a)(2)(B) a certification that the requesting party has in good faith conferred or attempted to confer with the other affected parties in person or by telephone in an effort to resolve the dispute without court action;

(a)(2)(C) a statement regarding proportionality under Rule 26(b)(2); and

(a)(2)(D) if the statement requests extraordinary discovery, a statement certifying that the party has reviewed and approved a discovery budget.

(a)(3) Objection length and content. No more than 7 days after the statement is filed, any other party may file an objection to the statement of discovery issues. The objection must be no more than 4 pages, not including permitted attachments, and must address the issues raised in the statement.

(a)(4) Permitted attachments. The party filing the statement must attach to the statement only a copy of the disclosure, request for discovery or the response at issue.

(a)(5) Proposed order. Each party must file a proposed order concurrently with its statement or objection.

(a)(6) Decision. Upon filing of the objection or expiration of the time to do so, either party may and the party filing the statement must file a Request to Submit for Decision under Rule 7(g). The court will promptly:

(a)(6)(A) decide the issues on the pleadings and papers;

(a)(6)(B) conduct a hearing by telephone conference or other electronic communication; or

(a)(6)(C) order additional briefing and establish a briefing schedule.

(a)(7) Orders. The court may enter orders regarding disclosure or discovery or to protect a party or person from discovery being conducted in bad faith or from annoyance, embarrassment, oppression, or undue burden or expense, or to achieve proportionality under Rule 26(b)(2), including one or more of the following:

(a)(7)(A) that the discovery not be had or that additional discovery be had;

(a)(7)(B) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(a)(7)(C) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(a)(7)(D) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(a)(7)(E) that discovery be conducted with no one present except persons designated by the court;

(a)(7)(F) that a deposition after being sealed be opened only by order of the court;

(a)(7)(G) that a trade secret or other confidential information not be disclosed or be disclosed only in a designated way;

(a)(7)(H) that the parties simultaneously deliver specified documents or information enclosed in sealed envelopes to be opened as directed by the court;

(a)(7)(I) that a question about a statement or opinion of fact or the application of law to fact not be answered until after designated discovery has been completed or until a pretrial conference or other later time;

(a)(7)(J) that the costs, expenses and attorney fees of discovery be allocated among the parties as justice requires; or

(a)(7)(K) that a party pay the reasonable costs, expenses and attorney fees incurred on account of the statement of discovery issues if the relief requested is granted or denied, or if a party provides discovery or withdraws a discovery request after a statement of discovery issues is filed and if the court finds that the party, witness, or attorney did not act in good faith or asserted a position that was not substantially justified.

(a)(8) Request for sanctions prohibited. A statement of discovery issues or an objection may include a request for costs, expenses and attorney fees but not a request for sanctions.

(a)(9) Statement of discovery issues does not toll discovery time. A statement of discovery issues does not suspend or toll the time to complete standard discovery.

(b) Motion for sanctions. Unless the court finds that the failure was substantially justified, the court, upon motion, may impose appropriate sanctions for the failure to follow its orders, including the following:

(b)(1) deem the matter or any other designated facts to be established in accordance with the claim or defense of the party obtaining the order;

(b)(2) prohibit the disobedient party from supporting or opposing designated claims or defenses or from introducing designated matters into evidence;

(b)(3) stay further proceedings until the order is obeyed;

(b)(4) dismiss all or part of the action, strike all or part of the pleadings, or render judgment by default on all or part of the action;

(b)(5) order the party or the attorney to pay the reasonable costs, expenses, and attorney fees, caused by the failure;

(b)(6) treat the failure to obey an order, other than an order to submit to a physical or mental examination, as contempt of court; and

(b)(7) instruct the jury regarding an adverse inference.

(c) Motion for costs, expenses and attorney fees on failure to admit. If a party fails to admit the genuineness of a document or the truth of a matter as requested under Rule 36, and if the party requesting the admissions proves the genuineness of the document or the truth of the matter, the party requesting the admissions may file a motion for an order requiring the other party to pay the reasonable costs, expenses and attorney fees incurred in making that proof. The court must enter the order unless it finds that:

(c)(1) the request was held objectionable pursuant to Rule 36(a);

(c)(2) the admission sought was of no substantial importance;

(c)(3) there were reasonable grounds to believe that the party failing to admit might prevail on the matter;

(c)(4) that the request was not proportional under Rule 26(b)(2); or

(c)(5) there were other good reasons for the failure to admit.

(d) Motion for sanctions for failure of party to attend deposition. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) to testify on behalf of a party fails to appear before the officer taking the deposition after service of the notice, any other party may file a motion for sanctions under paragraph (b). The failure to appear may not be excused on the ground that the discovery sought is objectionable unless the party failing to appear has filed a statement of discovery issues under paragraph (a).

(e) Failure to preserve evidence. Nothing in this rule limits the inherent power of the court to take any action authorized by paragraph (b) if a party destroys, conceals, alters, tampers with or fails to preserve a document, tangible item, electronic data or other evidence in violation of a duty.

(e)(1) 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:

(e)(1)(A) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(e)(1)(B) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

(e)(1)(B)(1) presume that the lost information was unfavorable to the party;

(e)(1)(B)(2) instruct the jury that it may or must presume the information was unfavorable to the party; or

(e)(1)(B)(3) dismiss the action or enter a default judgment.

(e)(1)(C) Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

Advisory Committee Notes

New note (add to Advisory Committee Notes):

The 2016 amendments to paragraph (e) merged the 2015 amendments to Federal Rule of Civil Procedure 37(e). The federal amendments "addressed the serious problems resulting from the continued exponential growth in the volume of [electronically-stored] information" by providing "measures a court may employ if information that should have been preserved is lost." Fed. R. Civ. P. 37, Advisory Committee Notes, 2015 Amendment. Unlike the federal rule, Utah's rule 37(e) also addressed non-electronically stored evidence. The committee preserved the language addressing that subject.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title V. Disclosures and Discovery (Refs & Annos)

Federal Rules of Civil Procedure Rule 37

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

Currentness

(a) Motion for an Order Compelling Disclosure or Discovery.

(1) ***In General.*** On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.

(2) ***Appropriate Court.*** A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty must be made in the court where the discovery is or will be taken.

(3) ***Specific Motions.***

(A) *To Compel Disclosure.* If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions.

(B) *To Compel a Discovery Response.* A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:

(i) a deponent fails to answer a question asked under Rule 30 or 31;

(ii) a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a)(4);

(iii) a party fails to answer an interrogatory submitted under Rule 33; or

(iv) a party fails to produce documents or fails to respond that inspection will be permitted -- or fails to permit inspection -- as requested under Rule 34.

(C) *Related to a Deposition.* When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order.

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(4) ***Evasive or Incomplete Disclosure, Answer, or Response.*** For purposes of this subdivision (a), an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.

(5) ***Payment of Expenses; Protective Orders.***

(A) *If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing).* If the motion is granted--or if the disclosure or requested discovery is provided after the motion was filed--the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if:

(i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;

(ii) the opposing party's nondisclosure, response, or objection was substantially justified; or

(iii) other circumstances make an award of expenses unjust.

(B) *If the Motion Is Denied.* If the motion is denied, the court may issue any protective order authorized under Rule 26(c) and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.

(C) *If the Motion Is Granted in Part and Denied in Part.* If the motion is granted in part and denied in part, the court may issue any protective order authorized under Rule 26(c) and may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion.

(b) Failure to Comply with a Court Order.

(1) ***Sanctions Sought in the District Where the Deposition Is Taken.*** If the court where the discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court. If a deposition-related motion is transferred to the court where the action is pending, and that court orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of either the court where the discovery is taken or the court where the action is pending.

(2) ***Sanctions Sought in the District Where the Action Is Pending.***

(A) *For Not Obeying a Discovery Order.* If a party or a party's officer, director, or managing agent--or a witness designated under Rule 30(b)(6) or 31(a)(4)--fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

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(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(iii) striking pleadings in whole or in part;

(iv) staying further proceedings until the order is obeyed;

(v) dismissing the action or proceeding in whole or in part;

(vi) rendering a default judgment against the disobedient party; or

(vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

(B) *For Not Producing a Person for Examination.* If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for examination, the court may issue any of the orders listed in Rule 37(b)(2)(A)(i)-(vi), unless the disobedient party shows that it cannot produce the other person.

(C) *Payment of Expenses.* Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(c) Failure to Disclose, to Supplement an Earlier Response, or to Admit.

(1) ***Failure to Disclose or Supplement.*** If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

(A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;

(B) may inform the jury of the party's failure; and

(C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

(2) ***Failure to Admit.*** If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court must so order unless:

(A) the request was held objectionable under Rule 36(a);

(B) the admission sought was of no substantial importance;

(C) the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or

(D) there was other good reason for the failure to admit.

(d) Party's Failure to Attend Its Own Deposition, Serve Answers to Interrogatories, or Respond to a Request for Inspection.

(1) ***In General.***

(A) *Motion; Grounds for Sanctions.* The court where the action is pending may, on motion, order sanctions if:

(i) a party or a party's officer, director, or managing agent--or a person designated under Rule 30(b)(6) or 31(a)(4)--fails, after being served with proper notice, to appear for that person's deposition; or

(ii) a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response.

(B) *Certification.* A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action.

(2) ***Unacceptable Excuse for Failing to Act.*** A failure described in Rule 37(d)(1)(A) is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c).

(3) ***Types of Sanctions.*** Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)-(vi). Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

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(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.

(f) Failure to Participate in Framing a Discovery Plan. If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

CREDIT(S)

(Amended December 29, 1948, effective October 20, 1949; March 30, 1970, effective July 1, 1970; April 29, 1980, effective August 1, 1980; amended by Pub.L. 96-481, Title II, § 205(a), October 21, 1980, 94 Stat. 2330, effective October 1, 1981; amended March 2, 1987, effective August 1, 1987; April 22, 1993, effective December 1, 1993; April 17, 2000, effective December 1, 2000; April 12, 2006, effective December 1, 2006; April 30, 2007, effective December 1, 2007; April 16, 2013, effective December 1, 2013; April 29, 2015, effective December 1, 2015.)

ADVISORY COMMITTEE NOTES

1937 Adoption

The provisions of this rule authorizing orders establishing facts or excluding evidence or striking pleadings, or authorizing judgments of dismissal or default, for refusal to answer questions or permit inspection or otherwise make discovery, are in accord with *Hammond Packing Co. v. Arkansas*, 1909, 29 S.Ct. 370, 212 U.S. 322, 53 L.Ed. 530, 15 Ann.Cas. 645, which distinguishes between the justifiable use of such measures as a means of compelling the production of evidence, and their unjustifiable use, as in *Hovey v. Elliott*, 1897, 17 S.Ct. 841, 167 U.S. 409, 42 L.Ed. 215, for the mere purpose of punishing for contempt.

1948 Amendment

The amendment effective October 1949, substituted the reference to "Title 28, U.S.C., § 1783" in subdivision (e) for the reference to "the Act of July 3, 1926, c. 762, § 1 (44 Stat. 835), U.S.C., Title 28, § 711."

1970 Amendment

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Rule 37 provides generally for sanctions against parties or persons unjustifiably resisting discovery. Experience has brought to light a number of defects in the language of the rule as well as instances in which it is not serving the purposes for which it was designed. See Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 Col.L.Rev. 480 (1958). In addition, changes being made in other discovery rules require conforming amendments to Rule 37.

Rule 37 sometimes refers to a "failure" to afford discovery and at other times to a "refusal" to do so. Taking note of this dual terminology, courts have imported into "refusal" a requirement of "wilfullness." See *Roth v. Paramount Pictures Corp.*, 8 F.R.D. 31 (W.D.Pa.1948); *Campbell v. Johnson*, 101 F.Supp. 705, 707 (S.D.N.Y.1951). In *Societe Internationale v. Rogers*, 357 U.S. 197 (1958), the Supreme Court concluded that the rather random use of these two terms in Rule 37 showed no design to use them with consistently distinctive meanings, that "refused" in Rule 37(b)(2) meant simply a failure to comply, and that wilfullness was relevant only to the selection of sanctions, if any, to be imposed. Nevertheless, after the decision in *Societe*, the court in *Hinson v. Michigan Mutual Liability Co.*, 275 F.2d 537 (5th Cir. 1960) once again ruled that "refusal" required wilfullness. Substitution of "failure" for "refusal" throughout Rule 37 should eliminate this confusion and bring the rule into harmony with the *Societe Internationale* decision. See Rosenberg, *supra*, 58 Col.L.Rev. 480, 489-490 (1958).

Subdivision (a). Rule 37(a) provides relief to a party seeking discovery against one who, with or without stated objections, fails to afford the discovery sought. It has always fully served this function in relation to depositions, but the amendments being made to Rules 33 and 34 give Rule 37(a) added scope and importance. Under existing Rule 33, a party objecting to interrogatories must make a motion for court hearing on his objections. The changes now made in Rules 33 and 37(a) make it clear that the interrogating party must move to compel answers, and the motion is provided for in Rule 37(a). Existing Rule 34, since it requires a court order prior to production of documents or things or permission to enter on land, has no relation to Rule 37(a). Amendments of Rules 34 and 37(a) create a procedure similar to that provided for Rule 33.

Subdivision (a)(1). This is a new provision making clear to which court a party may apply for an order compelling discovery. Existing Rule 37(a) refers only to the court in which the deposition is being taken; nevertheless, it has been held that the court where the action is pending has "inherent power" to compel a party deponent to answer. *Lincoln Laboratories, Inc. v. Savage Laboratories, Inc.*, 27 F.R.D. 476 (D.Del.1961). In relation to Rule 33 interrogatories and Rule 34 requests for inspection, the court where the action is pending is the appropriate enforcing tribunal. The new provision eliminates the need to resort to inherent power by spelling out the respective roles of the court where the action is pending and the court where the deposition is taken. In some instances, two courts are available to a party seeking to compel answers from a party deponent. The party seeking discovery may choose the court to which he will apply, but the court has power to remit the party to the other court as a more appropriate forum.

Subdivision (a)(2). This subdivision contains the substance of existing provisions of Rule 37(a) authorizing motions to compel answers to questions put at depositions and to interrogatories. New provisions authorize motions for orders compelling designation under Rules 30(b)(6) and 31(a) and compelling inspection in accordance with a request made under Rule 34. If the court denies a motion, in whole or part, it may accompany the denial with issuance of a protective order. Compare the converse provision in Rule 26(c).

Subdivision (a)(3). This new provision makes clear that an evasive or incomplete answer is to be considered, for purposes of subdivision (a), a failure to answer. The courts have consistently held that they have the power to compel adequate answers. *E.g.*, *Cone Mills Corp. v. Joseph Bancroft & Sons Co.*, 33 F.R.D. 318 (D.Del.1963). This power is recognized and incorporated into the rule.

Subdivision (a)(4). This subdivision amends the provisions for award of expenses, including reasonable attorney's fees, to the prevailing party or person when a motion is made for an order compelling discovery. At present, an award of expenses is made only if the losing party or person is found to have acted without substantial justification. The change requires that expenses be awarded unless the conduct of the losing party or person is found to have been substantially justified. The test of "substantial

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justification" remains, but the change in language is intended to encourage judges to be more alert to abuses occurring in the discovery process.

On many occasions, to be sure, the dispute over discovery between the parties is genuine, though ultimately resolved one way or the other by the court. In such cases, the losing party is substantially justified in carrying the matter to court. But the rules should deter the abuse implicit in carrying or forcing a discovery dispute to court when no genuine dispute exists. And the potential or actual imposition of expenses is virtually the sole formal sanction in the rules to deter a party from pressing to a court hearing frivolous requests for or objections to discovery.

The present provision of Rule 37(a) that the court shall require payment if it finds that the defeated party acted without "substantial justification" may appear adequate, but in fact it has been little used. Only a handful of reported cases include an award of expenses, and the Columbia Survey found that in only one instance out of about 50 motions decided under Rule 37(a) did the court award expenses. It appears that the courts do not utilize the most important available sanction to deter abusive resort to the judiciary.

The proposed change provides in effect that expenses should ordinarily be awarded unless a court finds that the losing party acted justifiably in carrying his point to court. At the same time, a necessary flexibility is maintained, since the court retains the power to find that other circumstances make an award of expenses unjust--as where the prevailing party also acted unjustifiably. The amendment does not significantly narrow the discretion of the court, but rather presses the court to address itself to abusive practices. The present provision that expenses may be imposed upon either the party or his attorney or both is unchanged. But it is not contemplated that expenses will be imposed upon the attorney merely because the party is indigent.

Subdivision (b). This subdivision deals with sanctions for failure to comply with a court order. The present captions for subsections (1) and (2) entitled, "Contempt" and "Other Consequences," respectively, are confusing. One of the consequences listed in (2) is the arrest of the party, representing the exercise of the contempt power. The contents of the subsections show that the first authorizes the sanction of contempt (and no other) by the court in which the deposition is taken, whereas the second subsection authorizes a variety of sanctions, including contempt, which may be imposed by the court in which the action is pending. The captions of the subsections are changed to reflect their contents.

The scope of Rule 37(b)(2) is broadened by extending it to include any order "to provide or permit discovery," including orders issued under Rules 37(a) and 35. Various rules authorize orders for discovery--*e.g.,* Rule 35(b)(1), Rule 26(c) as revised, Rule 37(d). See Rosenberg, *supra*, 58 Col.L.Rev. 480, 484-486. Rule 37(b)(2) should provide comprehensively for enforcement of all these orders. *Cf. Societe Internationale v. Rogers,* 357 U.S. 197, 207 (1958). On the other hand, the reference to Rule 34 is deleted to conform to the changed procedure in that rule.

A new subsection (E) provides that sanctions which have been available against a party for failure to comply with an order under Rule 35(a) to submit to examination will now be available against him for his failure to comply with a Rule 35(a) order to produce a third person for examination, unless he shows that he is unable to produce the person. In this context, "unable" means in effect "unable in good faith." See *Societe Internationale v. Rogers,* 357 U.S. 197 (1958).

Subdivision (b)(2) is amplified to provide for payment of reasonable expenses caused by the failure to obey the order. Although Rules 37(b)(2) and 37(d) have been silent as to award of expenses, courts have nevertheless ordered them on occasion. *E.g., United Sheeplined Clothing Co. v. Arctic Fur Cap Corp.,* 165 F.Supp. 193 (S.D.N.Y.1958); *Austin Theatre, Inc. v. Warner Bros. Pictures, Inc.,* 22 F.R.D. 302 (S.D.N.Y.1958). The provision places the burden on the disobedient party to avoid expenses by showing that his failure is justified or that special circumstances make an award of expenses unjust. Allocating the burden in this way conforms to the changed provisions as to expenses in Rule 37(a), and is particularly appropriate when a court order is disobeyed.

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An added reference to directors of a party is similar to a change made in subdivision (d) and is explained in the note to that subdivision. The added reference to persons designated by a party under Rules 30(b)(6) or 31(a) to testify on behalf of the party carries out the new procedure in those rules for taking a deposition of a corporation or other organization.

Subdivision (c). Rule 37(c) provides a sanction for the enforcement of Rule 36 dealing with requests for admission. Rule 36 provides the mechanism whereby a party may obtain from another party in appropriate instances either (1) an admission, or (2) a sworn and specific denial or (3) a sworn statement "setting forth in detail the reasons why he cannot truthfully admit or deny." If the party obtains the second or third of these responses, in proper form, Rule 36 does not provide for a pretrial hearing on whether the response is warranted by the evidence thus far accumulated. Instead, Rule 37(c) is intended to provide posttrial relief in the form of a requirement that the party improperly refusing the admission pay the expenses of the other side in making the necessary proof at trial.

Rule 37(c), as now written, addresses itself in terms only to the sworn denial and is silent with respect to the statement of reasons for an inability to admit or deny. There is no apparent basis for this distinction, since the sanction provided in Rule 37(c) should deter all unjustified failures to admit. This omission in the rule has caused confused and diverse treatment in the courts. One court has held that if a party give inadequate reasons, he should be treated before trial as having denied the request, so that Rule 37(c) may apply. *Bertha Bldg. Corp. v. National Theatres Corp.,* 15 F.R.D. 339 (E.D.N.Y.1954). Another has held that the party should be treated as having admitted the request. *Heng Hsin Co. v. Stern, Morgenthau & Co.,* 20 Fed.Rules Serv. 36a.52, Case 1 (S.D.N.Y. Dec. 10, 1954). Still another has ordered a new response, without indicating what the outcome should be if the new response were inadequate. *United States Plywood Corp. v. Hudson Lumber Co.,* 127 F.Supp. 489, 497-498 (S.D.N.Y.1954). See generally Finman, *The Request for Admissions in Federal Civil Procedure,* 71 Yale L.J. 371, 426-430 (1962). The amendment eliminates this defect in Rule 37(c) by bringing within its scope all failures to admit.

Additional provisions in Rule 37(c) protect a party from having to pay expenses if the request for admission was held objectionable under Rule 36(a) or if the party failing to admit had reasonable ground to believe that he might prevail on the matter. The latter provision emphasizes that the true test under Rule 37(c) is not whether a party prevailed at trial but whether he acted reasonably in believing that he might prevail.

Subdivision (d). The scope of subdivision (d) is broadened to include responses to requests for inspection under Rule 34, thereby conforming to the new procedures of Rule 34.

Two related changes are made in subdivision (d): the permissible sanctions are broadened to include such orders "as are just"; and the requirement that the failure to appear or respond be "wilful" is eliminated. Although Rule 37(d) in terms provides for only three sanctions, all rather severe, the courts have interpreted it as permitting softer sanctions than those which it sets forth. E.g., *Gill v. Stolow,* 240 F.2d 669 (2d Cir.1957); *Saltzman v. Birrell,* 156 F.Supp. 538 (S.D.N.Y.1957); 2A Barron & Holtzoff, *Federal Practice and Procedure* 554-557 (Wright ed. 1961). The rule is changed to provide the greater flexibility as to sanctions which the cases show is needed.

The resulting flexibility as to sanctions eliminates any need to retain the requirement that the failure to appear or respond be "wilful." The concept of "wilful failure" is at best subtle and difficult, and the cases do not supply a bright line. Many courts have imposed sanctions without referring to wilfullness. E.g., *Milewski v. Schneider Transportation Co.,* 238 F.2d 397 (6th Cir.1956); *Dictograph Products, Inc. v. Kentworth Corp.,* 7 F.R.D. 543 (W.D.Ky.1947). In addition, in view of the possibility of light sanctions, even a negligent failure should come within Rule 37(d). If default is caused by counsel's ignorance of Federal practice, cf. *Dunn v. Pa. R.R.,* 96 F.Supp. 597 (N.D.Ohio 1951), or by his preoccupation with another aspect of the case, *cf. Maurer-Neuer, Inc. v. United Packinghouse Workers,* 26 F.R.D. 139 (D.Kans.1960), dismissal of the action and default judgment are not justified, but the imposition of expenses and fees may well be. "Wilfullness" continues to play a role, along with various other factors, in the choice of sanctions. Thus, the scheme conforms to Rule 37(b) as construed by the Supreme Court in *Societe Internationale v. Rogers,* 357 U.S. 197, 208 (1958).

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A provision is added to make clear that a party may not properly remain completely silent even when he regards a notice to take his deposition or a set of interrogatories or requests to inspect as improper and objectionable. If he desires not to appear or not to respond, he must apply for a protective order. The cases are divided on whether a protective order must be sought. Compare *Collins v. Wayland,* 139 F.2d 677 (9th Cir. 1944), *cert. den.* 322 U.S. 744; *Bourgeois v. El Paso Natural Gas Co.,* 20 F.R.D. 358 (S.D.N.Y.1957); *Loosley v. Stone,* 15 F.R.D. 373 (S.D.Ill.1954), with *Scarlatos v. Kulukundis,* 21 F.R.D. 185 (S.D.N.Y.1957); *Ross v. True Temper Corp.,* 11 F.R.D. 307 (N.D.Ohio 1951). Compare also Rosenberg, *supra,* 58 Col.L.Rev. 480, 496 (1958) with 2A Barron & Holtzoff, *Federal Practice and Procedure* 530-531 (Wright ed. 1961). The party from whom discovery is sought is afforded, through Rule 26(c), a fair and effective procedure whereby he can challenge the request made. At the same time, the total noncompliance with which Rule 37(d) is concerned may impose severe inconvenience or hardship on the discovering party and substantially delay the discovery process. Cf. 2B Barron & Holtzoff, *Federal Practice and Procedure* 306-307 (Wright ed. 1961) (response to a subpoena).

The failure of an officer or managing agent of a party to make discovery as required by present Rule 37(d) is treated as the failure of the party. The rule as revised provides similar treatment for a director of a party. There is slight warrant for the present distinction between officers and managing agents on the one hand and directors on the other. Although the legal power over a director to compel his making discovery may not be as great as over officers or managing agents, *Campbell v. General Motors Corp.,* 13 F.R.D. 331 (S.D.N.Y.1952), the practical differences are negligible. That a director's interests are normally aligned with those of his corporation is shown by the provisions of old Rule 26(d)(2), transferred to 32(a)(2) (deposition of director of party may be used at trial by an adverse party for any purpose) and of Rule 43(b) (director of party may be treated at trial as a hostile witness on direct examination by any adverse party). Moreover, in those rare instances when a corporation is unable through good faith efforts to compel a director to make discovery, it is unlikely that the court will impose sanctions. Cf. *Societe Internationale v. Rogers,* 357 U.S. 197 (1958).

Subdivision (e). The change in the caption conforms to the language of 28 U.S.C. § 1783, as amended in 1964.

Subdivision (f). Until recently, costs of a civil action could be awarded against the United States only when expressly provided by Act of Congress, and such provision was rarely made. See H.R.Rep.No. 1535, 89th Cong., 2d Sess., 2-3 (1966). To avoid any conflict with this doctrine, Rule 37(f) has provided that expenses and attorney's fees may not be imposed upon the United States under Rule 37. See 2A Barron & Holtzoff, *Federal Practice and Procedure* 857 (Wright ed. 1961).

A major change in the law was made in 1966, 80 Stat. 308, 28 U.S.C. § 2412 (1966), whereby a judgment for costs may ordinarily be awarded to the prevailing party in any civil action brought by or against the United States. Costs are not to include the fees and expenses of attorneys. In light of this legislative development, Rule 37(f) is amended to permit the award of expenses and fees against the United States under Rule 37, but only to the extent permitted by statute. The amendment brings Rule 37(f) into line with present and future statutory provisions.

1980 Amendment

Subdivision (b)(2). New Rule 26(f) provides that if a discovery conference is held, at its close the court shall enter an order respecting the subsequent conduct of discovery. The amendment provides that the sanctions available for violation of other court orders respecting discovery are available for violation of the discovery conference order.

Subdivision (e). Subdivision (e) is stricken. Title 28, U.S.C. § 1783 no longer refers to sanctions. The subdivision otherwise duplicates Rule 45(e)(2).

Subdivision (g). New Rule 26(f) imposes a duty on parties to participate in good faith in the framing of a discovery plan by agreement upon the request of any party. This subdivision authorizes the court to award to parties who participate in good faith in an attempt to frame a discovery plan the expenses incurred in the attempt if any party or his attorney fails to participate in good faith and thereby causes additional expense.

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Failure of United States to Participate in Good Faith in Discovery. Rule 37 authorizes the court to direct that parties or attorneys who fail to participate in good faith in the discovery process pay the expenses, including attorneys' fees, incurred by other parties as a result of that failure. Since attorneys' fees cannot ordinarily be awarded against the United States (28 U.S.C. § 2412), there is often no practical remedy for the misconduct of its officers and attorneys. However, in the case of a government attorney who fails to participate in good faith in discovery, nothing prevents a court in an appropriate case from giving written notification of that fact to the Attorney General of the United States and other appropriate heads of offices or agencies thereof.

1987 Amendment

The amendments are technical. No substantive change is intended.

1993 Amendment

Subdivision (a). This subdivision is revised to reflect the revision of Rule 26(a), requiring disclosure of matters without a discovery request.

Pursuant to new subdivision (a)(2)(A), a party dissatisfied with the disclosure made by an opposing party may under this rule move for an order to compel disclosure. In providing for such a motion, the revised rule parallels the provisions of the former rule dealing with failures to answer particular interrogatories. Such a motion may be needed when the information to be disclosed might be helpful to the party seeking the disclosure but not to the party required to make the disclosure. If the party required to make the disclosure would need the material to support its own contentions, the more effective enforcement of the disclosure requirement will be to exclude the evidence not disclosed, as provided in subdivision (c)(1) of this revised rule.

Language is included in the new paragraph and added to the subparagraph (B) that requires litigants to seek to resolve discovery disputes by informal means before filing a motion with the court. This requirement is based on successful experience with similar local rules of court promulgated pursuant to Rule 83.

The last sentence of paragraph (2) is moved into paragraph (4).

Under revised paragraph (3), evasive or incomplete disclosures and responses to interrogatories and production requests are treated as failures to disclose or respond. Interrogatories and requests for production should not be read or interpreted in an artificially restrictive or hypertechnical manner to avoid disclosure of information fairly covered by the discovery request, and to do so is subject to appropriate sanctions under subdivision (a).

Revised paragraph (4) is divided into three subparagraphs for ease of reference, and in each the phrase “after opportunity for hearing” is changed to “after affording an opportunity to be heard” to make clear that the court can consider such questions on written submissions as well as on oral hearings.

Subparagraph (A) is revised to cover the situation where information that should have been produced without a motion to compel is produced after the motion is filed but before it is brought on for hearing. The rule also is revised to provide that a party should not be awarded its expenses for filing a motion that could have been avoided by conferring with opposing counsel.

Subparagraph (C) is revised to include the provision that formerly was contained in subdivision (a)(2) and to include the same requirement of an opportunity to be heard that is specified in subparagraphs (A) and (B).

Subdivision (c). The revision provides a self-executing sanction for failure to make a disclosure required by Rule 26(a), without need for a motion under subdivision (a)(2)(A).

Paragraph (1) prevents a party from using as evidence any witnesses or information that, without substantial justification, has not been disclosed as required by Rules 26(a) and 26(e)(1). This automatic sanction provides a strong inducement for disclosure of material that the disclosing party would expect to use as evidence, whether at a trial, at a hearing, or on a motion, such as one under Rule 56. As disclosure of evidence offered solely for impeachment purposes is not required under those rules, this preclusion sanction likewise does not apply to that evidence.

Limiting the automatic sanction to violations "without substantial justification," coupled with the exception for violations that are "harmless," is needed to avoid unduly harsh penalties in a variety of situations: *e.g.,* the inadvertent omission from a Rule 26(a)(1)(A) disclosure of the name of a potential witness known to all parties; the failure to list as a trial witness a person so listed by another party; or the lack of knowledge of a pro se litigant of the requirement to make disclosures. In the latter situation, however, exclusion would be proper if the requirement for disclosure had been called to the litigant's attention by either the court or another party.

Preclusion of evidence is not an effective incentive to compel disclosure of information that, being supportive of the position of the opposing party, might advantageously be concealed by the disclosing party. However, the rule provides the court with a wide range of other sanctions--such as declaring specified facts to be established, preventing contradictory evidence, or, like spoliation of evidence, allowing the jury to be informed of the fact of nondisclosure--that, though not self-executing, can be imposed when found to be warranted after a hearing. The failure to identify a witness or document in a disclosure statement would be admissible under the Federal Rules of Evidence under the same principles that allow a party's interrogatory answers to be offered against it.

Subdivision (d). This subdivision is revised to require that, where a party fails to file any response to interrogatories or a Rule 34 request, the discovering party should informally seek to obtain such responses before filing a motion for sanctions.

The last sentence of this subdivision is revised to clarify that it is the pendency of a motion for protective order that may be urged as an excuse for a violation of subdivision (d). If a party's motion has been denied, the party cannot argue that its subsequent failure to comply would be justified. In this connection, it should be noted that the filing of a motion under Rule 26(c) is not self-executing--the relief authorized under that rule depends on obtaining the court's order to that effect.

Subdivision (g). This subdivision is modified to conform to the revision of Rule 26(f).

2000 Amendment

Subdivision (c)(1). When this subdivision was added in 1993 to direct exclusion of materials not disclosed as required, the duty to supplement discovery responses pursuant to Rule 26(e)(2) was omitted. In the face of this omission, courts may rely on inherent power to sanction for failure to supplement as required by Rule 26(e)(2), *see 8 Federal Practice & Procedure* § 2050 at 607-09, but that is an uncertain and unregulated ground for imposing sanctions. There is no obvious occasion for a Rule 37(a) motion in connection with failure to supplement, and ordinarily only Rule 37(c)(1) exists as rule-based authority for sanctions if this supplementation obligation is violated.

The amendment explicitly adds failure to comply with Rule 26(e)(2) as a ground for sanctions under Rule 37(c)(1), including exclusion of withheld materials. The rule provides that this sanction power only applies when the failure to supplement was "without substantial justification." Even if the failure was not substantially justified, a party should be allowed to use the material that was not disclosed if the lack of earlier notice was harmless.

"Shall" is replaced by "is" under the program to conform amended rules to current style conventions when there is no ambiguity.

GAP Report

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The Advisory Committee recommends that the published amendment proposal be modified to state that the exclusion sanction can apply to failure "to amend a prior response to discovery as required by Rule 26(e)(2)." In addition, one minor phrasing change is recommended for the Committee Note.

2006 Amendment

Subdivision (f). Subdivision (f) is new. It focuses on a distinctive feature of computer operations, the routine alteration and deletion of information that attends ordinary use. Many steps essential to computer operation may alter or destroy information, for reasons that have nothing to do with how that information might relate to litigation. As a result, the ordinary operation of computer systems creates a risk that a party may lose potentially discoverable information without culpable conduct on its part. Under Rule 37(f), absent exceptional circumstances, sanctions cannot be imposed for loss of electronically stored information resulting from the routine, good-faith operation of an electronic information system.

Rule 37(f) applies only to information lost due to the "routine operation of an electronic information system" -- the ways in which such systems are generally designed, programmed, and implemented to meet the party's technical and business needs. The "routine operation" of computer systems includes the alteration and overwriting of information, often without the operator's specific direction or awareness, a feature with no direct counterpart in hard-copy documents. Such features are essential to the operation of electronic information systems.

Rule 37(f) applies to information lost due to the routine operation of an information system only if the operation was in good faith. Good faith in the routine operation of an information system may involve a party's intervention to modify or suspend certain features of that routine operation to prevent the loss of information, if that information is subject to a preservation obligation. A preservation obligation may arise from many sources, including common law, statutes, regulations, or a court order in the case. The good faith requirement of Rule 37(f) means that a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve. When a party is under a duty to preserve information because of pending or reasonably anticipated litigation, intervention in the routine operation of an information system is one aspect of what is often called a "litigation hold." Among the factors that bear on a party's good faith in the routine operation of an information system are the steps the party took to comply with a court order in the case or party agreement requiring preservation of specific electronically stored information.

Whether good faith would call for steps to prevent the loss of information on sources that the party believes are not reasonably accessible under Rule 26(b)(2) depends on the circumstances of each case. One factor is whether the party reasonably believes that the information on such sources is likely to be discoverable and not available from reasonably accessible sources.

The protection provided by Rule 37(f) applies only to sanctions "under these rules." It does not affect other sources of authority to impose sanctions or rules of professional responsibility.

This rule restricts the imposition of "sanctions." It does not prevent a court from making the kinds of adjustments frequently used in managing discovery if a party is unable to provide relevant responsive information. For example, a court could order the responding party to produce an additional witness for deposition, respond to additional interrogatories, or make similar attempts to provide substitutes or alternatives for some or all of the lost information.

2007 Amendment

The language of Rule 37 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

2013 Amendment

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Rule 37(b) is amended to conform to amendments made to Rule 45, particularly the addition of Rule 45(f) providing for transfer of a subpoena-related motion to the court where the action is pending. A second sentence is added to Rule 37(b)(1) to deal with contempt of orders entered after such a transfer. The Rule 45(f) transfer provision is explained in the Committee Note to Rule 45.

Changes Made After Publication and Comment

As described in the Report, the published preliminary draft was modified in several ways after the public comment period. The words "before trial" were restored to the notice provision that was moved to new Rule 45(a)(4). The place of compliance in new Rule 45(c)(2)(A) was changed to a place "within 100 miles of where the person resides, is employed, or regularly conducts business." In new Rule 45(f), the party consent feature was removed, meaning consent of the person subject to the subpoena is sufficient to permit transfer to the issuing court. In addition, style changes were made after consultation with the Standing Committee's Style Consultant. In the Committee Note, clarifications were made in response to points raised during the public comment period.

2015 Amendment

Subdivision (a). Rule 37(a)(3)(B)(iv) is amended to reflect the common practice of producing copies of documents or electronically stored information rather than simply permitting inspection. This change brings item (iv) into line with paragraph (B), which provides a motion for an order compelling "production, or inspection."

Subdivision (e). Present Rule 37(e), adopted in 2006, provides: "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." This limited rule has not adequately addressed the serious problems resulting from the continued exponential growth in the volume of such information. Federal circuits have established significantly different standards for imposing sanctions or curative measures on parties who fail to preserve electronically stored information. These developments have caused litigants to expend excessive effort and money on preservation in order to avoid the risk of severe sanctions if a court finds they did not do enough.

New Rule 37(e) replaces the 2006 rule. It authorizes and specifies measures a court may employ if information that should have been preserved is lost, and specifies the findings necessary to justify these measures. It therefore forecloses reliance on inherent authority or state law to determine when certain measures should be used. The rule does not affect the validity of an independent tort claim for spoliation if state law applies in a case and authorizes the claim.

The new rule applies only to electronically stored information, also the focus of the 2006 rule. It applies only when such information is lost. Because electronically stored information often exists in multiple locations, loss from one source may often be harmless when substitute information can be found elsewhere.

The new rule applies only if the lost information should have been preserved in the anticipation or conduct of litigation and the party failed to take reasonable steps to preserve it. Many court decisions hold that potential litigants have a duty to preserve relevant information when litigation is reasonably foreseeable. Rule 37(e) is based on this common-law duty; it does not attempt to create a new duty to preserve. The rule does not apply when information is lost before a duty to preserve arises.

In applying the rule, a court may need to decide whether and when a duty to preserve arose. Courts should consider the extent to which a party was on notice that litigation was likely and that the information would be relevant. A variety of events may alert a party to the prospect of litigation. Often these events provide only limited information about that prospective litigation, however, so that the scope of information that should be preserved may remain uncertain. It is important not to be blinded to this reality by hindsight arising from familiarity with an action as it is actually filed.

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Although the rule focuses on the common-law obligation to preserve in the anticipation or conduct of litigation, courts may sometimes consider whether there was an independent requirement that the lost information be preserved. Such requirements arise from many sources -- statutes, administrative regulations, an order in another case, or a party's own information-retention protocols. The court should be sensitive, however, to the fact that such independent preservation requirements may be addressed to a wide variety of concerns unrelated to the current litigation. The fact that a party had an independent obligation to preserve information does not necessarily mean that it had such a duty with respect to the litigation, and the fact that the party failed to observe some other preservation obligation does not itself prove that its efforts to preserve were not reasonable with respect to a particular case.

The duty to preserve may in some instances be triggered or clarified by a court order in the case. Preservation orders may become more common, in part because Rules 16(b)(3)(B)(iii) and 26(f)(3)(C) are amended to encourage discovery plans and orders that address preservation. Once litigation has commenced, if the parties cannot reach agreement about preservation issues, promptly seeking judicial guidance about the extent of reasonable preservation may be important.

The rule applies only if the information was lost because the party failed to take reasonable steps to preserve the information. Due to the ever-increasing volume of electronically stored information and the multitude of devices that generate such information, perfection in preserving all relevant electronically stored information is often impossible. As under the current rule, the routine, good-faith operation of an electronic information system would be a relevant factor for the court to consider in evaluating whether a party failed to take reasonable steps to preserve lost information, although the prospect of litigation may call for reasonable steps to preserve information by intervening in that routine operation. This rule recognizes that “reasonable steps” to preserve suffice; it does not call for perfection. The court should be sensitive to the party's sophistication with regard to litigation in evaluating preservation efforts; some litigants, particularly individual litigants, may be less familiar with preservation obligations than others who have considerable experience in litigation.

Because the rule calls only for reasonable steps to preserve, it is inapplicable when the loss of information occurs despite the party's reasonable steps to preserve. For example, the information may not be in the party's control. Or information the party has preserved may be destroyed by events outside the party's control -- the computer room may be flooded, a “cloud” service may fail, a malign software attack may disrupt a storage system, and so on. Courts may, however, need to assess the extent to which a party knew of and protected against such risks.

Another factor in evaluating the reasonableness of preservation efforts is proportionality. The court should be sensitive to party resources; aggressive preservation efforts can be extremely costly, and parties (including governmental parties) may have limited staff and resources to devote to those efforts. A party may act reasonably by choosing a less costly form of information preservation, if it is substantially as effective as more costly forms. It is important that counsel become familiar with their clients' information systems and digital data -- including social media -- to address these issues. A party urging that preservation requests are disproportionate may need to provide specifics about these matters in order to enable meaningful discussion of the appropriate preservation regime.

When a party fails to take reasonable steps to preserve electronically stored information that should have been preserved in the anticipation or conduct of litigation, and the information is lost as a result, Rule 37(e) directs that the initial focus should be on whether the lost information can be restored or replaced through additional discovery. Nothing in the rule limits the court's powers under Rules 16 and 26 to authorize additional discovery. Orders under Rule 26(b)(2)(B) regarding discovery from sources that would ordinarily be considered inaccessible or under Rule 26(c)(1)(B) on allocation of expenses may be pertinent to solving such problems. If the information is restored or replaced, no further measures should be taken. At the same time, it is important to emphasize that efforts to restore or replace lost information through discovery should be proportional to the apparent importance of the lost information to claims or defenses in the litigation. For example, substantial measures should not be employed to restore or replace information that is marginally relevant or duplicative.

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Subdivision (e)(1). This subdivision applies only if information should have been preserved in the anticipation or conduct of litigation, a party failed to take reasonable steps to preserve the information, information was lost as a result, and the information could not be restored or replaced by additional discovery. In addition, a court may resort to (e)(1) measures only "upon finding prejudice to another party from loss of the information." An evaluation of prejudice from the loss of information necessarily includes an evaluation of the information's importance in the litigation.

The rule does not place a burden of proving or disproving prejudice on one party or the other. Determining the content of lost information may be a difficult task in some cases, and placing the burden of proving prejudice on the party that did not lose the information may be unfair. In other situations, however, the content of the lost information may be fairly evident, the information may appear to be unimportant, or the abundance of preserved information may appear sufficient to meet the needs of all parties. Requiring the party seeking curative measures to prove prejudice may be reasonable in such situations. The rule leaves judges with discretion to determine how best to assess prejudice in particular cases.

Once a finding of prejudice is made, the court is authorized to employ measures "no greater than necessary to cure the prejudice." The range of such measures is quite broad if they are necessary for this purpose. There is no all-purpose hierarchy of the severity of various measures; the severity of given measures must be calibrated in terms of their effect on the particular case. But authority to order measures no greater than necessary to cure prejudice does not require the court to adopt measures to cure every possible prejudicial effect. Much is entrusted to the court's discretion.

In an appropriate case, it may be that serious measures are necessary to cure prejudice found by the court, such as forbidding the party that failed to preserve information from putting on certain evidence, permitting the parties to present evidence and argument to the jury regarding the loss of information, or giving the jury instructions to assist in its evaluation of such evidence or argument, other than instructions to which subdivision (e)(2) applies. 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 to deprive another party of the lost information's use in the litigation. An example of an inappropriate (e)(1) measure might be an order striking pleadings related to, or precluding a party from offering any evidence in support of, the central or only claim or defense in the case. On the other hand, it may be appropriate to exclude a specific item of evidence to offset prejudice caused by failure to preserve other evidence that might contradict the excluded item of evidence.

Subdivision (e)(2). This subdivision authorizes courts to use specified and very severe measures to address or deter failures to preserve electronically stored information, but only on finding that the party that lost the information acted with the intent to deprive another party of the information's use in the litigation. It is designed to provide a uniform standard in federal court for use of these serious measures when addressing failure to preserve electronically stored information. It rejects cases such as *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002), that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence.

Adverse-inference instructions were developed on the premise that a party's intentional loss or destruction of evidence to prevent its use in litigation gives rise to a reasonable inference that the evidence was unfavorable to the party responsible for loss or destruction of the evidence. Negligent or even grossly negligent behavior does not logically support that inference. Information lost through negligence may have been favorable to either party, including the party that lost it, and inferring that it was unfavorable to that party may tip the balance at trial in ways the lost information never would have. The better rule for the negligent or grossly negligent loss of electronically stored information is to preserve a broad range of measures to cure prejudice caused by its loss, but to limit the most severe measures to instances of intentional loss or destruction.

Similar reasons apply to limiting the court's authority to presume or infer that the lost information was unfavorable to the party who lost it when ruling on a pretrial motion or presiding at a bench trial. Subdivision (e)(2) limits the ability of courts to draw adverse inferences based on the loss of information in these circumstances, permitting them only when a court finds that the information was lost with the intent to prevent its use in litigation.

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Subdivision (e)(2) applies to jury instructions that permit or require the jury to presume or infer that lost information was unfavorable to the party that lost it. Thus, it covers any instruction that directs or permits the jury to infer from the loss of information that it was in fact unfavorable to the party that lost it. The subdivision does not apply to jury instructions that do not involve such an inference. For example, subdivision (e)(2) would not prohibit a court from allowing the parties to present evidence to the jury concerning the loss and likely relevance of information and instructing the jury that it may consider that evidence, along with all the other evidence in the case, in making its decision. These measures, which would not involve instructing a jury it may draw an adverse inference from loss of information, would be available under subdivision (e)(1) if no greater than necessary to cure prejudice. In addition, subdivision (e)(2) does not limit the discretion of courts to give traditional missing evidence instructions based on a party's failure to present evidence it has in its possession at the time of trial.

Subdivision (e)(2) requires a finding that the party acted with the intent to deprive another party of the information's use in the litigation. This 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. If a court were to conclude that the intent finding should be made by a jury, 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. If the jury does not make this finding, it may not infer from the loss that the information was unfavorable to the party that lost it.

Subdivision (e)(2) does not include a requirement that the court find prejudice to the party deprived of the information. This is because the finding of intent required by the subdivision can support not only an inference that the lost information was unfavorable to the party that intentionally destroyed it, but also an inference that the opposing party was prejudiced by the loss of information that would have favored its position. Subdivision (e)(2) does not require any further finding of prejudice.

Courts should exercise caution, however, in using the measures specified in (e)(2). Finding an intent to deprive another party of the lost information's use in the litigation does not require a court to adopt any of the measures listed in subdivision (e)(2). The remedy should fit the wrong, and the severe measures authorized by this subdivision should not be used when the information lost was relatively unimportant or lesser measures such as those specified in subdivision (e)(1) would be sufficient to redress the loss.

Notes of Decisions (2801)

Fed. Rules Civ. Proc. Rule 37, 28 U.S.C.A., FRCP Rule 37
Including Amendments Received Through 2-1-16

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