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: 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:
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> (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
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> (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:
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> (e)(1)(B)(1) presume, based on the failure to preserve alone, that the lost information was unfavorable to the party;
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> (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
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> (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.