Agenda

Advisory Committee on Rules of Civil Procedure

May 24, 2017

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 approval of minutes.	Tab 1	Jonathan Hafen
Prisoner mailbox rule: Civil Rule 6 and Appellate Rule 21.	Tab 2	Judge Blanch, Nancy Sylvester
HB 376: Potential Amendments to Rule 26.3 and Rule 6.	Tab 3	Leslie Slaugh, Nancy Sylvester
Rule 37 and ESI: Discussion Period Review	Tab 4	Judge Stone, Paul Stancil

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

Meeting Schedule:

September 27, 2017

October 25, 2017

November 15, 2017

Tab 1

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE UTAH RULES OF CIVIL PROCEDURE

Meeting Minutes – April 26, 2017

PRESENT: Chair Jonathan Hafen, Judge Andrew Stone, Judge Laura Scott, Paul Stancil, Rod Andreason, Leslie Slaugh, Terri McIntosh, Trystan Smith, Heather Sneddon, James Hunnicutt, Justin Toth, Sammi Anderson, Judge Kent Holmberg, Amber Mettler, Barbara Townsend, Judge Kate Toomey

TELEPHONE: Lincoln Davies

EXCUSED: Judge James Blanch, Judge John Baxter, Dawn Hautamaki

STAFF: Nancy Sylvester, Lauren Hosler

GUESTS: None

(1) WELCOME, APPROVAL OF MINUTES

Chair Jonathan Hafen welcomed the committee. Nancy Sylvester reviewed the proposed changes to the March committee meeting minutes. Judge Kent Holmberg moved to approve the minutes as amended; Rod Andreason seconded. The motion passed unanimously.

(2) UPDATES ON RULE 63, LOGUE SUBCOMMITTEE, AND PRISONER MAILBOX RULE

Ms. Sylvester presented a summary of edits the Utah Supreme Court had made to Rule 63, which will be sent out for comment concurrent with proposed changes adding presiding judges in justice court. She noted that the proposed changes to Rule 5 (which are currently out for comment) have already received a number of comments. Ms. Sylvester also gave a summary on the Logue Subcommittee, which is reviewing the interplay between post-conviction relief cases, requests for new trial based on newly discovered evidence, and timing of appeals. Ms. Sylvester then gave a brief summary on the status of discussions with the Rules of Appellate Procedure regarding the prisoner mailbox rule.

(3) RULES 7, 101: FILED VS. SERVED AND PRO SE

Ms. Sylvester presented a summary history of the proposals to amend Rules 7 and 101. She spoke of the impetus behind the proposed changes, which, in sum, was the potential unfairness to self-represented litigants when response dates are calculated from filing. The committee considered and discussed at length a number of proposals to address the stated concerns. It also determined that it should continue to table any amendments to Rule 101 pending the report of the Domestic Case

Process Improvements Subcommittee. Ultimately, the committee agreed to add the following subparagraph to Rule 6 (with no changes to Rules 7 and 101):

> **(d) Additional time for unrepresented parties.** When a party is unrepresented, does not have an electronic filing account, and may or must act within a specified time after the filing of a document and service of that document is made by mail under Rule 5(b)(3)(C), the period of time within which the unrepresented party may or must act is calculated form the service date and not the filing date of the document, and the extra 3 days under paragraph (c) would apply.

Leslie Slaugh moved to send the foregoing proposed change out for public comment; Amber Mettler seconded. The committee approved the motion unanimously. Ms. Sylvester noted that the rule will be circulated for comment at the same time the prisoner mailbox amendments go out.

(4) ARIZONA REFORMS (DISCUSSION ONLY)

Paul Stancil provided a summary of a report published by the Arizona Committee on Civil Justice Reform on proposed changes to the Arizona Rules of Civil Procedure. The committee discussed a number of the proposals in detail, and noted that several of them resembled innovations previously adopted in Utah years ago. The committee tabled the adoption of any specific proposal or changes, pending circulation of additional materials for consideration.

(5) COMMITTEE QUEUE DISCUSSION

Mr. Hafen reviewed the committee queue process and the list of topics currently in the queue and solicited feedback on both from the committee.

(6) ADJOURNMENT

The remaining matters were deferred, and the committee adjourned at 5:51 pm. The next meeting will be held on May 24, 2017 at 4:00 pm at the Administrative Office of the Courts, Level 3.

Tab 2

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
Date: May 19, 2017
Re: Prisoner Mailbox Rule

On May 4, Judge Blanch and I met with the Appellate Rules Committee to discuss the prisoner mailbox rule. As you will see in the attached memorandum James Ishida prepared for that committee, we had a few issues to work through to bring our rules closer. The rules at issue are Civil Rule of Procedure 6 and Appellate Rule of Procedure 21. Ultimately, the Appellate Rules Committee determined that it preferred our language, but with a few requests for changes:

1) More precisely define what an "inmate" is. The phrase that committee tossed around was "a person in a place of legal confinement."
2) "Contemporaneously filed" should modify the notarized statement or written declaration to encourage these to be filed simultaneously.
3) Change "and" to "or" regarding legal mail requirements so that an inmate isn't penalized if an institution's mail requirements are overly burdensome but they otherwise pay for postage.

Judge Blanch and I agreed with the changes and the attached amended rule reflects them. Also attached is Rule 45, which was adopted effective May 1. This committee made some changes to paragraph (i) in anticipation of adopting the prisoner mailbox rule, but as the attached draft rule reflects, the "confined in an institution" language is struck since it would now be redundant to the definition of inmate in Rule 6(e)(1).

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: Appellate Rules Committee

FROM: James N. Ishida

DATE: April 19, 2017

RE: Proposed Amendment to Appellate Rule 21

This Committee has been asked to consider a conforming amendment to Appellate Rule 21, consistent with the proposed amendment to Civil Rule 6 regarding the "prisoner mailbox rule."

I. BACKGROUND

A. Preliminary Amendments to the Prisoner Mailbox Rule

On December 5, 2016, the Supreme Court approved for publication a proposal from the Civil Rules Committee, recommending that Civil Rule 5 be amended to include a new subdivision (g), which has been popularly described as the "prisoner mailbox rule." The proposal was intended to mirror its counterpart in Utah Rule of Appellate Procedure 21(f).

The Supreme Court, however, added one wrinkle to the Civil Rules proposal. The Court wanted to clarify when the clock starts to run on filing a responsive document. Therefore, the Court added the following language at the end of proposed new subdivision (g):

"*Response time will be calculated from the date the papers are received by the court.*"

This new language is not in Appellate Rule 21(f). The Court had asked that the Civil Rules proposal be submitted to this Committee for its consideration as to whether conforming changes should be made to Appellate Rule 21(f). At its meeting on February 2, 2017, this Committee had approved the conforming change to Rule 21(f).

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B. Subsequent Action by the Civil Rules Committee

Following public comment on its proposed amendment to Civil Rule 5, the Civil Rules Committee made several sound but significantly different changes to its proposed prisoner mailbox rule. The new proposed prisoner mailbox rule is now found in Civil Rule 6 (see attached). Because of the Civil Rules Committee's post-comment changes, we now have two different versions of the prisoner mailbox rule from the Civil and Appellate Rules Committees.

C. Appellate Rules Committee Proposal

At its last meeting on April 6, 2017, this Committee proposed a number of revisions to Appellate Rule 21, which incorporate elements of (1) the recent amendment to the federal prisoner mailbox rule in Federal Rule of Appellate Procedure 25(a)(2)(C), (2) local practice, and (3) the prisoner mailbox proposal by the Utah Civil Rules Committee. Highlights of the proposed changes to Appellate Rule 21 include:

1. Adopting the "contemporary declaration" language found in FRAP 25(a)(2)(C),[1]

2. Clarifying that a declaration, and not a notarized statement, is all that is required from the confined person,[2]

3. Broadening the rule to cover inmates and confined individuals,

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[1]The Advisory Committee on the Federal Rules of Appellate Procedure noted that there were several good reasons for requiring the contemporaneous filing of a declaration or notarized statement, including the observations that memories are fresh and it would streamline the process. However, the advisory committee also received several comments critical of this requirement when it published for comment FRAP 25(a)(2)(C). One such comment, from the Federal Courts Committee of the New York County Lawyers Association, was concerned that pro se litigants would have difficulty with complying with this new requirement because of other myriad requirements for appellate filings. The Association also pointed out that this new requirement differs from other rules – habeas and 28 USC 2255 rules – thus creating potential for confusion. The federal advisory committee acknowledged the validity of the Association's concerns, which prompted it to retain clarifying language in the rule.

[2]The federal Appellate Rules Committee chose to retain both declarations and notarized statements in amended FRAP 25(a)(2)(C). During preliminary discussions, it was suggested that notarized statements be deleted because declarations would be easier for inmates to prepare and because institutions lack notaries public. However, the advisory committee elected to retain both declarations and notarized statements for several reasons: (1) there had been no public comments suggesting the deletion of notarized statements; (2) research showed that notaries are available in some institutions; and (3) rules pertaining to habeas and section 28 USC 2255 proceedings all refer to declarations and notarized statements.

4. Omitting reference to first-class postage, which may not be applicable in all cases, and including a requirement that the confined person must conform to the mailing practices of the institution,

5. Adopting the initial clause of FRAP 25(a)(2)(C), requiring a confined person to conform to the institution's mailing practices in order to receive the benefit of the rule, and

6. Electing not to include FRAP 25(a)(2)(C)(ii) in the proposed amendment, which would give the appellate court discretion to permit a later filing of the declaration.[3]

D. Differences Between Civil and Appellate Proposals

Stylistic differences aside, there are several material differences between the Appellate proposal and the Civil proposal:

1. The Civil Rule addresses both "filing" and "service" by an inmate, whereas the Appellate Rule addresses only "filing" by a confined person,

2. The Appellate Rule requires the confined person to present his or her papers to the prison mail system, along with a declaration stating the date the papers were deposited and that the confined person complied with all applicable mail requirements as established by the institution. The Civil Rule does not include this "contemporary declaration" requirement, and

3. The Civil Rule expressly provides that the response time is calculated from the date the papers are received by the court or the parties served or the date of the postmark. The Appellate Rules is silent on the calculation of the response time.[4]

E. Illustrative Appellate Declaration Form

This Committee may also wish to consider adopting a new illustrative declaration form to assist confined persons comply with the new proposed prisoner mailbox rule. The federal rules committees had approved in 2016 a new Form 7, appended to the Federal Rules of Appellate Procedure, which serves this purpose. FRAP Form 7 is attached.

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[3]If this safety valve provision is deleted, then what happens if a confined person submits his or her papers without a declaration?

[4]This Committee may wish to consider adding language to its proposal regarding the calculation of the response time because the Supreme Court specifically added that language to the Civil Rules Committee's initial proposal. This Committee had also adopted similar language in February 2017 when it approved its first proposed amendment to Appellate Rule 21(f).

II. CONCLUSION

This Committee is now being asked to consider whether to make conforming changes to Appellate Rule 21 in light of the prisoner mailbox rule as proposed by the Civil Rules Committee in Rule 6. If this Committee approves the conforming amendment, then it is anticipated that both committees will ask the Supreme Court for approval to publish for public comment its respective prisoner mailbox rule.

Attachments: Proposed amendment to Appellate Rule 21
Proposed amendment to Civil Rule 5
Proposed amendment to Civil Rule 6
Public comments on proposed prisoner mailbox rule
Form 7 (Declaration of Inmate Filing) - FRAP Appendix of Forms

Rule 21. Filing and service.

(a) Filing. Papers required or permitted to be filed by these rules shall be filed with the clerk of the appropriate court. Filing may be accomplished by mail addressed to the clerk. Except as provided in subpart (f), filing is not considered timely unless the papers are received by the clerk within the time fixed for filing, except that briefs shall be deemed filed on the date of the postmark if first class mail is utilized. If a motion requests relief which may be granted by a single justice or judge, the justice or judge may accept the motion, note the date of filing, and transmit it to the clerk.

(b) Service of all papers required. Copies of all papers filed with the appellate court shall, at or before the time of filing, be served on all other parties to the appeal or review. Service on a party represented by counsel shall be made on counsel of record, or, if the party is not represented by counsel, upon the party at the last known address. A copy of any paper required by these rules to be served on a party shall be filed with the court and accompanied by proof of service.

(c) Manner of service. Service may be personal or by mail. Personal service includes delivery of the copy to a clerk or other responsible person at the office of counsel. Service by mail is complete on mailing.

(d) Proof of service. Papers presented for filing shall contain an acknowledgment of service by the person served or a certificate of service in the form of a statement of the date and manner of service, the names of the persons served, and the addresses at which they were served. The certificate of service may appear on or be affixed to the papers filed. If counsel of record is served, the certificate of service shall designate the name of the party represented by that counsel.

(e) Signature. All papers filed in the appellate court shall be signed by counsel of record or by a party who is not represented by counsel.

(f) Filing by [~~inmate~~ or] a person in a place of legal confinement. Papers filed by [~~an inmate~~ or] a person committed to a place of legal confinement ~~confined in an institution~~ are timely filed if they are deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a contemporaneously filed notarized statement or written declaration setting forth the date of deposit and stating that first-class postage has been, or is being, prepaid or that the [inmate or] person committed to a place of legal confinement has complied with any applicable requirements for legal mail set by the institution. Response time

will be calculated from the date the papers are received by the court. ~~Timely filing may be shown by a notarized statement or written declaration setting forth the date of deposit and stating that first-class postage has been prepaid.~~

(g) Filings containing other than public information and records. If a filing, including an addendum, contains non-public information, the filer must also file a version with all such information removed. Non-public information means information classified as private, controlled, protected, safeguarded, sealed, juvenile court legal, or juvenile court social, or any other information to which the right of public access is restricted by statute, rule, order, or case law.

Rule 6. Time.

(a) Computing time. The following rules apply in computing any time period specified in these rules, any local rule or court order, or in any statute that does not specify a method of computing time.

(a)(1) When the period is stated in days or a longer unit of time:

(a)(1)(A) exclude the day of the event that triggers the period;

(a)(1)(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(a)(1)(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday or legal holiday.

(a)(2) When the period is stated in hours:

(a)(2)(A) begin counting immediately on the occurrence of the event that triggers the period;

(a)(2)(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(a)(2)(C) if the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(a)(3) Unless the court orders otherwise, if the clerk's office is inaccessible:

(a)(3)(A) on the last day for filing under Rule 6(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday or legal holiday; or

(a)(3)(B) during the last hour for filing under Rule 6(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.

(a)(4) Unless a different time is set by a statute or court order, filing on the last day means:

(a)(4)(A) for electronic filing, before midnight; and

(a)(4)(B) for filing by other means, the filing must be made before the clerk's office is scheduled to close.

(a)(5) The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(a)(6) "Legal holiday" means the day for observing:

(a)(6)(A) New Year's Day;

(a)(6)(B) Dr. Martin Luther King, Jr. Day;

(a)(6)(C) Washington and Lincoln Day;

(a)(6)(D) Memorial Day;

(a)(6)(E) Independence Day;

(a)(6)(F) Pioneer Day;

(a)(6)(G) Labor Day;

(a)(6)(H) Columbus Day;

(a)(6)(I) Veterans' Day;

(a)(6)(J) Thanksgiving Day;

(a)(6)(K) Christmas; and

(a)(6)(L) any day designated by the Governor or Legislature as a state holiday.

(b) Extending time.

(b)(1) When an act may or must be done within a specified time, the court may, for good cause, extend the time:

(b)(1)(A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or

(b)(1)(B) on motion made after the time has expired if the party failed to act because of excusable neglect.

(b)(2) A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d) and (e), and 60(c).

(c) Additional time after service by mail. When a party may or must act within a specified time after service and service is made by mail under Rule 5(b)(3)(C), 3 days are added after the period would otherwise expire under paragraph (a).

(d) Additional time after filing for unrepresented parties. When a party is unrepresented, does not have an electronic filing account, and may or must act within a specified time after the filing of a document and service of that document is made by mail under Rule 5(b)(3)(C), the period of time within which the unrepresented party may or must act is calculated from the service date and not the filing date of the document, and the extra 3 days under paragraph (c) would apply.

(e) Filing or service by inmate.

(e)(1) For purposes of Rule 45(i) and this paragraph (e), an inmate is a person confined to an institution or committed to a place of legal confinement.

(e)(2) Papers filed or served by an inmate ~~confined in an institution~~ are timely filed or served if they are deposited in the institution's internal mail system on or before the last day for filing or service. Timely filing or service may be shown by a contemporaneously filed notarized statement or written declaration setting forth the date of deposit and stating that first-class postage has been, or is being, prepaid, ~~and~~ or that the inmate has complied with any applicable requirements for legal mail set by the institution. Response time will be calculated from the date the papers are received by the court, or for papers served on parties that do not need to be filed with the court, the postmark date the papers were deposited in U.S. mail, plus any time added under paragraph (b).

(e)(3) The provisions of paragraph (d)(1) do not apply to service of process, which is governed by Rule 4.

Rule 45. Subpoena.

(a) Form; issuance.

(a)(1) Every subpoena shall:

(a)(1)(A) issue from the court in which the action is pending;

(a)(1)(B) state the title and case number of the action, the name of the court from which it is issued, and the name and address of the party or attorney responsible for issuing the subpoena;

(a)(1)(C) command each person to whom it is directed

(a)(1)(C)(i) to appear and give testimony at a trial, hearing or deposition, or

(a)(1)(C)(ii) to appear and produce for inspection, copying, testing or sampling documents, electronically stored information or tangible things in the possession, custody or control of that person, or

(a)(1)(C)(iii) to copy documents or electronically stored information in the possession, custody or control of that person and mail or deliver the copies to the party or attorney responsible for issuing the subpoena before a date certain, or

(a)(1)(C)(iv) to appear and to permit inspection of premises;

(a)(1)(D) if an appearance is required, specify the date, time and place for the appearance; and

(a)(1)(E) include a notice to persons served with a subpoena in a form substantially similar to the approved subpoena form. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(a)(2) The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney admitted to practice in Utah may issue and sign a subpoena as an officer of the court.

(b) Service; fees; prior notice.

(b)(1) A subpoena may be served by any person who is at least 18 years of age and not a party to the case. Service of a subpoena upon the person to whom it is directed shall be made as provided in Rule 4(d).

(b)(2) If the subpoena commands a person's appearance, the party or attorney responsible for issuing the subpoena shall tender with the subpoena the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States, or this state, or any officer or agency of either, fees and mileage need not be tendered.

(b)(3) If the subpoena commands a person to copy and mail or deliver documents or electronically stored information, to produce documents, electronically stored information or tangible things for inspection, copying, testing or sampling or to permit inspection of premises, the party or attorney responsible for issuing the subpoena shall serve each party with the subpoena by delivery or other method of actual notice before serving the subpoena.

(c) Appearance; resident; non-resident.

(c)(1) A person who resides in this state may be required to appear:

(c)(1)(A) at a trial or hearing in the county in which the case is pending; and

(c)(1)(B) at a deposition, or to produce documents, electronically stored information or tangible things, or to permit inspection of premises only in the county in which the person resides, is employed, or transacts business in person, or at such other place as the court may order.

(c)(2) A person who does not reside in this state but who is served within this state may be required to appear:

(c)(2)(A) at a trial or hearing in the county in which the case is pending; and

(c)(2)(B) at a deposition, or to produce documents, electronically stored information or tangible things, or to permit inspection of premises only in the county in which the person is served or at such other place as the court may order.

(d) Payment of production or copying costs. The party or attorney responsible for issuing the subpoena shall pay the reasonable cost of producing or copying documents, electronically stored information or tangible things. Upon the request of any other party and the payment of reasonable costs, the party or attorney responsible for issuing the subpoena shall provide to the requesting party copies of all documents, electronically stored information or tangible things obtained in response to the subpoena or shall make the tangible things available for inspection.

(e) Protection of persons subject to subpoenas; objection.

(e)(1) The party or attorney responsible for issuing a subpoena shall take reasonable steps to avoid imposing an undue burden or expense on the person subject to the subpoena. The court shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney fee.

(e)(2) A subpoena to copy and mail or deliver documents or electronically stored information, to produce documents, electronically stored information or tangible things, or to permit inspection of premises shall comply with Rule 34(a) and (b)(1), except that the person subject to the subpoena must be allowed at least 14 days after service to comply.

(e)(3) The person subject to the subpoena or a non-party affected by the subpoena may object under Rule 37 if the subpoena:

(e)(3)(A) fails to allow reasonable time for compliance;

(e)(3)(B) requires a resident of this state to appear at other than a trial or hearing in a county in which the person does not reside, is not employed, or does not transact business in person;

(e)(3)(C) requires a non-resident of this state to appear at other than a trial or hearing in a county other than the county in which the person was served;

(e)(3)(D) requires the person to disclose privileged or other protected matter and no exception or waiver applies;

(e)(3)(E) requires the person to disclose a trade secret or other confidential research, development, or commercial information;

(e)(3)(F) subjects the person to an undue burden or cost;

(e)(3)(G) requires the person to produce electronically stored information in a form or forms to which the person objects;

(e)(3)(H) requires the person to provide electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost; or

(e)(3)(I) requires the person to disclose an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study that was not made at the request of a party.

(e)(4)(A) If the person subject to the subpoena or a non-party affected by the subpoena objects, the objection must be made before the date for compliance.

(e)(4)(B) The objection shall be stated in a concise, non-conclusory manner.

(e)(4)(C) If the objection is that the information commanded by the subpoena is privileged or protected and no exception or waiver applies, or requires the person to disclose a trade secret or other confidential research, development, or commercial information, the objection shall sufficiently describe the nature of the documents, communications, or things not produced to enable the party or attorney responsible for issuing the subpoena to contest the objection.

(e)(4)(D) If the objection is that the electronically stored information is from sources that are not reasonably accessible because of undue burden or cost, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost.

(e)(4)(E) The objection shall be served on the party or attorney responsible for issuing the subpoena. The party or attorney responsible for issuing the subpoena shall serve a copy of the objection on the other parties.

(e)(5) If objection is made, or if a party requests a protective order, the party or attorney responsible for issuing the subpoena is not entitled to compliance but may request an order to compel compliance under Rule 37(a). The objection or request shall be served on the other parties and on the person subject to the subpoena. An order compelling compliance shall protect the person subject to or affected by the subpoena from significant expense or harm. The court may quash or modify the subpoena. If the party or attorney responsible for issuing the subpoena shows a substantial need for the information that cannot be met without undue hardship, the court may order compliance upon specified conditions.

(f) Duties in responding to subpoena.

(f)(1) A person commanded to copy and mail or deliver documents or electronically stored information or to produce documents, electronically stored information or tangible things shall serve on the party or attorney responsible for issuing the subpoena a declaration under penalty of law stating in substance:

(f)(1)(A) that the declarant has knowledge of the facts contained in the declaration;

(f)(1)(B) that the documents, electronically stored information or tangible things copied or produced are a full and complete response to the subpoena;

(f)(1)(C) that the documents, electronically stored information or tangible things are the originals or that a copy is a true copy of the original; and

(f)(1)(D) the reasonable cost of copying or producing the documents, electronically stored information or tangible things.

(f)(2) A person commanded to copy and mail or deliver documents or electronically stored information or to produce documents, electronically stored information or tangible things shall copy or 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 subpoena.

(f)(3) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in the form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable.

(f)(4) If the information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party who received the information of the claim and the basis for it. After being notified, the party must promptly return, sequester, or destroy the specified information and any copies of it and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve the information. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon that person is punishable as contempt of court.

(h) Procedure when witness evades service or fails to attend. If a witness evades service of a subpoena or fails to attend after service of a subpoena, the court may issue a warrant to the sheriff of the county to arrest the witness and bring the witness before the court.

(i) Procedure when witness is an inmate. If the witness is an inmate ~~confined in an institution~~ as that term is defined in Rule 6(e)(1), a party may move for an order to examine the witness in the institution or to produce the witness before the court or officer for the purpose of being orally examined.

(j) Subpoena unnecessary. A person present in court or before a judicial officer may be required to testify in the same manner as if the person were in attendance upon a subpoena.

Advisory Committee Notes

My Name

Address

City, State, Zip

I am the [ ] Plaintiff/Petitioner
[ ] Defendant/Respondent

In the _____District Court _____County

Court Address _____

_____ Plaintiff/Petitioner v. _____ Defendant/Respondent	**Declaration of Inmate Filing** _____ Case Number _____ Judge _____ Commissioner

I _____ (name) make the following statements based on my own personal knowledge.

(1) I am a person in a place of legal confinement at _____ (name of institution).

(2) On _____ (date) I am depositing the _____ (name of document) in this case, along with this declaration, in the institution's internal mailing system.

(3) First-class postage has been, or is being, prepaid, or I have complied with any applicable requirements for legal mail set by this institution.

I declare under criminal penalty of the State of Utah and Utah Code Section 78B-5-705 that the foregoing is true and correct.

Sign here ► _____

Date

Typed or Printed Name _____

Certificate of Service

I certify that I mailed a copy of this document to the following people.

Person's Name	Method of Service	Mailed to Address	On this Date
	[ ] Mail		
	[ ] Mail		
	[ ] Mail		
	[ ] Mail		

_____ Sign here ► _____

Date

Typed or Printed Name _____

Tab 3

Utah State Courts

Nancy Sylvester <nancyjs@utcourts.gov>

Disclosures in unlawful detainer actions

Leslie Slaugh <slaughl@provolawyers.com> Tue, May 16, 2017 at 10:11 AM
To: Nancy Sylvester <nancyjs@utcourts.gov>, "Jonathan O. Hafen (jhafen@parrbrown.com)" <jhafen@parrbrown.com>

Rule 26.3(b)(2) requires certain disclosures "If the plaintiff requests an evidentiary hearing to determine occupancy under Section 78B-6-810." At the time the rule was adopted, § 78B-6-810 was limited to occupancy hearings. The 2017 legislature changed the statute to now provide for expedited hearings in any unlawful detainer matter.

Also, the Rule 26.3 disclosures are limited to situations where the tenant is not a commercial tenant. When the rule was adopted, the expedited procedures of § 78B-6-810 did not apply to commercial tenants. That exclusion has now been eliminated and the expedited procedures apply in any unlawful detainer case.

House Bill 376 amended § 78B-6-810as follows:

> (2)(a) In an action for unlawful detainer [~~where the claim is for nonpayment of rent or for occupancy of a property after a forced sale as described in Section 78B-6-802.5~~], the court shall hold an evidentiary hearing, upon request of either party, within 10 business days after the day on which the defendant files [~~the defendant's answer~~.] an answer or response.
>
> [(~~6) The expedited hearing provisions in this section do not apply to actions involving commercial tenants~~.]

We may want to consider whether the rule needs to be changed in light of the new legislation.

Mr. Leslie W. Slaugh

Howard, Lewis & Petersen, PC

120 East 300 North

Provo, UT 84606-2907

Voice 801-373-6345

Fax 801-377-4991

Rule 26.3. Disclosure in unlawful detainer actions.

(a) Scope. This rule applies to all actions for eviction or damages arising out of an unlawful detainer under Title 78B, Chapter 6, Part 8, Forcible Entry and Detainer when the tenant is not a commercial tenant.

(b) Plaintiff's disclosures.

(b)(1) Disclosures served with complaint and summons. Instead of the disclosures and timing of disclosures required by Rule 26(a), and unless included in the complaint, the plaintiff must serve on the defendant with the summons and complaint:

(b)(1)(A) any written rental agreement;

(b)(1)(B) the eviction notice that was served;

(b)(1)(C) an itemized calculation of rent past due, damages, costs and attorney fees at the time of filing;

(b)(1)(D) an explanation of the factual basis for the eviction; and

(b)(1)(E) notice to the defendant of the defendant's obligation to serve the disclosures required by paragraph (c).

(b)(2) Disclosures for occupancy hearing.

(b)(2)(A) If the plaintiff requests an evidentiary hearing to determine occupancy under Section 78B-6-810, the plaintiff must serve on the defendant with the request:

(b)(2)(A)(i) any document not yet disclosed that the plaintiff will offer at the hearing; and

(b)(2)(A)(ii) the name and, if known, the address and telephone number of each fact witness the plaintiff may call at the occupancy hearing and, except for an adverse party, a summary of the expected testimony.

(b)(2)(B) If the defendant requests an evidentiary hearing to determine occupancy, the plaintiff must serve the disclosures required by paragraph (b)(2)(A) on the defendant no less than 2 days before the hearing. The plaintiff must serve the disclosures by the method most likely to be promptly received.

(c) Defendant's disclosures for occupancy hearing.

(c)(1) If the defendant requests an evidentiary hearing to determine occupancy under Section 78B-6-810, the defendant must serve on the plaintiff with the request:

(c)(1)(A) any document not yet disclosed that the defendant will offer at the hearing; and

(c)(1)(B) the name and, if known, the address and telephone number of each fact witness the defendant may call at the occupancy hearing and, except for an adverse party, a summary of the expected testimony.

(c)(2) If the plaintiff requests an evidentiary hearing to determine occupancy, the defendant must serve the disclosures required by paragraph (c)(1) on the plaintiff no less than 2 days before the hearing. The defendant must serve the disclosures by the method most likely to be promptly received.

(d) Pretrial disclosures; objections. No later than 14 days before trial, the parties must serve the disclosures required by Rule 26(a)(5)(A). No later than 7 days before trial, each party must serve and file counter designations of deposition testimony, objections and grounds for the objections to the use of a deposition and to the admissibility of exhibits.

Effective November 1, 2016.

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: Brent Johnson
From: Keisa L. Williams
Date: May 8, 2017
Re: **H.B. 376 – Landlord-Tenant Rights**

Task: Modify any rules or processes that may be impacted by the provisions of this bill.

Amends: 78B-6-810, 78B-6-812

- Allows an evidentiary hearing upon request for all unlawful detainer actions, not just those involving nonpayment of rent or occupancy after a forced sale under 78B-6-802.5
- Evidentiary hearings must be held within 10 business days after the defendant files an answer or response
- The expedited hearing provisions are now applicable to commercial tenants
- Judges must now making a finding of "extenuating circumstances" in order to change the 3 calendar day vacate order in an order of restitution and the order must so advise defendants

Rules Affected:

- Utah Rule of Civil Procedure 6 – Time. (lines 94-96)
  - This rule ***may*** need revision, however, I think we are safe either way
  - I've attached a draft amendment for consideration by the Utah Rules of Civil Procedure Committee
  - 5/8/17: Rule draft emailed to Nancy Sylvester

Forms Affected: (5/8/17: email to Jessica Van Buren)

- Flowchart of the Eviction Process
  - Occupancy hearing held within 10 **business** days after answer
- **OCAP:** According to Kim Allard, OCAP updates are complete.

Website Provisions Affected: (5/8/17: email to Jessica Van Buren)

- General Information
  - The court eviction process happens quickly. Do not ignore notices that have been served on you. Keep a copy of everything for your records, including all notices

and court papers. **It is important to note that as of May 9, 2017, the expedited hearing provisions explained here also apply to actions involving commercial tenants.**

- Occupancy **(Evidentiary)** hearing; Utah Code Section 78B-6-810.
  - The judge will hold a hearing within 10 **business** days after the day on which the tenant files an answer if:
    - the complaint to evict claims**:**
      - failure to pay rent**,**
      - **unlawful possession,**
      - **unlawful assignment or sublet,**
      - **the commitment or permission of waste,**
      - **unlawful business,**
      - **nuisance,**
      - **criminal acts,**
      - **failure to perform a condition of the lease**;

      or,
    - the new owner of the premises is evicting the former owner after a forced sale.
- Order for restitution of the premises; Utah Code Section 78B-6-812.
  - The restitution order:
    - directs the tenant to vacate the premises, remove the tenant's personal property, and restore possession of the premises to the landlord, or be forcibly removed by a sheriff or constable;
    - advises the tenant of deadline to vacate the premises, which is usually 3 calendar days following service of the order, but it might be less **if the court finds extenuating circumstances**; and
    - advises the tenant of the tenant's right to a hearing to contest the manner in which the order is enforced.

Encl. Draft amendment to URCP 6

Rule 6. Time.

(a) Computing time. The following rules apply in computing any time period specified in these rules, any local rule or court order, or in any statute that does not specify a method of computing time.

(a)(1) When the period is stated in days or a longer unit of time:

(a)(1)(A) exclude the day of the event that triggers the period;

(a)(1)(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(a)(1)(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday or legal holiday.

(a)(2) When the period is stated in hours:

(a)(2)(A) begin counting immediately on the occurrence of the event that triggers the period;

(a)(2)(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(a)(2)(C) if the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(a)(3) Unless the court orders otherwise, if the clerk's office is inaccessible:

(a)(3)(A) on the last day for filing under Rule 6(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday or legal holiday; or

(a)(3)(B) during the last hour for filing under Rule 6(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.

(a)(4) Unless a different time is set by a statute or court order, filing on the last day means:

(a)(4)(A) for electronic filing, before midnight; and

(a)(4)(B) for filing by other means, the filing must be made before the clerk's office is scheduled to close.

(a)(5) The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(a)(6) "Legal holiday" means the day for observing:

(a)(6)(A) New Year's Day;

(a)(6)(B) Dr. Martin Luther King, Jr. Day;

(a)(6)(C) Washington and Lincoln Day;

(a)(6)(D) Memorial Day;

(a)(6)(E) Independence Day;

(a)(6)(F) Pioneer Day;

(a)(6)(G) Labor Day;

(a)(6)(H) Columbus Day;

(a)(6)(I) Veterans' Day;

(a)(6)(J) Thanksgiving Day;

(a)(6)(K) Christmas; and

(a)(6)(L) any day designated by the Governor or Legislature as a state holiday.

(b) Extending time.

(b)(1) When an act may or must be done within a specified time, the court may, for good cause, extend the time:

(b)(1)(A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or

(b)(1)(B) on motion made after the time has expired if the party failed to act because of excusable neglect.

(b)(2) A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d) and (e), and 60(c).

(b)(3) A court must not shorten or extend the time to vacate in an order of restitution pursuant to Utah Code Section 78B-6-812, without a finding of extenuating circumstances.

(c) Additional time after service by mail. When a party may or must act within a specified time after service and service is made by mail under Rule 5(b)(3)(C), 3 days are added after the period would otherwise expire under paragraph (a).

Effective May 1, 2016

LANDLORD-TENANT RIGHTS

2017 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: James A. Dunnigan

Senate Sponsor: Todd Weiler

LONG TITLE

General Description:

This bill modifies provisions related to forcible entry and detainer.

Highlighted Provisions:

This bill:

- addresses timing of an evidentiary hearing;
- repeals exemption involving commercial tenants;
- amends provisions related to an order of restitution; and
- makes technical changes.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

78B-6-810, as last amended by Laws of Utah 2009, Chapters 184 and 298

78B-6-812, as last amended by Laws of Utah 2013, Chapter 206

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **78B-6-810** is amended to read:

78B-6-810. Court procedures.

(1) In an action under this chapter in which the tenant remains in possession of the property:

(a) the court shall expedite the proceedings, including the resolution of motions and trial;

(b) the court shall begin the trial within 60 days after the day on which the complaint is served, unless the parties agree otherwise; and

(c) if this chapter requires a hearing to be held within a specified time, the time may be extended to the first date thereafter on which a judge is available to hear the case in a jurisdiction in which a judge is not always available.

(2) (a) In an action for unlawful detainer [~~where the claim is for nonpayment of rent or for occupancy of a property after a forced sale as described in Section 78B-6-802.5~~], the court shall hold an evidentiary hearing, upon request of either party, within 10 business days after the day on which the defendant files [~~the defendant's answer.~~] an answer or response.

(b) At the evidentiary hearing held in accordance with Subsection (2)(a):

(i) the court shall determine who has the right of occupancy during the litigation's pendency; and

(ii) if the court determines that all issues between the parties can be adjudicated without further proceedings, the court shall adjudicate those issues and enter judgment on the merits.

(3) (a) In an action for unlawful detainer in which the claim is for nuisance and alleges an act that would be considered criminal under the laws of this state, the court shall hold an evidentiary hearing within 10 days after the day on which the complaint is filed to determine whether the alleged act occurred.

(b) The hearing required by Subsection (3)(a) shall be set at the time the complaint is filed and notice of the hearing shall be served upon the defendant with the summons at least three calendar days before the scheduled time of the hearing.

(c) If the court, at an evidentiary hearing held in accordance with Subsection (3)(a), determines that it is more likely than not that the alleged act occurred, the court shall issue an order of restitution.

(d) If an order of restitution is issued in accordance with Subsection (3)(c), a constable

or the sheriff of the county where the property is situated shall return possession of the property to the plaintiff immediately.

(e) The court may allow a period of up to 72 hours before restitution may be made under Subsection (3)(d) if the court determines the time is appropriate under the circumstances.

(f) At the evidentiary hearing held in accordance with Subsection (3)(a), if the court determines that all issues between the parties can be adjudicated without further proceedings, the court shall adjudicate those issues and enter judgment on the merits.

(g) "An act that would be considered criminal under the laws of this state" under Subsection (3)(a) includes only the following:

(i) an act that would be considered a felony under the laws of this state;

(ii) an act that would be considered criminal affecting the health or safety of a tenant, the landlord, the landlord's agent, or other person on the landlord's property;

(iii) an act that would be considered criminal that causes damage or loss to any tenant's property or the landlord's property;

(iv) a drug- or gang-related act that would be considered criminal;

(v) an act or threat of violence against any tenant or other person on the premises, or against the landlord or the landlord's agent; and

(vi) any other act that would be considered criminal that the court determines directly impacts the peaceful enjoyment of the premises by any tenant.

(4) (a) At any hearing held in accordance with this chapter in which the tenant after receiving notice fails to appear, the court shall issue an order of restitution.

(b) If an order of restitution is issued in accordance with Subsection (4)(a), a constable or the sheriff of the county where the property is situated shall return possession of the property to the plaintiff immediately.

(5) A court adjudicating matters under this chapter may make other orders as are appropriate and proper.

[~~(6) The expedited hearing provisions in this section do not apply to actions involving commercial tenants.~~]

Section 2. Section **78B-6-812** is amended to read:

78B-6-812. Order of restitution -- Service -- Enforcement -- Disposition of personal property -- Hearing.

(1) [~~Each~~] An order of restitution shall:

(a) direct the defendant to vacate the premises, remove the defendant's personal property, and restore possession of the premises to the plaintiff, or be forcibly removed by a sheriff or constable;

(b) advise the defendant of the time limit set by the court for the defendant to vacate the premises, which shall be three calendar days following service of the order, unless the court determines that a longer or shorter period is appropriate [~~under the~~] after a finding of extenuating circumstances; and

(c) advise the defendant of the defendant's right to a hearing to contest the manner of its enforcement.

(2) (a) A copy of the order of restitution and a form for the defendant to request a hearing as listed on the form shall be served in accordance with Section 78B-6-805 by a person authorized to serve process pursuant to Subsection 78B-8-302(1). If personal service is impossible or impracticable, service may be made by:

(i) mailing a copy of the order and the form by first class mail to the defendant's last-known address and posting a copy of the order and the form at a conspicuous place on the premises; or

(ii) mailing a copy of the order and the form to the commercial tenant defendant's last-known place of business and posting a copy of the order and the form at a conspicuous place on the business premises.

(b) A request for hearing by the defendant may not stay enforcement of the restitution order unless:

(i) the defendant furnishes a corporate bond, cash bond, certified funds, or a property bond to the clerk of the court in an amount approved by the court according to the formula set forth in Subsection 78B-6-808(4)(b); and

(ii) the court orders that the restitution order be stayed.

(c) The date of service, the name, title, signature, and telephone number of the person serving the order and the form shall be legibly endorsed on the copy of the order and the form served on the defendant.

(d) The person serving the order and the form shall file proof of service in accordance with Rule 4(e), Utah Rules of Civil Procedure.

(3) (a) If the defendant fails to comply with the order within the time prescribed by the court, a sheriff or constable at the plaintiff's direction may enter the premises by force using the least destructive means possible to remove the defendant.

(b) Personal property of the defendant may be removed from the premises by the sheriff or constable and transported to a suitable location for safe storage. The sheriff or constable may delegate responsibility for inventory, moving, and storage to the plaintiff, who shall store the personal property in a suitable place and in a reasonable manner.

(c) A tenant may not access the property until the removal and storage costs have been paid in full, except that the tenant shall be provided reasonable access within five business days to retrieve:

(i) clothing;

(ii) identification;

(iii) financial documents, including all those related to the tenant's immigration status, employment status;

(iv) documents pertaining to receipt of public services; and

(v) medical information, prescription medications, and any medical equipment required for maintenance of medical needs.

(d) The personal property removed and stored shall, after 15 calendar days, be considered abandoned property and subject to Section 78B-6-816.

(4) In the event of a dispute concerning the manner of enforcement of the restitution order, the defendant may file a request for a hearing. The court shall set the matter for hearing within 10 calendar days from the filing of the request, or as soon thereafter as practicable, and

shall mail notice of the hearing to the parties.

(5) The Judicial Council shall draft the forms necessary to implement this section.

Tab 4

RULE DISCUSSIONS

The Utah Supreme Court's Advisory Committee on the Rules of Civil Procedure requests comments for purposes of ongoing discussion on proposed rules.

Posted: March 16, 2017

Utah Courts

Proposal to Amend URCP 37(e) – Discussion Period Closes May 8, 2017

The **Utah Supreme Court's Advisory Committee on the Rules of Civil Procedure** invites discussion on a proposal to amend Rule 37(e) of the Utah Rules of Civil Procedure in conformity with its federal counterpart. The 2015 amendments to Rule 37(e) of the Federal Rules of Civil Procedure address failure to preserve electronically stored information (ESI). The committee invites public discussion on this issue to inform whether or in what form a proposed rule amendment should go to the Utah Supreme Court. *The proposal has not been approved by the Utah Supreme Court.*

Included with proposed Rule 37(e) is a memorandum that details some of the discussions the committee has already engaged in on this topic as well as Federal Rule 37.

URCP037(e). Failure to Preserve Electronically Stored Information.

Rule 37(e) Discussion Memorandum

Federal Rule of Civil Procedure 37

Please use the comment box below to participate in the discussion of this issue.

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CATEGORIES

- URCP037(e)

This entry was posted in **URCP037(e)**.

UTAH COURTS

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2 thoughts on "Proposal to Amend URCP 37(e) – Discussion Period Closes May 8, 2017"

Matt Sorensen
March 25, 2017 at 6:26 pm Edit

Regarding Committee member #1's first point: Under the FRCP the good faith operation of an information system under a document retention policy, in absence of a reasonable expectation of litigation, is a safe harbor to spoliation, as long as the destruction of the ESI pursuant to the retention policy was done prior to the rise of conditions preceding litigation. This should address the first hypothetical regarding negative comments.

If removing "may" and leaving "must" in place ends in forcing juries to make inferences, I'm not in favor. The federal language of "may or must" allows the judge discretion to instruct the jury regarding the inference, and allows juries flexibility based on facts.

I disagree with Committee member #1's statement that "ESI … is …vastly easier to secure from loss than hard copies." This may be true in certain contexts but with modern cloud computing services and content distribution networks built to proliferate data for high availability purposes, it can be excruciating, and admittedly infrequent, to preserve and collect ESI from such environments. "Inexpensive cloud-based storage" referring to unstructured data like email messages, word documents, spreadsheets, etc. are easier preserve and collect. The structured data contained in databases in the cloud is another, more difficult e-discovery use case entirely.

I am in agreement with Committee Member #2's response.

I am unconvinced by Committee Member #1 that the proposed e.1.D is necessary.

Reply

Philip Favro
May 2, 2017 at 7:21 pm Edit

I want to thank the Utah Supreme Court and the Advisory Committee on the Rules of Civil Procedure (Committee) for the opportunity to comment on the proposed amendments to Utah Rule of Civil Procedure 37(e) (URCP 37(e)). The proliferation of electronically stored information (ESI), together with the difficulties associated with preserving, collecting, and producing such information, amply justify the Committee's efforts to amend URCP 37(e).

As presently drafted, proposed URCP 37(e) offers constructive methods for addressing some of the problems associated with a party's failure to preserve relevant ESI. Nevertheless, I wish to recommend various changes to the proposed rule. These recommended changes are based on observations I have made about Federal Rule of Civil Procedure 37(e), my experience with discovery, and my legal scholarship on the confluence of litigation and technology.

1. Eliminate the "Safe Harbor" Provision in Proposed URCP 37(e)(1)(C)

The Committee should follow FRCP 37(e) and eliminate the "safe harbor" provision in proposed URCP 37(e)(1)(C). The danger in retaining URCP 37(e)(1)(C) is twofold. First, it would provide a different "safe harbor" from sanctions that would be separate and apart from the "reasonable steps" standard delineated under proposed URCP 37(e)(1). This would result in the creation of separate analyses for determining the application of sanctions that would unnecessarily complicate the sanctions framework for courts and counsel. Worse, the provision – standing alone and isolated from the "reasonable steps" standard – would essentially create an escape clause that encourages litigants not to intervene and stop the destruction of relevant ESI under the ordinary operation of an electronic information system.

URCP 37(e)(1)(C) should be stricken since, in purpose, it is superfluous of the "reasonable steps" protection encompassed within proposed URCP 37(e)(1). The federal rules advisory committee recognized as much and felt the overall language of FRCP 37(e) should be simplified to prevent confusion in the application of the rule. The advisory committee note to FRCP 37(e) now provides as follows: "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." A similar, explanatory discussion would also merit inclusion in any Committee note accompanying URCP 37(e).

2. Track the Numbering and Language of FRCP 37(e) with Two Exceptions

I agree with Committee Member No. 2 that proposed URCP 37(e) should generally track the numbering and language of FRCP 37(e). The federal rules advisory committee has done an excellent job balancing the equities between requesting and responding parties in FRCP 37(e). On the one hand, FRCP 37(e) provides responding parties with protections from unreasonable preservation requirements and sanctions demands. And yet, it enables requesting parties to seek redress for legitimate preservation grievances. Finally, it empowers the judiciary with sufficient discretion to fashion resolutions to fact-specific and complex preservation questions.

Following the federal model will allow courts and counsel to take advantage of the rapidly growing FRCP 37(e) jurisprudence being developed by federal district courts around the country. This is a particularly significant consideration since there will likely be only a few state appellate court opinions interpreting URCP 37(e) that can provide guidance on the issues. Any such opinions likely will not be issued until several years after an amended URCP 37(e) is enacted.

3. Exception No. 1 – Apply URCP 37(e) to All Forms of Evidence

Proposed URCP 37(e) should be amended to apply to all forms of evidence. The reasons for this suggested change are twofold. First, there is increasing confusion in federal court regarding the nature of what constitutes ESI for purposes of FRCP 37(e). Like Utah Rule of Civil Procedure 34, Federal Rule of Civil Procedure 34 allows for the discovery of relevant electronically stored information including data "stored in any medium." However, federal courts in certain instances have declined to analyze the destruction of digital video files under FRCP 37(e). See, e.g., Wichansky v. Zowine, 2016 WL 6818945 (D. Ariz. Mar. 22, 2016) (explaining that Rule 37(e) did not apply because "the parties do not consent that the lost information constitutes electronically stored information."); Pettit v. Smith, 2014 WL 4425779 (D. Ariz. Sept. 9, 2014) (holding that the "deletion of a digital video file . . . does not concern ESI in the sense addressed in [the proposed FRCP 37(e) amendments]."). If courts are forced to guess whether a particular form of electronic data (video, audio, etc.) constitutes ESI, this will lead to separate analyses and differing frameworks for imposing sanctions resulting from certain ESI preservation failures. This will create confusion rather than clarity under URCP 37(e) for clients, counsel, and the courts.

Second, Utah risks creating confusion through differing sanctions standards for the destruction of ESI versus the destruction of the devices that house the ESI. Consider the following questions:

* Does ESI include a mobile phone?
* ESI certainly includes the data on the phone, but what about the device itself?
* Should the destruction of a phone, tablet, thumb drive, automobile, or other hardware be treated with a different standard than the destruction of the information stored on the device or hardware?

The last question is particularly significant for personal injury litigation involving automobiles. Automobiles now contain any number of categories of ESI including tracking devices, vehicle performance, mileage, entertainment, communication, and the like. While these categories of ESI may be separated from the actual vehicle (i.e., the chassis, wheels, struts, and brakes), the failure to properly preserve a vehicle after a car crash can result in the destruction of the vehicle's ESI. Should there be different standards for addressing the destruction of the car as opposed to the ESI in the car?

Allowing differing preservation standards could create mischief in discovery and offer certain litigants a perverse incentive to not keep relevant information in certain circumstances.

4. Exception No. 2 – Specifically Require a Showing of "Bad Faith" to Establish an "Intent to Deprive" under proposed URCP 37(e)(1)(B)

I recommend that URCP 37(e)(1)(B) or its accompanying committee note be clarified to require that a showing of bad faith to establish an "intent to deprive." This recommendation is based on ambiguity in the guidance from the federal advisory committee on this particular issue.

The federal advisory committee report issued in connection with the FRCP 37(e) amendment explains that the "intent requirement is akin to bad faith." Despite this straightforward explanation, the federal advisory committee note does not take such a restrictive view. Instead, the note indicates that sanctions under FRCP 37(e)(2) are limited "to instances of intentional loss or destruction."

Conduct that is "intentional" and which results in the spoliation of ESI is not necessarily tantamount to bad faith. This was confirmed by the United States Court of Appeal for the Seventh Circuit many years ago when it observed the following distinction between bad faith and intentional conduct: "[t]hat the documents were destroyed intentionally no one can doubt, but 'bad faith' means destruction for the purpose of hiding adverse information." Mathis v. John Morden Buick, Inc., 136 F.3d 1153, 1155 (7th Cir. 1998); see also Micron Tech., Inc. v. Rambus Inc., 645 F.3d 1311, 1327 (Fed. Cir. 2011) ("In determining that a spoliator acted in bad faith, a district court must do more than state the conclusion of spoliation and note that the document destruction was intentional."). For further information, see Philip J. Favro, The New ESI Sanctions Framework Under the Proposed Rule 37(e) Amendments, 21 Rich. J.L. & Tech. 8, 14-16 (2015), **http://jolt.richmond.edu/v21i3/article8.pdf**.

The ambiguity in FRCP 37(e) has now led to federal courts issuing opinions that have found an "intent to deprive" on what appears to be a lesser showing akin to recklessness or even gross negligence. See, e.g., TLS Management v. Rodriguez-Toledo, 2017 WL 1155743 (D.P.R. Mar. 27, 2017); O'Berry v. Turner, 2016 WL 1700403 (M.D. Ga. Apr. 27, 2016).

To create greater clarity and less ambiguity and confusion on this issue, URCP 37(e)(1)(B) or its accompanying committee should unequivocally state that a showing of bad faith is required to establish an "intent to deprive."

5. Create a Robust Committee Note

URCP 37(e) is a complex rule filled with important nuances and subtle distinctions. To help all parties to the litigation process better understand the rule's intent, the Committee should develop a robust explanatory note. Without such a note, lawyers and judges will be left groping for guidance on the issues. This will particularly be the case if URCP 37(e) does not generally track the language and numbering of its federal analogue.

Reply

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State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

MEMORANDUM

To: Public
From: The Advisory Committee on the Rules of Civil Procedure
Date: March 24, 2017
Re: Rule 37(e)

Over the past several months, the Advisory Committee on the Rules of Civil Procedure has had a robust discussion on the merits of amending Rule 37(e) in conformity with the 2015 federal amendments. At its February meeting, the committee tentatively reached a consensus on adopting the federal language, but the committee expressed concerns about the federal notes.

The committee is specifically concerned that the notes appear to suggest a court's discretion is limited with respect to giving general instructions on permissible inferences that may be made from the loss or destruction of electronically stored information (ESI). A related concern is that a finder of fact would be limited about the kinds of inferences it may make based on the totality of the evidence and that parties would be potentially barred from litigating what the loss or destruction of electronically stored information means.

The committee proposed a note to address these issues, but it would represent a departure from the Federal Rule, meaning some Federal jurisprudence could be inapplicable in Utah.

Other points of discussion include whether "presume" or "infer" should be used in Paragraph (e)(1)(B)(1) and whether "may" or "must" should be used in Paragraph (e)(1)(B)(2).

The discussion below, which was an email exchange between two committee members, sums up well the debate the committee has had over whether Utah should chart its own path or adopt the federal rule in its entirety. The committee invites public discussion on this issue to inform whether or in what form a proposed rule amendment should go to the Utah Supreme Court.

COMMITTEE MEMBER 1'S E-MAIL REGARDING FRCP 37(e)

I have a few of general objections to the proposed Rule:

1) I think it is based on a logically flawed premise: that, as a matter of law, any loss of information that does not occur with the specific intent to conceal it from an opponent in litigation cannot justify an inference that the information was adverse to the party that lost it;
2) It assumes that the determination of intentional destruction is clear-cut and binary;
3) It adopts a view of the judge's role in preliminary fact finding that is inconsistent with how the Utah Supreme Court views that role in other contexts; and,
4) I cannot recall any other place in the Rules of Civil Procedure or even Evidence that restricts the judge's discretion with respect to how the jury is to be instructed.

The first point is, I think easy to logically demonstrate. Imagine a company that collects, from a variety of sources, all sorts of user comments and reviews on its products. They are reduced to electronic form, any paper originals shredded, and the electronic records forwarded to the marketing department. Long before any threatened litigation, the company adopts the following policy—the comments are logged by date, positive reviews and comments are uploaded to a marketing database for use in future marketing, negative comments are deleted.

The original database logs 1,000 comments. 300 are preserved in the positive comment marketing database. May the jury infer the 700 destroyed comments were negative? Why shouldn't the judge be able to tell them they can make an inference if they think the facts support it?

Suppose counsel for the company makes the following jury argument: "The Judge has instructed you to consider only the evidence you have heard or seen during this trial—you must not make any inferences about those 700 emails, because they are not in evidence." Is opposing counsel entitled to an instruction that such an inference does not violate the instructions? Or is opposing counsel limited to the "common sense" instruction? What about the circumstantial evidence instruction? Is that inappropriate in this circumstance, because it arguably tells the jury that it could, from the indirect evidence (the policy of deleting negative emails) infer the fact to be proven? What is the difference?

For that matter, I believe the proposed Rule, by forbidding an instruction on how to apply the evidence, could be interpreted to affect the 403 analysis of its admissibility: because the jury may not be instructed that it may use the fact of the missing documents to infer they were negative, introducing that fact is only likely to mislead or confuse or prejudice them. Are we ready to say that evidence of the fact that a document existed but was lost through anything less than intentional spoliation is never relevant?

My second point complicates this problem further. Because the permissive instruction is prohibited except in cases where there is an affirmative finding that the party that "should have" preserved the documents but failed "acted with the intent to deprive another," a much larger class of cases are implicated. What about reckless behavior? Is it unreasonable to believe that some persons, in some contexts, might take less care of negative information than they do with documents that reflect positively on them? What is the standard of proof for showing

"intent to deprive another"? Because the conduct is fraudulent in nature there's probably a pretty good argument that it's clear and convincing. Can we really say, categorically, that absent clear and convincing evidence of intent to deprive, there is no case that would justify an inference? Recall as well that we are working here with the absence of evidence—because the document is gone, there is often very little evidence about the reason it is gone.

Assume the case that the committee seemed to be focused on, in which the missing document and negative inference is case-dispositive. (I think this is the rare exception in actual practice). Plaintiff has made the not-insubstantial showings that the document existed and that it "should have been preserved." The Court considers all the evidence and concludes that it, personally, cannot conclude (by whatever standard is to be applied) that the documents were lost with the intent to deprive the plaintiff. But significantly, the Court also concludes that a reasonable jury might come to the opposite conclusion as to intent. Under the rule's proposed text, the default position is innocence. Here, the case is disposed of because the case relies on an inference that the Court is prohibited from instructing the jury it may, but is not required to, make. It would make no sense to send a case to a jury on an inference that the Court is prohibited, under an express rule, from instructing the jury it is allowed to make. So in this example a case is resolved in the defendant's favor because the defendant destroyed a document it should have preserved. I do not think that is consistent with current Utah law on the inferences the court is required to make at this stage—this rule flips that principle on its head.

This is where my third concern mentioned above comes into play. Federal courts are understandably more comfortable with judges adopting this gatekeeper role. Utah appellate court decisions on the role of a judge are far more jury-oriented. We require threshold showings of reliability, and trust juries to make the ultimate decisions of fact. If the inference to be made as to the destruction of a document is a fact relevant to an underlying dispute, I believe the policies of the Utah appellate courts would be to allow it to be litigated for the jury. And I do not see any reason to handicap that litigation by restricting the court's power to give appropriate (and pretty standard) instructions on how to review evidence.

I have a few alternative proposals, listed below in the order that I consider preferable:

1) Do not amend the Rule. When courts and rules committees started the process of addressing ESI, we were behind the times, and the reality was that the expense of ESI storage and ease by which it is lost justified a special rule. I would argue that we are once again behind the times: ESI storage is now vastly cheaper than hard copy storage, and vastly easier to secure from loss than hard copies. That is precisely why it has become so predominant. Inexpensive, cloud-based storage has really changed that original paradigm. I cannot think of any compelling reason to treat the destruction of an email differently than the destruction of a letter, other than the email destruction by an enterprise of any significant size nowadays seems far more likely to be intentional than the loss of a physical letter. We in Utah can still learn from case law specific to ESI without attempting to address it in a special rule.
2) If the distinction between ESI and other documents is to be retained, delete the reference to a permissive ("may") adverse inference instruction from those sanctions

listed as restricted to intentional deprivation cases, and make clear that the court and the jury remain free to make such inferences in appropriate cases.

3) Adopt a shifting burdens approach:
   a) Once the party seeking the document shows its existence and the fact that it should have been preserved, the burden of explanation for its loss should shift to the party that lost the document. If mere negligent loss of the document does not support a reasonable inference that it was adverse (a point I don't think follows logically in every case, see above), at least require the party at fault to prove by preponderance that the loss was merely negligent. This would require some explanation for the loss instead of the "we dunno" approach I often see. That at least gives the other party fair grounds to attack an actual explanation.
   b) Absent an affirmative finding by the court of mere negligence or less, the "may infer" instruction should be available in appropriate cases, at the court's discretion. For the life of me, I have a hard time thinking of other means of alleviating prejudice that will actually matter at trial.
   c) If the party seeking the inference proves (again, probably by clear and convincing evidence) an intent to deprive, the harsher sanctions under the current rule (beyond the permissive inference instruction) should become available.

To be clear, I think the third option is based on a logical fallacy, and improperly restricts the judge's traditional role in instructing the jury. But it is at least significantly preferable to adopting innocent destruction as a default rule for handling missing ESI.

Finally, I think by straying into dictating what instructions the court may give to a jury, the proposed amendment oversteps the appropriate role of the rules. We have model Instructions, but even those are optional. I think decisions on proper instructions should be flexible and case-by-case, and not categorically limited by rules made in the abstract. I think that may be at least part of the reason for the preceding subsection regarding the court's "inherent power" that this amendment expressly seeks to limit.

For reference, here is the instruction I gave in the [] case I mentioned at the meeting:

> If a party fails to present otherwise admissible evidence that was at some time reasonably available to that party, and was not equally available to the other party, then you may infer that the evidence is unfavorable to the party that had access to it. In determining whether to make such an inference, you should consider the party's reason, if offered, for not presenting it. Whether to make such an inference, and the weight you give to it, is entirely up to you.

Ultimately, I don't see this type of instruction as a sanction at all, and should not be addressed as a sanction. Instructing the jury as to how to process evidence is something that courts do all the time. If a court has determined that the fact that a document existed and was lost is probative of a fact at issue, the court should be free to instruct the jury how it may consider that evidence in its deliberations. The parties can litigate the inferences to be drawn from those facts.

COMMITTEE MEMBER 2'S RESPONSE TO COMMITTEE MEMBER 1'S E-MAIL

In my view, many of the concerns raised arise out of (1) a misunderstanding of what the Rule does and what it does not do; and (2) forgetting context—that we are dealing with the scope of available sanctions for the loss of electronically stored information ("ESI").

In summary, proposed Rule 37(e) only applies when certain prerequisites have been met. Specifically:

- First, the electronically stored information "should have been preserved." In other words, the ESI was lost or destroyed after the common law duty to preserve or some other duty to preserve (i.e. statutory, regulatory, or court order) arose. In [Committee Member 1]'s hypothetical, the policy of the company to delete negative emails is adopted "long before any threatened litigation"—before there was any duty to preserve. Rule 37(e) would have no application to these facts.
- Second, the ESI is lost because a party failed to take reasonable steps to preserve it.
- Third, the ESI cannot be restored or replaced through additional discovery. Before courts resort to sanctions, the focus should be on recovery of lost information so that the case can be tried on the merits and not on presumptions about the content of missing evidence.

If these prerequisites are met, the Court may: (1) only upon a finding of prejudice from the loss, "order measures no greater than necessary to cure the prejudice;" or (2) only upon finding that the party acted with "intent to deprive another party of the information's use in the litigation" impose what have been called the "nuclear sanctions." These include: (A) presuming the lost information was unfavorable to the party; (2) instructing the jury that it "may or must presume the information was unfavorable" to the party who lost it; or (3) dismiss the action or enter a default. FRCP 37(e)(1)(2)(A-C).

The rule applies only to "adverse inference" instructions. It does not prohibit giving traditional missing evidence instructions (like the one at the end of [Committee Member 1]'s email). The rule does not forbid parties from presenting evidence to the jury concerning the loss of ESI and what inferences might be drawn from that loss. URCP 37(e)(2), Comment.

The rule does not forbid the jury from being the fact finder about intent to deprive. The comment provides: "This finding [of intent to deprive] 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." FRCP 37(e)(2), Comment.

Having said this, the objection that courts should never be in the business of making findings about why the ESI was lost and "intent to deprive" disregards the fact that we are dealing with a judicial discovery sanction. In this context, courts are uniquely qualified to

determine intent and have done so under Utah Rule 37(b) for many years. These discovery sanctions have always required a judicial determination that a party had engaged in intentional, willful, or persistent dilatory conduct.

To understand why "intent to deprive" is required before an adverse inference instruction is given requires an appreciation for how these instructions developed. The comment to Rule 37(e)(2) provides:

> 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.

I agree with this reasoning. When a party intentionally destroys evidence to prevent its use in the litigation, it is reasonable to infer that the content of the now missing evidence was adverse to that party's claims or defenses. But when ESI is lost by mistake, the inference about its adverse content is without foundation. The lost information may well have been favorable. An adverse inference instruction under these circumstances invites the jury to speculate. When dealing with missing evidence, greater care should be taken.

Importantly, an adverse inference instruction—like the other (e)(2) sanctions—is "nuclear" because it is outcome determinative. We cannot underestimate the impact of the judge—the otherwise neutral arbiter—putting his or her finger on the scale and telling the jury they "must" presume that the content of missing ESI was unfavorable.

Like [Committee Member 1] and I, the federal circuits were split on the question of when an inference about the adverse nature of missing ESI is reasonable. The federal rule rejects cases that sustained adverse inference instructions for negligent or grossly negligent loss of ESI. *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002).

Finally, the exponential growth of ESI continues to impose on parties an overwhelming burden and expense. The uncertainty of when "nuclear sanctions" may be imposed has caused parties to engage in over-preservation which is frankly unsustainable. Counsel for Microsoft testified before the Advisory Committee on the Federal Rules in Phoenix in 2014. He explained that for every one document actually received into evidence, Microsoft was preserving over 675,000 (I think). Moreover, ESI can be lost by mere inaction—even when reasonable steps are taken to preserve it. I am not persuaded that we have turned a technological corner in this regard, especially when the data we keep is growing at an exponential rate.

In conclusion, my position is:

1) Adopt rule 37(e) as is. Eliminate the uncertainty surrounding the nuclear sanctions. Allow Utah to benefit from a uniform standard and the case law that is already developing in the federal courts.
2) If a change is made, eliminate the prohibition of "may presume" instructions. This would allow for the flexibility [Committee Member 1] desires.
3) Don't address burdens of proof in the rule. The drafters of the federal rule expressly avoided this issue. See, FRCP 37(e)(2), Comment. Judges should be permitted to have flexibility to decide this issue on a case by case basis.

COMMITTEE MEMBER 1'S REPLY TO COMMITTEE MEMBER 2

I appreciate [Committee Member 2]'s thoughtful response to my email. I thought I would offer a brief reply.

The logical assumption that no inference arises based on a merely negligent failure to preserve is only supportable if one assumes no other facts regarding the original set of documents or their preservation. If any outside fact makes it more likely than not that a negative document is lost than a positive one, the correct inference is that the lost document was most probably negative. With a lot of effort to recall my symbolic logic, I could show my math, but I won't attempt that here. Instead, take my original example. Litigation is threatened or commences. The preservation memo goes out, but the IT director for the marketing department is out sick for the ten days after the memo. 100 documents are lost as a result. One is at issue. Based on my original assumptions, there's a 70% chance that that document was negative.

What does the proposed Rule tell me if I am sitting as the factfinder? In a jury context, what can I instruct the jury to do with this information? The plain language of the rule bars me from presuming that the lost information was unfavorable, or instructing the jury that it may infer as much.

If the logic of the rule is that the sole fact that a document was not preserved does not lead to an inference that it was adverse, then its restrictions on instructions should be expressly limited to that situation. If courts are free to instruct juries that they may consider the failure to preserve along with other facts in determining whether the lost document was more likely adverse than not, then it should say so. I have proposed language below that accommodates this concern.

As an aside, I do not accept the proposition that the failure to preserve a relevant document during litigation does not generate a reasonable inference on its own that the document was adverse to the case. We are dealing here with a custodian who has an interest in the case. We apply filters in determining what to preserve and what to produce. Even predictive coding is potentially subject to user bias. Perhaps I am cynical, but I maintain that if the universe of documents to be preserved is subject to any human intervention, there exists a likelihood that conscious or implicit biases will affect the quality of what documents are preserved.

Moreover, the proposed rule has a built-in bias of its own. It effectively assumes negligence as the default position. Absent a finding of intent to deprive, the rule requires that the court not presume the documents were adverse to the party at fault, and not instruct a jury that they may make such an inference. That may be appropriate in the context of sanctions. But if the rule is limited to sanctions, it should say so, and not purport to limit otherwise reasonable instructions or inferences. Again, I think the language below addresses this.

Finally, I continue to believe that a special rule for ESI is now, with all respect, quaint. Those 675,000 documents cited by Microsoft and mentioned by [Committee Member 2]? Sounds like a lot, but they would fit in your pocket. A gigabyte will hold just under 30,000 email files. If you add in other types of files such as powerpoint and spreadsheet files, the average (from what I can tell, unweighted for frequency) is about 5,000 documents per gigabyte. So Microsoft's 675,000 documents per exhibit drops to 135 gigabytes. My iPhone holds 124. That data can be searched in a matter of seconds. Yes, ESI can be lost through automated processes—the flip side is that, unlike physical documents, ESI can be preserved throughout an enterprise in automated fashion. Cloud storage is cheap and mathematically far more reliable than physical storage. Compare the rate of cloud storage (pennies per gigabyte per month) to costs for storing the old banker's boxes of documents. Compare the reliability rates of preserving electronic data with the handwritten "shred dates" on stacks of boxes curated by part-time college kids. Why are we cutting a break for those who fail to preserve electronic data and not those who fail to preserve physical documents? Why restrict judges' ability to adapt sanctions for ESI, when we have trusted them to address those issues with respect to physical documents?

My view is that the existing rule is adequate to address ESI and we should trust judges to apply logically supportable inferences and instructions. However, if the Committee insists on amending the Rule, I would suggest the following modifications to proposed 37(e)(1):

> (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, based on the failure to preserve alone, that the lost information was unfavorable to the party;
>
> (e)(1)(B)(2) instruct the jury that, based on the failure to preserve alone, 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.
>
> (e)(1)(D) Nothing in this rule bars a court from considering, or instructing a jury that it may consider, a failure to preserve electronically stored information, along with all other evidence in the case, in inferring the content of the lost information or any other fact at issue in the case.

This is not entirely inconsistent with the federal rule's comments. Those comments state that the federal rule permits a court to allow "the parties to present evidence to the jury concerning the loss and likely relevance of information and [to instruct] the jury that it may consider that evidence, along with all the other evidence in making its decision." The comment goes on to say, however, that this "would not involve instructing a jury it may draw an adverse inference from loss of information." I think this fine distinction impermissibly regulates the judge's ability to instruct the jurors. It is not supported by logic, because with additional facts an adverse inference may be appropriate, and it appears to favor a vague "in making its decision" instruction in lieu of a specific instruction that the content of the document may be inferred from its destruction and other collateral facts. To the extent the comment then goes on to require the jury to make a finding of intent to deprive before making an adverse inference regarding the document, the federal committee wanders into substantive law, not procedure. We should not be legislating a safe harbor for parties who have failed to preserve documents they were obliged to preserve.

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. Except as provided in paragraph (e), ~~U~~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. Except as provided in paragraph (e)(1), ~~N~~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 2017 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.

It is the advisory committee's view that subsection (e) concerns sanctions available for the destruction of electronically stored information and is limited to such sanctions. It does not limit the court's ability to sanction in other circumstances (see e.g., 37(b)(7)), and does not bar (1) the parties from litigating the issue of the loss or destruction of electronically stored information before the finder of fact, (2) the finder

of fact from making whatever inferences it deems appropriate from the totality of the evidence, or (3) the court from giving general instructions regarding permissible inferences from a failure to produce evidence formerly in a party's possession.

Regarding missing evidence instructions, this note represents a departure from the approach articulated in the federal committee's 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 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.

(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:

(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.

(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

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

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.

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).

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.

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

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

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.

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.

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.

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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