Agenda

Advisory Committee on Rules of Civil Procedure

September 28, 2016

4:00 to 6:00 p.m.

Scott M. Matheson Courthouse

450 South State Street

Judicial Council Room

Administrative Office of the Courts, Suite N31

Welcome and approval of minutes	Tab 1	Jonathan Hafen
Rule 4. Process (service upon roommates)	Tab 2	Zachary Myers
Rule 65C. Post-conviction Relief (records in a criminal case)	Tab 3	James Ishida
Rules 4 and 15: Further amendments requested by the Utah Supreme Court.	Tab 4	Jonathan Hafen and Nancy Sylvester
Rule 7. Filed vs. served and limit on order to show cause	Tab 5	Mary Jane Ciccarello, Nancy Sylvester, Judge James Blanch
FRCP Rule 37(e) Failure to Preserve ESI	Tab 6	Nancy Sylvester, Paul Stancil

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

Meeting Schedule:

October 26, 2016

November 16, 2016

January 25, 2017

February 22, 2017

March 22, 2017

April 26, 2017

May 24, 2017

June 28, 2017

September 27, 2017

October 25, 2017

November 15, 2017

Tab 1

UTAH SUPREME COURT ADVISORY COMMITTEE
ON RULES OF CIVIL PROCEDURE

Meeting Minutes – June 22, 2016

Present:	Amber Mettler, Terri McIntosh, Magistrate Judge Furse, Judge Kate Toomey, Lori Woffinden, Rod Andreason, Kent Holmberg, Judge James Blanch, James Hunnicutt, Jonathan Hafen, Trystan Smith, Steve Marsden, Judge Lyle Anderson, Barbara Townsend
Telephone:	Lincoln Davies
Staff:	Nancy Sylvester, Heather Sneddon, Tim Shea
Guests:	Utah Supreme Court Justices and Court Staff

I. Welcome and Recognition/Appreciation of Outgoing Members – Jonathan Hafen

Jonathan Hafen welcomed justices from the Utah Supreme Court and court staff to the meeting, and invited their comments regarding Tim Shea's retirement. Chief Justice Durrant commented that Mr. Shea's fingerprints are all over our court system, and that few have done more to improve the administrative of justice in our courts than Mr. Shea. Mr. Shea expressed his gratitude. Mr. Hafen also noted that Steve Marsden, Judge Anderson, and Scott Bell are departing (or have departed) as members of the committee this year, and expressed the committee's appreciation for their service.

II. Approval of minutes. [Tab 1] – Jonathan Hafen.

Mr. Hafen invited a motion to approve the minutes. Rod Andreason and Jim Hunnicutt suggested some edits. Mr. Andreason moved to approve the minutes with the suggested corrections. Mr. Hunnicutt seconded. All voted in favor.

III. Rule 4(d)(1)(A), Personal Service. Comments to Proposed Amendments. [Tab 2] – Nancy Sylvester

Nancy Sylvester discussed the comments received on the proposed amendments to Rule 4(d)(1)(A) on personal service.

Discussion:

- An issue arose as to whether the proposed amendments contemplated that a "wet signature" complaint had to be served because references to a "copy" had been removed from the rule. Ms. Sylvester said that was not the intent. Mr. Andreason suggested that the reference to a "copy" be put back in the rule. The committee discussed where in the rule a "copy" should be referenced. Ms. Sylvester suggested that she put "copy" back in wherever it appeared previously, unless in context, the rule is obviously referring to a copy. Barbara Townsend so moved. Kent Holmberg seconded. All voted in favor. Mr. Hafen mentioned that lines 191-193 may be eliminated because "copy" is going back in the rule.

- The committee discussed several commenters' concerns regarding the elimination of "any time prior to trial" from the rule regarding service on defendants. Mr. Holmberg commented that Utah is an outlier in permitting service up until the time of trial. Several members commented that a plaintiff may always file a motion seeking additional time to serve one or more defendants if the plaintiff has been diligent in attempting service. The cost of that motion is trivial compared to starting discovery over again because one or more defendants was/were served after the close of discovery. Steve Marsden suggested that the committee consider reaching out to the plaintiffs' bar on the issue. The comments do not provide much insight on the reasons for the pushback. Judge Toomey commented that while we like to make a point of hearing from people, we've already sent the rule out for comment. Mr. Hafen noted that a further comment period would delay any rule changes for six months, and we are already more generous than the federal system regarding service. Judge Blanch said that we are coming into conformity with other jurisdictions.

- Other commenters raised issues regarding the elimination of the waiver of service procedure. Judge Blanch commented that he believes people are confused about the removal of that procedure; the rules still allow acceptance of service of process under subsection (d)(3). Terri McIntosh mentioned that the elimination of waiver of service removes the ability to recover the cost of service. The judges reported that they rarely, if ever, saw motions to recover those costs. Ms. Townsend reported that the OPC used to seek those costs, but that she doesn't mind getting rid of the waiver of service provision. Judge Blanch and Magistrate Judge Furse said that this issue seems to reflect an education gap regarding the rule. Judge Blanch suggested an alteration to the committee note: "Elimination of the procedure for seeking waiver of service under subsection (f) does not eliminate the parties' ability to agree to acceptance of service under subsection (d)(3)."

- Some commenters suggested that subsection (d)(1) prohibit anyone interested in the action from serving process, not just parties to the action. Sylvan Wornick further proposed that service be accomplished by a U.S. citizen. Ms. Sylvester explained that the committee had removed the previous language in the rule regarding service by a sheriff or constable, and suggested that perhaps that language be added back in. Mr. Andreason said he is opposed to adding the language back in because it is redundant. The committee agreed. Ms. Sylvester will add the proposal that service be accomplished by a U.S. citizen to the cue.

- Judge Toomey moved that Rule 4 be sent to the Supreme Court as further amended during the meeting. Mr. Andreason seconded. All voted in favor.

IV. Rule 58C, Motion to Renew Judgment. [Tab 3] – Judge Joseph Bean, Nancy Sylvester

Ms. Sylvester described an issue raised by Judge Bean about Rule 58C: if a judgment is renewed, is accrued interest added to the balance of the old judgment, which would then cause interest to be compounded going forward, or is it just the balance of the old judgment that is renewed, with simple interest continuing to accrue? He prepared a memo on it. She discussed the issue with Mr. Shea, and he indicated that interest is a creature of statute.

Discussion:

- Kent Holmberg asked whether this is a question the committee has already considered. Ms. Sylvester responded that the question previously before the committee was whether the

old post-judgment interest rate or the new interest rate applied to a renewed judgment. This question is different.

- Judge Anderson commented that perhaps the committee should not be deciding this question. If the statute is unclear regarding how interest should be calculated, it likely a question for the Legislature. It isn't procedural. Mr. Hafen asked whether other committee members agreed. The committee agreed with Judge Anderson; the rule will be left as-is.

V. Rule 35, Physical and Mental Examination of Persons. [Tab 4] – Trystan Smith, Judge Blanch, Barbara Townsend

Trystan Smith explained that he and the subcommittee on Rule 35 have come up with proposed language to address the two main questions regarding the rule: whether and when. The answer to "whether" a Rule 35 report must be disclosed is yes, but it will look different than a Rule 26(a)(4) report. The answer to "when" the Rule 35 report must be disclosed is 28 days after the examination. Judge Blanch prepared language for the advisory committee note explaining the differences between a Rule 35 and Rule 26(a)(4) report. In all cases, if a Rule 35 exam has been conducted, a Rule 35 report will be issued. If the examining party elects a report, a subsequent Rule 26(a)(4) report will be prepared. Nevertheless, a party is not precluded from choosing to issue a combined report that complies both with Rule 35 and Rule 26(a)(4). Mr. Smith also described the competing interests of plaintiffs' lawyers and defense lawyers that the subcommittee tried to balance in coming up with the changes to this rule. Mr. Hafen complimented the subcommittee on their work.

Discussion:

- Mr. Hafen asked committee members whether they felt that the rule changes were fair to both sides. They reported that they did.

- Mr. Andreason raised a potential timing ambiguity in line 16: when the rule explains that a party must disclose their examiner as an expert under Rule 26(a)(4), are we talking about the entire rule, including the timing? If so, he suggests that it be changed to "in the time and manner" required under Rule 26(a)(4). Barbara Townsend and Judge Blanch indicated their approval of the change.

- Jim Hunnicutt raised a question concerning the new language in the advisory committee note and whether we want to include the term "medical." Sometimes these examinations are not "medical" per se; he treats vocational assessments as Rule 35 examinations. Judge Blanch commented that we are trying to capture the concept that what you are entitled to is a medical record—something that a treating physician would create. While he understands the impetus for wanting to remove "medical," he likes having that as an anchor because people will better understand what is required. A vocational expert is different, but he does not believe it will create confusion. He is concerned that if "medical" is removed, we will lose the reference to the type of record that is very familiar to everyone, particularly when the overwhelming majority of reports under Rule 35 are in fact medical. Mr. Marsden suggested that "medical" be removed from lines 41 and 44. Judge Blanch agreed with those removals, as did Mr. Smith.

- Judge Toomey moved that we send the rule out for comment with the amendments discussed. Amber Mettler seconded. All voted in favor.

VI. Fed. R. Civ. P. 34(b)(2)(A)-(C), Requests for Production. [Tab 5] – Nancy Sylvester

Ms. Sylvester reminded the committee that we have been reviewing Rule 34 for potential changes in response to the changes recently made to the federal rule. The committee was concerned about adopting the federal changes wholesale. Therefore, Ms. Sylvester added the specificity requirement in line 23, and with respect to lines 24-25, she adopted FRCP 34(b)(2)(C) requiring the responding party to state whether responsive materials are being withheld. She also added some clarifying language in lines 25-26 from the federal advisory committee notes.

Discussion:

- Mr. Andreason commented that this is a good draft—better than the federal rule. Mr. Smith agreed that this draft provides more clarity on the "specificity" required.

- Mr. Andreason suggested a minor change: on lines 24-26, we use the term "materials," whereas subsection (b)(1) refers to "items." He'd prefer to use "items" in place of "materials."

- Mr. Andreason also suggested that at the end of lines 24-25, we should require that the responding party describe the category of items being withheld. The alternative to describe the limits on the search conducted may be kept. Mr. Marsden said that it doesn't provide a lot of teeth, but it does provide some. Thinking of the federal rule that permits a description of categories of documents, you're going to get descriptions such as "financial documents," "insurance policies," and "correspondence." Mr. Andreason said he would be fine with that; at least he'd be getting something. Ms. Mettler questioned whether the change would be circular. She would be inclined to simply parrot back the request. It seems onerous to have to catalogue what you are withholding. Messrs. Hafen and Hunnicutt suggested that the rule say "describe the items being withheld." Judge Blanch asked whether that would invite litigation over whether a privilege log, or something similar, is required. He doesn't want to invite that.

- Mr. Smith suggested that the language relate back to subsection (b)(1): if you object, it has to be based on the requested item or category. Thus, after "an objection must state," we would add "by individual item or category" whether any responsive items/documents are being withheld. Mr. Andreason commented that he thinks this might be the best resolution.

- Mr. Hunnicutt questioned whether "relevant" is superfluous in line 26. Mr. Marsden responded that "relevant" should stay—people frequently ask for information that is irrelevant. That is the basis for the objection. He proposed instead that the rule say that an "objection that states the limits that have controlled the search qualifies as a statement that the items have been withheld." He would leave out "responsive" and "relevant."

- Mr. Andreason moved to send the rule out for comment as amended during the meeting. Mr. Hunnicutt seconded. All voted in favor.

The meeting adjourned at 5:40 p.m.

Tab 2

HEPWORTH MURRAY & ASSOCIATES
ATTORNEYS AT LAW

MICHAEL K. HEPWORTH, ESQ.
BENJAMIN L. LAWRENCE, ESQ.
JENNIFER K. ZELENY, ESQ.
NICHOLAS S. NIELSEN, ESQ.
ALLISON C. NAVAR, ESQ.

JOHN W. MURRAY, ESQ.
JOANNA G. BELL, ESQ.
ZACHARY C. MYERS, ESQ.
M. TANNER CLAGETT, ESQ. (UT & CO)
TYLER CALL, ESQ.

ASHLEY PETERSON, PL
AUDREY KNUDSON, PL
NICHOLE DELAWARE, PL
KELLY WHITE, JD
SHAYLYNN PRICE, LS

June 14, 2016

Memorandum to the Advisory Committee on Rules of Civil Procedure: Service to Dwelling-Mates in Unlawful Detainer Actions, Utah Rule of Civil Procedure 4(d)(1)(A).

By Zachary C. Myers

I. Introduction

Utah Rule of Civil Procedure 4(d)(1)(A) should be revised, because it does not adequately ensure notice to individuals facing forcibly eviction from their dwellings.

II. Utah Rule of Civil Procedure 4(d)(1)(A) does not provide notice reasonably calculated to apprise interested parties of the pendency of unlawful detainer (eviction) actions.

Utah Rule of Civil Procedure 4(d)(1)(A) permits service of process "by leaving a copy at the individual's dwelling house or usual place of abode with some person of suitable age and discretion there residing." Generally, a defendant in a civil case has twenty-one (21) days to respond to a complaint after being served with summons. *See* UTAH R. CIV. P. 12(a). However, in an unlawful detainer action, a defendant has only *three days* to respond after service of summons. *See* UTAH CODE ANN. § 78B-6-807(3) (2015).

Notice by personal service to a person of suitable age residing at a defendant's dwelling ("dwelling-mate") is reasonable when the defendant has *twenty-one days* to respond. *See* UTAH

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R. CIV. P. 4(d)(1)(A), 12(a). However, when a defendant has a mere three days to respond, notice delivered to a dwelling-mate is *not* "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). If a defendant's dwelling-mate takes any longer than three days to pass the papers along, the time to respond will have already passed. *See* UTAH CODE ANN. § 78B-6-807(3); UTAH R. CIV. P. 4(d)(1)(A). An individual can be evicted in a matter of days without ever having papers put in their hands or otherwise being informed of the court proceedings.

I am personally aware of more than one case where a individual was forcibly evicted before receiving any actual notice of eviction proceedings, because their dwelling-mate failed to apprise them of unlawful detainer actions or provide them with the summons.

Eviction is an extremely traumatic and disruptive penalty. When you are forcibly evicted your belongings are taken from you. You are homeless. People often lose their jobs after being evicted because of the massive disruption on their lives. Unlawful detainer provides a "severe remedy" which warrants more, not less, due process protections. *See Sovereen v. Meadows*, 595 P.2d 852, 853 (Utah 1979).

After being evicted, unlawful detainer defendants face default judgments, which can be quite large because plaintiffs are permitted to treble the damages that they claim. *See* UTAH CODE ANN. § 78B-6-811(3). These default judgments can be difficult to set aside, requiring expensive and lengthy litigation before a defendant is even allowed to argue the merits of her case.

Utah's scheme for serving notice to defendants in unlawful detainer actions should be revised. The risk that a three-day summons to a dwelling-mate will be ineffective notice is too high. The current scheme may even be unconstitutional. *See Walker v. City of Hutchinson, Kan.*, 352 U.S. 112, 117 (1956) ("In too many instances notice by publication is no notice at all.") The current scheme is not "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *See Mullane*, 339 U.S. at 314.

I. Recommendation

I recommend revising Utah Rule of Civil Procedure 4(d)(1)(A) so that service to a dwelling-mate is generally not permitted in unlawful detainer actions, unless the plaintiff first obtains leave of court. (*See* Exhibit A.)

Thank you for your time and consideration.

EXHIBIT A

PROPOSED REVISION TO UTAH RULE OF CIVIL PROCEDURE 4(D)

Proposed changes are in red and underlined:

> **(d) Method of service.** Unless waived in writing, service of the summons and complaint shall be by one of the following methods:
>
> …
>
> (d)(1)(A) Upon any individual other than one covered by subparagraphs (B), (C) or (D) below, by delivering a copy of the summons and the complaint to the individual personally, or by leaving a copy at the individual's dwelling house or usual place of abode with some person of suitable age and discretion there residing, or by delivering a copy of the summons and the complaint to an agent authorized by appointment or by law to receive service of process;
>
> (d)(1)(A)(i) notwithstanding section (d)(1)(A), in 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 or Title 57, Chapter 16, Mobile Home Park Residency Act, service shall not be accomplished by leaving a copy at the individual's dwelling house or usual place of abode with some person of suitable age and discretion there residing unless the party seeking service obtains leave of court pursuant to section (d)(4).
>
> …

See UTAH R. CIV. P. 4(d).

Tab 3

Nancy Sylvester <nancyjs@utcourts.gov>

Rule 65C

Tim Shea <tims@utcourts.gov> Thu, Jun 2, 2016 at 2:50 PM
To: Jonathan Hafen <jhafen@parrbrown.com>, Nancy Sylvester <nancyjs@utcourts.gov>
Cc: Joan Watt <jwatt@sllda.com>

Jonathan and Nancy,

It feels more than a little odd to be requesting a change to the Rules of Civil Procedure.

In working through a variety of electronic filing scenarios, the appellate rules committee identified one in which records from a case not on appeal should be but often are not included as part of the record in a case that is on appeal.

In a petition for post-conviction relief, Section 78B-9-104(2) and Section 78B-9-105(1)—clearly intend that the district court judge consider the entire record of the criminal prosecution, but the experience of practitioners is that the criminal record is not always included in its entirety as part of the PCRA appeal.

The appellate rules committee recommends that Rule of Civil Procedure 65C be amended to expressly make the criminal record part of the civil proceedings at the district court level to enable the appellate court to review all of that record. I have attached a draft for your consideration.

The amendment would be helpful under existing circumstances, and will be needed when appellate e-filing is implemented. With any luck, I will be idling away my time by the time your committee considers this. Please keep Joan Watt apprised of developments.

Thanks,
Tim

URCP065C.docx
23K

Rule 65C. Post-conviction relief.

(a) Scope. This rule governs proceedings in all petitions for post-conviction relief filed under the Post-Conviction Remedies Act, Utah Code Title 78B, Chapter 9. The Act sets forth the manner and extent to which a person may challenge the legality of a criminal conviction and sentence after the conviction and sentence have been affirmed in a direct appeal under Article I, Section 12 of the Utah Constitution, or the time to file such an appeal has expired.

(b) Procedural defenses and merits review. Except as provided in paragraph (h), if the court comments on the merits of a post-conviction claim, it shall first clearly and expressly determine whether that claim is independently precluded under Section 78B-9-106.

(c) Commencement and venue. The proceeding shall be commenced by filing a petition with the clerk of the district court in the county in which the judgment of conviction was entered. The petition should be filed on forms provided by the court. The court may order a change of venue on its own motion if the petition is filed in the wrong county. The court may order a change of venue on motion of a party for the convenience of the parties or witnesses.

(d) Contents of the petition. The petition shall set forth all claims that the petitioner has in relation to the legality of the conviction or sentence. The petition shall state:

(d)(1) whether the petitioner is incarcerated and, if so, the place of incarceration;

(d)(2) the name of the court in which the petitioner was convicted and sentenced and the dates of proceedings in which the conviction was entered, together with the court's case number for those proceedings, if known by the petitioner;

(d)(3) in plain and concise terms, all of the facts that form the basis of the petitioner's claim to relief;

(d)(4) whether the judgment of conviction, the sentence, or the commitment for violation of probation has been reviewed on appeal, and, if so, the number and title of the appellate proceeding, the issues raised on appeal, and the results of the appeal;

(d)(5) whether the legality of the conviction or sentence has been adjudicated in any prior post-conviction or other civil proceeding, and, if so, the case number and title of those proceedings, the issues raised in the petition, and the results of the prior proceeding; and

(d)(6) if the petitioner claims entitlement to relief due to newly discovered evidence, the reasons why the evidence could not have been discovered in time for the claim to be addressed in the trial, the appeal, or any previous post-conviction petition.

(e) Attachments to the petition. If available to the petitioner, the petitioner shall attach to the petition:

(e)(1) affidavits, copies of records and other evidence in support of the allegations;

(e)(2) a copy of or a citation to any opinion issued by an appellate court regarding the direct appeal of the petitioner's case;

(e)(3) a copy of the pleadings filed by the petitioner in any prior post-conviction or other civil proceeding that adjudicated the legality of the conviction or sentence; and

(e)(4) a copy of all relevant orders and memoranda of the court.

(f) Memorandum of authorities. The petitioner shall not set forth argument or citations or discuss authorities in the petition, but these may be set out in a separate memorandum, two copies of which shall be filed with the petition.

(g) Assignment. On the filing of the petition, the clerk shall promptly assign and deliver it to the judge who sentenced the petitioner. If the judge who sentenced the petitioner is not available, the clerk shall assign the case in the normal course.

(h)(1) Summary dismissal of claims. The assigned judge shall review the petition, and, if it is apparent to the court that any claim has been adjudicated in a prior proceeding, or if any claim in the petition appears frivolous on its face, the court shall forthwith issue an order dismissing the claim, stating either that the claim has been adjudicated or that the claim is frivolous on its face. The order shall be sent by mail to the petitioner. Proceedings on the claim shall terminate with the entry of the order of dismissal. The order of dismissal need not recite findings of fact or conclusions of law.

(h)(2) A claim is frivolous on its face when, based solely on the allegations contained in the pleadings and attachments, it appears that:

(h)(2)(A) the facts alleged do not support a claim for relief as a matter of law;

(h)(2)(B) the claim has no arguable basis in fact; or

(h)(2)(C) the claim challenges the sentence only and the sentence has expired prior to the filing of the petition.

(h)(3) If a claim is not frivolous on its face but is deficient due to a pleading error or failure to comply with the requirements of this rule, the court shall return a copy of the petition with leave to amend within 21 days. The court may grant one additional 21-day period to amend for good cause shown.

(h)(4) The court shall not review for summary dismissal the initial post-conviction petition in a case where the petitioner is sentenced to death.

(i) Service of petitions. If, on review of the petition, the court concludes that all or part of the petition should not be summarily dismissed, the court shall designate the portions of the petition that are not dismissed and direct the clerk to serve a copy of the petition, attachments and memorandum by mail upon the respondent. If the petition is a challenge to a felony conviction or sentence, the respondent is the state of Utah represented by the Attorney General. In all other cases, the respondent is the governmental entity that prosecuted the petitioner.

(j) Appointment of pro bono counsel. If any portion of the petition is not summarily dismissed, the court may, upon the request of an indigent petitioner, appoint counsel on a pro bono basis to represent the petitioner in the post-conviction court or on post-conviction appeal. In determining whether to appoint counsel the court shall consider whether the petition or the appeal contains factual allegations that will

require an evidentiary hearing and whether the petition involves complicated issues of law or fact that require the assistance of counsel for proper adjudication.

(k) Answer or other response. Within 30 days after service of a copy of the petition upon the respondent, or within such other period of time as the court may allow, the respondent shall answer or otherwise respond to the portions of the petition that have not been dismissed and shall serve the answer or other response upon the petitioner in accordance with Rule 5(b). Within 30 days (plus time allowed for service by mail) after service of any motion to dismiss or for summary judgment, the petitioner may respond by memorandum to the motion. No further pleadings or amendments will be permitted unless ordered by the court.

(l) Hearings. After pleadings are closed, the court shall promptly set the proceeding for a hearing or otherwise dispose of the case. The court may also order a prehearing conference, but the conference shall not be set so as to delay unreasonably the hearing on the merits of the petition. At the prehearing conference, the court may:

(l)(1) consider the formation and simplification of issues;

(l)(2) require the parties to identify witnesses and documents; and

(l)(3) require the parties to establish the admissibility of evidence expected to be presented at the evidentiary hearing.

(m) Presence of the petitioner at hearings. The petitioner shall be present at the prehearing conference if the petitioner is not represented by counsel. The prehearing conference may be conducted by means of telephone or video conferencing. The petitioner shall be present before the court at hearings on dispositive issues but need not otherwise be present in court during the proceeding. The court may conduct any hearing at the correctional facility where the petitioner is confined.

(n) Discovery; records.

(n)(1) Discovery under Rules 26 through 37 shall be allowed by the court upon motion of a party and a determination that there is good cause to believe that discovery is necessary to provide a party with evidence that is likely to be admissible at an evidentiary hearing.

(n)(2) The court may order either the petitioner or the respondent to obtain any relevant transcript or court records.

(n)(3) All records in the criminal case under review, including the records in an appeal of that conviction, are deemed part of the trial court record in the petition for post-conviction relief. A record from the criminal case retains the security classification that it had in the criminal case.

(o) Orders; stay.

(o)(1) If the court vacates the original conviction or sentence, it shall enter findings of fact and conclusions of law and an appropriate order. If the petitioner is serving a sentence for a felony conviction, the order shall be stayed for 7 days. Within the stay period, the respondent shall give written notice to the court and the petitioner that the respondent will pursue a new trial, pursue a new

110 sentence, appeal the order, or take no action. Thereafter the stay of the order is governed by these
111 rules and by the Rules of Appellate Procedure.
112 (o)(2) If the respondent fails to provide notice or gives notice that no action will be taken, the stay
113 shall expire and the court shall deliver forthwith to the custodian of the petitioner the order to release
114 the petitioner.
115 (o)(3) If the respondent gives notice that the petitioner will be retried or resentenced, the trial
116 court may enter any supplementary orders as to arraignment, trial, sentencing, custody, bail,
117 discharge, or other matters that may be necessary and proper.
118 **(p) Costs.** The court may assign the costs of the proceeding, as allowed under Rule 54(d), to any
119 party as it deems appropriate. If the petitioner is indigent, the court may direct the costs to be paid by the
120 governmental entity that prosecuted the petitioner. If the petitioner is in the custody of the Department of
121 Corrections, Utah Code Title 78A, Chapter 2, Part 3 governs the manner and procedure by which the trial
122 court shall determine the amount, if any, to charge for fees and costs.
123 **(q) Appeal.** Any final judgment or order entered upon the petition may be appealed to and reviewed
124 by the Court of Appeals or the Supreme Court of Utah in accord with the statutes governing appeals to
125 those courts.
126 **Advisory Committee Notes**
127

Tab 4

Administrative Office of the Courts

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

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

MEMORANDUM

To: Civil Rules Committee
From: Nancy Sylvester
Date: September 23, 2016
Re: Rules 4 and 15

At its August 24 meeting, the Utah Supreme Court took up several sets of rules for final action. Among them were Rules 4 and 15, which they held up pending further consideration by the committee. As a reminder, Rule 4 was amended to eliminate the authority to serve a defendant any time before trial, see *St. Jeor v. Kerr Corporation*, 2015 UT 49, ¶2, and Rule 15 was amended based on a concurring opinion by Judge Voros. In *Wright v. P.K. Transport*, 2014 UT App 93, he requested that the committee amend Rule 15 to incorporate the provisions of Fed. R. Civ. P. 15(c) regarding the relation-back of an amended pleading when the amended pleading adds a new party.

The court expressed concern that the "good cause" language in Rule 4(b) may be too broad and suggested that a narrower exception for service after 120 days be considered by the committee. In discussions with the court later on, I determined that their concern was two-fold: 1) the request should be made within the 120 days except in narrow circumstances, which are addressed in Rule 6(b); and 2) if a previously undiscoverable defendant is later discovered after the 120 days, Rule 15 should allow for the addition of the defendant to the action. Right now, Rule 15(c)(3) as previously amended by the committee appears to only provide for the *substitution* – not the *addition* – of a defendant in an amended pleading. A simple fix to Rule 15 on line 39 – changing "the naming of the party" to "the naming of the parties" may resolve the court's concern. Rule 4 does not appear to require further amendment unless a reference to Rule 6 in paragraph (b) would be appropriate.

Rule 4. Process.

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

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

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

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

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

(c) Contents of summons.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(d)(1)(E) Upon ~~any~~ a corporation not ~~herein~~ otherwise provided for in this rule, ~~upon~~ a limited liability company, a partnership, or ~~upon~~ an unincorporated association ~~which is~~ subject to suit under a common name, by delivering a copy of the summons and ~~the~~ complaint to an officer, a managing or general agent, or other agent authorized by appointment or ~~by~~ law to receive ~~service of~~ process and ~~, if the agent is one authorized by statute to receive service and the statute so requires,~~ by also mailing a copy of the summons and ~~the~~ complaint to the defendant, if the agent is one authorized by statute to receive process and the statute so requires. If no ~~such~~ officer or

agent can be found within the state, and the defendant has, or advertises or holds itself out as having, ~~an office or~~ a place of business within the state or elsewhere, or does business within this state or elsewhere, then upon the person in charge of ~~such office or~~ the place of business;

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

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

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

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

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

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

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

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

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

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

(d)(3) Acceptance of service.

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

(d)(3)(B) Acceptance of service by party. Unless the person to be served is a minor under 14 years old or an individual judicially declared to be incapacitated, of unsound mind, or

incapable of conducting the individual's own affairs, a party may accept service of a summons and complaint by signing a document that acknowledges receipt of the summons and complaint.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(e) Proof of service.

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

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

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

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

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

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

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

185 ~~(f)(3) A defendant who waives service of a summons does not thereby waive any objection to~~
186 ~~venue or to the jurisdiction of the court over the defendant.~~
187 ~~(f)(4) If a defendant refuses a request for waiver of service submitted in accordance with this rule,~~
188 ~~the court shall impose upon the defendant the costs subsequently incurred in effecting service.~~
189 **Advisory Committee Notes**
190 2016 Amendments
191 Paragraph (d)(3) contemplates delivery and acceptance of the summons and complaint by various
192 methods, including electronic delivery and signature. Elimination of the express procedure for seeking
193 waiver of service under paragraph (f) does not eliminate the parties' ability to agree to accept service
194 under paragraph (d)(3).

Rule 15. Amended and supplemental pleadings.

(a) Amendments before trial.

(a)(1) A party may amend ~~his~~ its pleading once as a matter of course ~~at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time~~ within:

(a)(1)(A) 21 days after serving it ~~is served~~; or

(a)(1)(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

(a)(2) ~~Otherwise~~ In all other cases, a party may amend ~~his~~ its pleading only ~~by leave of~~ with the court's permission or ~~by written consent of~~ the ~~adverse party; and leave shall be freely given~~ opposing party's written consent. The party must attach its proposed amended pleading to the motion to permit an amended pleading. The court should freely give permission when justice ~~so~~ requires.

(a)(3) ~~A party shall plead in response to an amended pleading~~ Any required response to an amended pleading must be filed within the time remaining ~~for response~~ to respond to the original pleading or within 14 days after service of the amended pleading, whichever ~~period may be the longer, unless the court otherwise orders~~ is later.

(b) Amendments ~~to conform to the evidence~~ during and after trial.

(b)(1) When an issue~~s~~ not raised ~~by~~ in the pleadings ~~are~~ is tried by the parties' express or implied consent ~~of the parties~~, ~~they shall~~ it must be treated in all respects as if ~~they had been~~ raised in the pleadings. ~~Such amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but~~ A party may move—at any time, even after judgment—to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure ~~so~~ to amend does not affect the result of the trial of ~~these~~ that issue~~s~~.

(b)(2) If, at trial, a party objects that evidence is ~~objected to at the trial on the ground that it is~~ not within the issues ~~made by~~ raised in the pleadings, the court may ~~allow~~ permit the pleadings to be amended ~~when the presentation of the merits of the action will be subserved thereby~~. The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the ~~admission of such~~ evidence would prejudice ~~him in maintaining his~~ that party's action or defense ~~up~~on the merits. The court ~~shall~~ may grant a continuance~~, if necessary,~~ to enable the objecting party to meet ~~such~~ the evidence.

(c) Relation back of amendments. ~~Whenever~~ An amendment to a pleading relates back to the date of the original pleading when:

(c)(1) the law that provides the applicable statute of limitations allows relation back;

(c)(2) ~~the claim or defense asserted in the amended pleading~~ the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set ~~forth~~ out—or attempted to be set ~~forth~~ out—in the original pleading~~, the amendment relates back to the date of the original pleading~~; or

(c)(3) the amendment changes the party or the naming of the part~~y~~ies against whom a claim is asserted, if paragraph (c)(2) is satisfied and if, within the period provided by Rule 4(b) for serving the summons and complaint, the party to be brought in by amendment:

(c)(3)(A) received such notice of the action that it will not be prejudiced in defending on the merits; and

(c)(3)(B) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

(d) Supplemental pleadings. ~~Upon~~ On motion ~~of a party~~ and reasonable notice, the court may, ~~upon reasonable notice and upon such terms as are~~ on just terms, permit ~~him~~ a party to ~~serve~~ file a supplemental pleading setting ~~forth~~ out any transaction~~s~~, ~~or~~ occurrence~~s~~, or event~~s~~ ~~which have~~ that happened ~~since~~ after the date of the pleading ~~sought~~ to be supplemented. ~~Permission may be granted~~ The court may permit supplementation even though the original pleading is defective in ~~its statement of~~ stating a claim ~~for relief~~ or defense. ~~If the court deems it advisable that the adverse~~ The court may order that the opposing party ~~plead~~ respond to the supplemental pleading~~, it shall so order, specifying the time therefor~~ within a specified time.

Tab 5

Administrative Office of the Courts

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

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

MEMORANDUM

To: Civil Rules Committee
From: Nancy Sylvester
Date: September 23, 2016
Re: Rule 7

Both Mary Jane Ciccarello and Brent Johnson have raised concerns about the "filed" versus "served" language in Rule 7. Mary Jane will be addressing how this unfairly impacts pro se litigants at this meeting. Because we have another Rule 7 request pending, I take this opportunity to also bring it to the committee.

Judge Blanch and Judge Kelly raised a concern that the pre-2015 Rule 7(b)(2) language addressing limits on orders to show cause should not have been eliminated from the rule. The language offers guidance to parties and counsel on when it is appropriate for a party to move the court for an order to show cause. They request that the language, which is below, be returned to the rule.

> (b)(2) Limit on order to show cause. An application to the court for an order to show cause shall be made only for enforcement of an existing order or for sanctions for violating an existing order. An application for an order to show cause must be supported by an affidavit sufficient to show cause to believe a party has violated a court order.

Rule 7 was last amended in 2015. I made a new paragraph (q) so that the paragraph lettering did not change with this addition. Nonetheless, the committee may decide there is a more appropriate placement for the language earlier in the rule.

Rule 7. Pleadings allowed; motions, memoranda, hearings, orders.

(a) Pleadings. Only these pleadings are allowed:

(a)(1) a complaint;

(a)(2) an answer to a complaint;

(a)(3) an answer to a counterclaim designated as a counterclaim;

(a)(4) an answer to a crossclaim;

(a)(5) a third-party complaint;

(a)(6) an answer to a third-party complaint; and

(a)(7) a reply to an answer if ordered by the court.

(b) Motions. A request for an order must be made by motion. The motion must be in writing unless made during a hearing or trial, must state the relief requested, and must state the grounds for the relief requested. Except for the following, a motion must be made in accordance with this rule.

(b)(1) A motion, other than a motion described in paragraphs (b)(2), (b)(3) or (b)(4), made in proceedings before a court commissioner must follow Rule 101.

(b)(2) A request under Rule 26 for extraordinary discovery must follow Rule 37(a).

(b)(3) A request under Rule 37 for a protective order or for an order compelling disclosure or discovery—but not a motion for sanctions—must follow Rule 37(a).

(b)(4) A request under Rule 45 to quash a subpoena must follow Rule 37(a).

(b)(5) A motion for summary judgment must follow the procedures of this rule as supplemented by the requirements of Rule 56.

(c) Name and content of motion.

(c)(1) The rules governing captions and other matters of form in pleadings apply to motions and other papers. The moving party must title the motion substantially as: “Motion [short phrase describing the relief requested].” The motion must include the supporting memorandum. The motion must include under appropriate headings and in the following order:

(c)(1)(A) a concise statement of the relief requested and the grounds for the relief requested; and

(c)(1)(B) one or more sections that include a concise statement of the relevant facts claimed by the moving party and argument citing authority for the relief requested.

(c)(2) If the moving party cites documents, interrogatory answers, deposition testimony, or other discovery materials, relevant portions of those materials must be attached to or submitted with the motion.

(c)(3) If the motion is for relief authorized by Rule 12(b) or 12(c), Rule 56 or Rule 65A, the motion may not exceed 25 pages, not counting the attachments, unless a longer motion is permitted by the court. Other motions may not exceed 15 pages, not counting the attachments, unless a longer motion is permitted by the court.

(d) Name and content of memorandum opposing the motion.

(d)(1) A nonmoving party may file a memorandum opposing the motion within 14 days after the motion is ~~filed~~ served. The nonmoving party must title the memorandum substantially as: "Memorandum opposing motion [short phrase describing the relief requested]." The memorandum must include under appropriate headings and in the following order:

(d)(1)(A) a concise statement of the party's preferred disposition of the motion and the grounds supporting that disposition;

(d)(1)(B) one or more sections that include a concise statement of the relevant facts claimed by the nonmoving party and argument citing authority for that disposition; and

(d)(1)(C) objections to evidence in the motion, citing authority for the objection.

(d)(2) If the non-moving party cites documents, interrogatory answers, deposition testimony, or other discovery materials, relevant portions of those materials must be attached to or submitted with the memorandum.

(d)(3) If the motion is for relief authorized by Rule 12(b) or 12(c), Rule 56 or Rule 65A, the memorandum opposing the motion may not exceed 25 pages, not counting the attachments, unless a longer memorandum is permitted by the court. Other opposing memoranda may not exceed 15 pages, not counting the attachments, unless a longer memorandum is permitted by the court.

(e) Name and content of reply memorandum.

(e)(1) Within 7 days after the memorandum opposing the motion is ~~filed~~ served, the moving party may file a reply memorandum, which must be limited to rebuttal of new matters raised in the memorandum opposing the motion. The moving party must title the memorandum substantially as "Reply memorandum supporting motion [short phrase describing the relief requested]." The memorandum must include under appropriate headings and in the following order:

(e)(1)(A) a concise statement of the new matter raised in the memorandum opposing the motion;

(e)(1)(B) one or more sections that include a concise statement of the relevant facts claimed by the moving party not previously set forth that respond to the opposing party's statement of facts and argument citing authority rebutting the new matter;

(e)(1)(C) objections to evidence in the memorandum opposing the motion, citing authority for the objection; and

(e)(1)(D) response to objections made in the memorandum opposing the motion, citing authority for the response.

(e)(2) If the moving party cites documents, interrogatory answers, deposition testimony, or other discovery materials, relevant portions of those materials must be attached to or submitted with the memorandum.

(e)(3) If the motion is for relief authorized by Rule 12(b) or 12(c), Rule 56 or Rule 65A, the reply memorandum may not exceed 15 pages, not counting the attachments, unless a longer

memorandum is permitted by the court. Other reply memoranda may not exceed 10 pages, not counting the attachments, unless a longer memorandum is permitted by the court.

(f) Objection to evidence in the reply memorandum; response. If the reply memorandum includes an objection to evidence, the nonmoving party may file a response to the objection no later than 7 days after the reply memorandum is ~~filed~~ served. If the reply memorandum includes evidence not previously set forth, the nonmoving party may file an objection to the evidence no later than 7 days after the reply memorandum is ~~filed~~ served, and the moving party may file a response to the objection no later than 7 days after the objection is ~~filed~~ served. The objection or response may not be more than 3 pages.

(g) Request to submit for decision. When briefing is complete or the time for briefing has expired, either party may file a "Request to Submit for Decision, but, if no party files a request, the motion will not be submitted for decision. The request to submit for decision must state whether a hearing has been requested and the dates on which the following documents were filed:

(g)(1) the motion;

(g)(2) the memorandum opposing the motion, if any;

(g)(3) the reply memorandum, if any; and

(g)(4) the response to objections in the reply memorandum, if any.

(h) Hearings. The court may hold a hearing on any motion. A party may request a hearing in the motion, in a memorandum or in the request to submit for decision. A request for hearing must be separately identified in the caption of the document containing the request. The court must grant a request for a hearing on a motion under Rule 56 or a motion that would dispose of the action or any claim or defense in the action unless the court finds that the motion or opposition to the motion is frivolous or the issue has been authoritatively decided.

(i) Notice of supplemental authority. A party may file notice of citation to significant authority that comes to the party's attention after the party's motion or memorandum has been filed or after oral argument but before decision. The notice may not exceed 2 pages. The notice must state the citation to the authority, the page of the motion or memorandum or the point orally argued to which the authority applies, and the reason the authority is relevant. Any other party may promptly file a response, but the court may act on the motion without waiting for a response. The response may not exceed 2 pages.

(j) Orders.

(j)(1) Decision complete when signed; entered when recorded. However designated, the court's decision on a motion is complete when signed by the judge. The decision is entered when recorded in the docket.

(j)(2) Preparing and serving a proposed order. Within 14 days of being directed by the court to prepare a proposed order confirming the court's decision, a party must serve the proposed order on the other parties for review and approval as to form. If the party directed to prepare a proposed order fails to timely serve the order, any other party may prepare a proposed order confirming the court's decision and serve the proposed order on the other parties for review and approval as to form.

(j)(3) Effect of approval as to form. A party's approval as to form of a proposed order certifies that the proposed order accurately reflects the court's decision. Approval as to form does not waive objections to the substance of the order.

(j)(4) Objecting to a proposed order. A party may object to the form of the proposed order by filing an objection within 7 days after the order is served.

(j)(5) Filing proposed order. The party preparing a proposed order must file it:

(j)(5)(A) after all other parties have approved the form of the order (The party preparing the proposed order must indicate the means by which approval was received: in person; by telephone; by signature; by email; etc.);

(j)(5)(B) after the time to object to the form of the order has expired (The party preparing the proposed order must also file a certificate of service of the proposed order.); or

(j)(5)(C) within 7 days after a party has objected to the form of the order (The party preparing the proposed order may also file a response to the objection.).

(j)(6) Proposed order before decision prohibited; exceptions. A party may not file a proposed order concurrently with a motion or a memorandum or a request to submit for decision, but a proposed order must be filed with:

(j)(6)(A) a stipulated motion;

(j)(6)(B) a motion that can be acted on without waiting for a response;

(j)(6)(C) an ex parte motion;

(j)(6)(D) a statement of discovery issues under Rule 37(a); and

(j)(6)(E) the request to submit for decision a motion in which a memorandum opposing the motion has not been filed.

(j)(7) Orders entered without a response; ex parte orders. An order entered on a motion under paragraph (l) or (m) can be vacated or modified by the judge who made it with or without notice.

(j)(8) Order to pay money. An order to pay money can be enforced in the same manner as if it were a judgment.

(k) Stipulated motions. A party seeking relief that has been agreed to by the other parties may file a stipulated motion which must:

(k)(1) be titled substantially as: "Stipulated motion [short phrase describing the relief requested];

(k)(2) include a concise statement of the relief requested and the grounds for the relief requested;

(k)(3) include a signed stipulation in or attached to the motion and;

(k)(4) be accompanied by a request to submit for decision and a proposed order that has been approved by the other parties.

(l) Motions that may be acted on without waiting for a response.

(l)(1) The court may act on the following motions without waiting for a response:

(l)(1)(A) motion to permit an over-length motion or memorandum;

(l)(1)(B) motion for an extension of time if filed before the expiration of time;

(l)(1)(C) motion to appear pro hac vice; and

(l)(1)(E) other similar motions.

(l)(2) A motion that can be acted on without waiting for a response must:

(l)(2)(A) be titled as a regular motion;

(l)(2)(B) include a concise statement of the relief requested and the grounds for the relief requested;

(l)(2)(C) cite the statute or rule authorizing the motion to be acted on without waiting for a response; and

(l)(2)(D) be accompanied by a request to submit for decision and a proposed order.

(m) Ex parte motions. If a statute or rule permits a motion to be filed without serving the motion on the other parties, the party seeking relief may file an ex parte motion which must:

(m)(1) be titled substantially as: "Ex parte motion [short phrase describing the relief requested];

(m)(2) include a concise statement of the relief requested and the grounds for the relief requested;

(m)(3) cite the statute or rule authorizing the ex parte motion;

(m)(4) be accompanied by a request to submit for decision and a proposed order.

(n) Motion in opposing memorandum or reply memorandum prohibited. A party may not make a motion in a memorandum opposing a motion or in a reply memorandum. A party who objects to evidence in another party's motion or memorandum may not move to strike that evidence. Instead, the party must include in the subsequent memorandum an objection to the evidence.

(o) Overlength motion or memorandum. The court may permit a party to file an overlength motion or memorandum upon a showing of good cause. An overlength motion or memorandum must include a table of contents and a table of authorities with page references.

(p) Limited statement of facts and authority. No statement of facts and legal authorities beyond the concise statement of the relief requested and the grounds for the relief requested required in paragraph (c) is required for the following motions:

(p)(1) motion to allow an over-length motion or memorandum;

(p)(2) motion to extend the time to perform an act, if the motion is filed before the time to perform the act has expired;

(p)(3) motion to continue a hearing;

(p)(4) motion to appoint a guardian ad litem;

(p)(5) motion to substitute parties;

(p)(6) motion to refer the action to or withdraw it from alternative dispute resolution under Rule 4-510.05;

(p)(7) motion for a conference under Rule 16; and

(p)(8) motion to approve a stipulation of the parties.

185 **(q) Limit on order to show cause.** An application to the court for an order to show cause shall be
186 made only for enforcement of an existing order or for sanctions for violating an existing order. An
187 application for an order to show cause must be supported by an affidavit sufficient to show cause to
188 believe a party has violated a court order.

189 **Addition to Committee Notes**

190 The 2016 amendments to Rule 7 adopt and renumber omitted paragraph (b)(2) from the pre-2015
191 version of the rule. New paragraph (q) addresses limits on applications for orders to cause. The
192 amendments also change "filed" to "served" in places where service must be made on the opposing
193 party. The change addresses concerns of prejudice to pro se litigants who do not have the benefit of
194 electronic filing.

195 **Advisory Committee Notes**

196

Tab 6

Administrative Office of the Courts

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

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

MEMORANDUM

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

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

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

(a) Statement of discovery issues.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) Motion for costs, expenses and attorney fees on failure to admit. If a party fails to admit the genuineness of a document or the truth of a matter as requested under Rule 36, and if the party requesting the admissions proves the genuineness of the document or the truth of the matter, the party requesting the admissions may file a motion for an order requiring the other party to pay the reasonable

85 costs, expenses and attorney fees incurred in making that proof. The court must enter the order unless it
86 finds that:

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

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

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

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

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

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

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

102 **(e)(1) Failure to Preserve Electronically Stored Information.** If electronically stored information
103 that should have been preserved in the anticipation or conduct of litigation is lost because a party
104 failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional
105 discovery, the court:

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

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

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

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

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

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

117 **Advisory Committee Notes**

118 New note (add to Advisory Committee Notes):

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

125

Federal Rules of Civil Procedure Rule 37

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

Currentness

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) Failure to Comply with a Court Order.

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

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

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

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

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

(iii) striking pleadings in whole or in part;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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(e) Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

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

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

(A) presume that the lost information was unfavorable to the party;

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

(C) dismiss the action or enter a default judgment.

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

CREDIT(S)

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

ADVISORY COMMITTEE NOTES

1937 Adoption

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

1948 Amendment

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

1970 Amendment

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1980 Amendment

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

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

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

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

1987 Amendment

The amendments are technical. No substantive change is intended.

1993 Amendment

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2000 Amendment

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

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

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

GAP Report

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

2006 Amendment

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

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

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

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

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

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

2007 Amendment

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

2013 Amendment

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

Changes Made After Publication and Comment

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

2015 Amendment

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In an appropriate case, it may be that serious measures are necessary to cure prejudice found by the court, such as forbidding the party that failed to preserve information from putting on certain evidence, permitting the parties to present evidence and argument to the jury regarding the loss of information, or giving the jury instructions to assist in its evaluation of such evidence or argument, other than instructions to which subdivision (e)(2) applies. Care must be taken, however, to ensure that curative measures under subdivision (e)(1) do not have the effect of measures that are permitted under subdivision (e)(2) only on a finding of intent to deprive another party of the lost information's use in the litigation. An example of an inappropriate (e)(1) measure might be an order striking pleadings related to, or precluding a party from offering any evidence in support of, the central or only claim or defense in the case. On the other hand, it may be appropriate to exclude a specific item of evidence to offset prejudice caused by failure to preserve other evidence that might contradict the excluded item of evidence.

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

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

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

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

Subdivision (e)(2) requires a finding that the party acted with the intent to deprive another party of the information's use in the litigation. This finding may be made by the court when ruling on a pretrial motion, when presiding at a bench trial, or when deciding whether to give an adverse inference instruction at trial. If a court were to conclude that the intent finding should be made by a jury, the court's instruction should make clear that the jury may infer from the loss of the information that it was unfavorable to the party that lost it only if the jury first finds that the party acted with the intent to deprive another party of the information's use in the litigation. If the jury does not make this finding, it may not infer from the loss that the information was unfavorable to the party that lost it.

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

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

Notes of Decisions (2801)

Fed. Rules Civ. Proc. Rule 37, 28 U.S.C.A., FRCP Rule 37
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