Agenda

Advisory Committee on Rules of Civil Procedure

October 26, 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, Leslie Slaugh, and guests
Rule 15: Further amendment requested by the Utah Supreme Court (committee note).	Tab 3	Jonathan Hafen and Nancy Sylvester
Rule 34 and 35: Comments	Tab 4	Nancy Sylvester
FRCP Rule 37(e) Failure to Preserve ESI	Tab 5	Paul Stancil, Nancy Sylvester
Tier 2 vs. Tier 3 and limits on verdicts	Tab 6	Jonathan Hafen

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

Meeting Schedule:

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 – September 28, 2016

PRESENT: Jonathan Hafen, Trystan Smith, James Hunnicut, Judge James Blanch, Judge Kate Toomey, Terri McIntosh, Lincoln Davies, Kent Holmberg, Judge Andrew Stone, Leslie Slaugh, Sammi Anderson, Heather Sneddon, John Baxter, Rod Andreason, Paul Stancil

TELEPHONE: Dawn Hautamaki

STAFF: Nancy Sylvester, James Ishida, Lauren Hosler

GUESTS: Zach Myers, Judy Finch, Rick Schwermer, Mary Jane Ciccarello

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(1) WELCOME AND APPROVAL OF MINUTES.

Chair Jonathan Hafen welcomed the committee, in particular the new members. Mr. Hafen invited all members of the committee to introduce themselves and reviewed the committee's Principles of Rulemaking, noting that they are available on the committee website (http://www.utcourts.gov/utc/civproc/). The minutes from the June 22, 2016 meeting were unanimously approved, with a few minor amendments.

(2) RULE 4. PROCESS (SERVICE UPON ROOMMATES).

Zachary Myers presented to the committee. Mr. Myers proposed a revision to Rule 4(d)(1)(A) that would disallow service on a dwelling-mate in unlawful detainer actions, without first obtaining leave of the Court. Mr. Myers explained that the basis for his proposed revision is that, in conjunction with the three day period to respond, notice to a dwelling-mate is leaving many tenants without actual notice of the hearing date, resulting in many defaults.

Mr. Slaugh raised concerns about difficulties effecting service under the current rule, including issues of successful avoidance of service, and queried to Mr. Myers his response to an argument that this is another hurdle making eviction more difficult. Mr. Myers responded that many tenants have legitimate defenses that aren't getting heard because they don't have actual notice.

Judge Stone expressed concern that during the pendency of service treble damages are accruing against tenants. Judge Stone explained that the service of an unlawful detainer action isn't the tenant's first notice, as a notice to quit is required prior to filing the action.

Mr. Slaugh explained there are situations where service is technically legal, but ineffective for providing actual notice. He suggested the rule be amended to provide additional reassurances for actual notice in instances of short response times.

Mr. Holmberg asked about the interplay between this rule and the legislative framework. Mr. Schwermer explained the interplay between the Supreme Court's and the Legislature's rulemaking authority over procedural matters and explained the Legislative process for amending a Rule of Civil Procedure. Mr. Schwermer noted that the Supreme Court recommended the committee review the proposed amendment because the issue had been previously raised to the Legislature. Mr. Schwermer suggested that even if the committee ultimately decided not to act in response to the proposed amendment, the Legislature would appreciate the committee's input on the language of the proposed amendment as the Legislature may act in the event the committee does not.

Judge Blanch questioned the prudence of substance-specific rules of service and the possibility of opening the door to modifying service rules for other specific types of action. As an alternative, Judge Blanch proposed linking the three day response time to a method of actual service, rather than deeming service ineffective. Mr. Slaugh proposed alternate language to allow service upon dwelling-mates "except in an action where the time for response is less than 21 days, unless leave of court is granted." Mr. Myers noted that the "unless leave of the court is granted" may be redundant.

Mr. Hunnicut asked what other types of lawsuits the proposed rule might impact, i.e. have a response time of less than 21 days. The committee considered the applicability of the proposal to temporary restraining orders.

Mr. Hafen suggested we invite members on both sides of the issue to discuss the matter further at a future meeting; the committee concurred.

(3) RULE 65C. POST-CONVICTION RELIEF (RECORDS IN A CRIMINAL CASE).

Mr. Ishida presented on behalf of the Appellate Rules Committee requesting a change to Rule 65C to expressly make the criminal record part of the post-conviction relief ("PCRA") civil record, enabling the appellate court to review the criminal record in conjunction with a PCRA appeal. Mr. Ishida explained that sometimes in PCRA appeals the criminal record is not included. And although, as a practical matter, it is typically available upon request, the proposed amendment would obviate the need to make a specific request.

Judge Stone noted that a clarification would also be useful at the trial court level because there is some discussion about whether the criminal matter is extra-judicial in the separate, civil PCRA action. Mr. Hafen questioned whether there was any reason not to adopt this proposal, noting he didn't see any.

Judge Toomey moved to send the proposed amendment out for comment, and Mr. Andreason seconded. The motion passed unanimously.

(4) RULES 4 AND 15. FURTHER AMENDMENTS REQUESTED BY THE UTAH SUPREME COURT.

Mr. Hafen began by explaining the process of submitting the committee's proposed amendments to the Utah Supreme Court for consideration. Ms. Sylvester explained the committee's proposed amendments to Rules 4 and 15 were presented to the Utah Supreme Court, and that the Court recommended the proposed amendments undergo further consideration by the committee. Ms. Sylvester detailed the Court's concerns about the interplay among proposed Rule 15(c), proposed Rule 4(b), and existing Rule 6(b).

The committee discussed the potential inconsistency between the "good cause" standard set forth in proposed Rule 4(b) on line 7 and the standards set forth in Rule 6(b)(1)(A)-(B). Mr. Hafen proposed removing "The court may allow a longer period of time for good cause shown." in proposed Rule 4(b), and adding an advisory committee note that "Nothing in the amendment is intended to modify the applicability of Rule 6."

Mr. Andreason questioned why the "good cause" standard was a problem. The committee discussed the issue at length. In particular, there was concern that the proposed Rule 4(b) permitted the court to order a different period of time "for good cause shown" regardless of whether the request was made before or after the expiration of the 120 days, and Rule 6 would require "excusable neglect" if the request was made after the expiration of the 120 days. The prudence of such a change was discussed by the committee. The committee also discussed the relationship between proposed Rule 4(b) and proposed Rule 15(c), as well as the relationship between proposed Rule 15(c) and Rule 15(c) of the Federal Rules of Civil Procedure ("FRCP"). The committee proposed alternate language for Rule 4(b) of "unless the court orders a different period under Rule 6" with no advisory committee note. The committee further discussed whether an additional comment period was necessary as a result of this proposed change. Mr. Smith moved to adopt the language "unless the court orders a different period of time under Rule 6" and present the proposed amendment to the Supreme Court. Ms. Sneddon seconded. The motion passed unanimously.

Mr. Hafen moved back to Rule 15 and suggested the committee delay a decision on Rule 15 in order to obtain further clarification from the Supreme Court. Mr. Davies sought clarification regarding the history of Rule 15, in particular its deviation from FRCP 15. The committee also discussed the impetus for amending Rule 15—a concurring opinion by Judge Voros in the case of *Wright v. PK Transport*, 2014 UT App 93, ¶¶ 18-22. The committee questioned and discussed whether the proposed Rule 15(c) language contemplated adding a party, or just substituting or changing a party, ultimately determining that it did contemplate adding a party. The committee again noted that the proposed Rule 15(c) was identical to FRCP 15(c). Mr. Davies discussed the operation of FRCP 15(c).

Mr. Hafen recommended the committee defer any further modifications to proposed Rule 15(c) in order to discuss the proposed Rule 15(c) further with the Utah Supreme Court. The committee agreed.

(5) RULE 7. FILED VS. SERVED AND LIMIT ON ORDERS TO SHOW CAUSE.

Mary Jane Ciccarello, director of the Self-Help Center of the Utah State Courts, presented to the committee on her proposed changes to Rule 7. Ms. Ciccarello discussed the large number of pro se parties utilizing our court system, in particular in eviction, divorce, and debt collection actions where there is an abundance of motion practice, and shared her concerns about the language of "filed" versus "served" in Rule 7. Ms. Ciccarello noted that because pro se plaintiffs cannot e-file, they are not always receiving notice of filings simultaneous with actual filing like attorneys, who are required to e-file, necessarily are. As a result, she explained there is confusion among pro se parties about what it means to file, when service is accomplished, and the applicability of Rule 6(c) in light of its "service" language, and also there are delays in receiving actual notice of filings resulting in shorter response times for pro se parties as compared to represented parties. Ms. Ciccarello also noted the inconsistency with the language of Rule 101 which states "filed and served."

Judge Blanch noted that the committee previously considered a similar proposal, but declined to recommend it to maintain predictability for the automatically generated scheduling orders. Judge Blanch stated that, notwithstanding the prior decision, since the proposal is only to change the wording of Rule 7, and for the majority of filings service occurs simultaneously with filing, he supports the proposal to protect the interests of self-represented parties.

Mr. Slaugh expressed concern about the possibility of the proposal undermining the "days are days" simplicity of the current rules by reintroducing the three-day mailing rule for filed documents and questioned whether pro se parties are really hurt by the decreased response time created by service via mail and the "filing" language.

Ms. Ciccarello responded that pro se parties are most hurt by the uncertainty of how service is accomplished under the rules, and stated that many pro se parties are not getting served with documents, don't know what date to state on a certificate of service, and don't know and can't ascertain when their responses are due (because it's not apparent from the face of the document when filing is accomplished).

The committee discussed the proposals and compared the existing and proposed rules to the federal rules. The committee further discussed whether the proposal would add or remove uncertainty for pro se parties, and whether a more appropriate solution may be to allow pro se parties to e-file.

Ms. Slyvester asked Ms. Ciccarello about her proposal for Rule 101. Ms. Ciccarello responded that she proposed that Rule 101 use only "filed" or "served," and not both as it currently does, and that the same term used in Rule 7 be used in Rule 101.

The committee also considered a proposal to amend Rule 6 to create an exception specifically for self-represented parties. Ms. Ciccarello noted that knowledge of the filing date is an additional hurdle for self-represented parties because they don't have access to the docket. The committee discussed the ongoing applicability of Rule 6(c) in light of the shift in language in the rules from "served" to "filing." The committee deferred a decision on the proposal and opted to reconsider

the proposal again, along with Rules 6(c) and 101. The committee invited Ms. Ciccarello to return to a future meeting.

Judge Blanch presented on the proposed change to Rule 7(q) on orders to show cause. He explained that, as a result of the prior change, attorneys are now filing orders to show cause on matters other than to enforce existing orders or for contempt for violation of an existing order. The committee was unanimously in support of the proposal. Judge Toomey moved to restore the proposed language to Rule 7(q) without an advisory committee note referencing the change; Mr. Davies seconded. The motion passed unanimously.

(6) ADJOURNMENT.

The remaining matters were deferred, and the committee adjourned at 6:00pm. The next meeting will be held on October 25, 2016 at 4:00pm at the Administrative Office of the Courts, Level 3.

Tab 2

Administrative Office of the Courts

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

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

MEMORANDUM

To: Civil Rules Committee
From: Nancy Sylvester
Date: October 20, 2016
Re: Rule 4

A concern was raised by attorney Zachary Myers about the sufficiency of notice in an eviction proceeding when a roommate is served, as opposed to the person subject to the eviction, in light of the 3-day time period for response. The committee will hear from both landlord representatives and tenant representatives on this issue.

Attached are two documents: 1) Mr. Myers's proposal, and 2) committee member Leslie Slaugh's proposal which came out of discussions at the last meeting. The primary difference between the two is that Mr. Myers's proposal has language that is specific to the landlord-tenant situation, and Mr. Slaugh's proposal is broader.

HEPWORTH MURRAY & ASSOCIATES
ATTORNEYS AT LAW

MICHAEL K. HEPWORTH, ESQ.
BENJAMIN L. LAWRENCE, ESQ.
JENNIFER K. ZELENY, ESQ.
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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

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).

Rule 4: Leslie Slaugh's Suggestion

Application. Shortened response times are commonly encountered in unlawful detainer actions, but there are several other statutes that contemplate a response time less than 21 days:

> Utah Code § 6-1-8. A challenge to a creditor's claim after an assignment for the benefit of creditors is served as a summons, but any response is due "not less than 10 nor more than 40 days" as stated in the notice of contest.
>
> Utah Code § 30-3-4.5. A motion for temporary separation order is served "with a 20-day summons, in accordance with the rules of civil procedure."
>
> Utah Code § 57-16-6(3)(c). Certain eviction proceedings for mobile home parks may be treated as unlawful detainer actions. "If unlawful detainer is charged, the court shall endorse on the summons the number of days within which the defendant is required to appear and defend the action, which shall not be less than five days or more than 20 days from the date of service."
>
> Utah Code § 78A-6-109(14). A juvenile court petition must be served "not less than 48 hours before the time set in the summons for the appearance of the person served." Although this is a juvenile court statute, the procedure is governed by the Utah Rules of Civil Procedure. Utah R. Juv. P. 2(a).
>
> Utah Code § 77-6-4. In a proceeding for removal of city or county officers by judicial proceedings, "The time fixed for appearance may not be less than 10 days from the date of service of summons. The service of the accusation, summons, and the return of service shall be made in the manner provided by law for service of civil process."
>
> Utah Code § 78A-6-506, proceedings for termination of parental rights, allows a hearing "no sooner than 10 days after service of summons is complete."
>
> Utah Code § 41-1a-113(3). In proceedings before the Motor Vehicle Division, a summons to compel witness testimony "shall be served at least five days before the return date."
>
> Utah Code § 57-22-6(5). In certain actions against the owner under the Utah Fit Premises Act, "the court shall endorse on the summons that the owner is required to appear and defend the action within three business days."

Comparison with federal rule. State rule 4(d)(1)(A) is substantively similar to federal rule 4(e)(2). The language and structure of the federal rule have been simplified.

> Fed. R. Civ. P. 4(e)(2): [Service may be accomplished by:]
> (2) doing any of the following:
> (A) delivering a copy of the summons and of the complaint to the individual personally;

(B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or

(C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

Current Utah R. Civ. P. 4(d)(1)(A): Personal service shall be made as follows:

(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;

Recommendation. I recommend we adopt the structure and most of the language of the federal rule. The concern with service on a co-dweller applies only to the middle clause of rule 4(d)(1)(A), but qualifying just that middle clause is awkward with the current structure.

Our rule 4(d)(1)(A) ends with a semicolon. The federal counterpart ends with a period. I recommend using periods throughout rule 4 at the end of each alternative type of service.

CLEAN

Upon any individual other than one covered by subparagraphs (B), (C) or (D) below, by doing any of the following:

i. delivering a copy of the summons and of the complaint to the individual personally;

ii. unless the time for response is less than 21 days, leaving a copy of each at the individual's dwelling or usual place of abode with some person of suitable age and discretion who resides there; or

iii. delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

REDLINE

Upon any individual other than one covered by subparagraphs (B), (C) or (D) below, by doing any of the following:

i. delivering a copy of the summons and of the complaint to the individual personally~~;, or~~

ii. unless the time for response is less than 21 days, ~~by~~ leaving a copy of each at the individual's dwelling ~~house~~ or usual place of abode with some person of suitable age and discretion who resides there ~~residing,~~; or

~~i.~~iii. ~~by~~ delivering a copy of each ~~the summons and the complaint~~ to an agent authorized by appointment or by law to receive service of process.

Rule 4. Process.

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

(b) Time of service. Unless the summons and complaint are accepted, a copy of the summons and complaint in an action commenced under Rule 3(a)(1) must be served no later than 120 days after the complaint is filed, unless the court orders a different period under Rule 6. If the summons and complaint are not timely served, the action against the unserved defendant may be dismissed without prejudice on motion of any party or on the court's own initiative.

(c) Contents of summons.

(c)(1) The summons must:

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

(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;

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

(c)(1)(E) notify the defendant that in case of failure to answer in writing, judgment by default will be entered against the defendant; 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 10 days after service.

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

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

(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 by publication, the summons must also briefly state the subject matter and the sum of money or other relief demanded, and that the complaint is on file with the court.

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

(d)(1) Personal service. The summons and complaint may be served by any person 18 years of age or older at the time of service and not a party to the action or a party's attorney. If the person to be served refuses to accept a copy of the summons and complaint, service is sufficient if the person serving them states the name of the process and offers to deliver them. Personal service must be made as follows:

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

(d)(1)(B) Upon a minor under 14 years old by delivering a copy of the summons and complaint to the minor and also to the 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 minor, or with whom the minor resides, or by whom the minor is employed;

(d)(1)(C) Upon an individual judicially declared to be incapacitated, of unsound mind, or incapable of conducting the individual's own affairs, by delivering a copy of the summons and complaint to the individual and to the guardian or conservator of the individual if one has been appointed; the individual's legal representative if one has been appointed, and, in the absence of a guardian, conservator, or legal representative, to the person, if any, who has care, custody, or control of the 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 complaint to the person who has the care, custody, or control of the individual, or to that person's designee or to the guardian or conservator of the individual if one has been appointed. The person to whom the summons and complaint are delivered must promptly deliver them to the individual;

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

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

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

(d)(1)(I) Upon an irrigation or drainage district, by delivering a copy of the summons and 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 by delivering a copy of the summons and complaint to the attorney general and any other person or agency required by statute to be served; and

(d)(1)(K) Upon a public board, commission or body by delivering a copy of the summons and 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)(4) Service in a foreign country. Service in a foreign country must be made as follows:

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

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

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

(d)(5) Other service.

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

(d)(5)(B) If the motion is granted, the court will order service of the complaint and summons by means reasonably calculated, under all the circumstances, to apprise the named parties of the action. The court's order must specify the content of the process to be served and the event upon which service is complete. Unless service is by publication, a copy of the court's order must be served with the process specified by the court.

(d)(5)(C) If the summons is required to be published, the court, upon the request of the party applying for service by other means, must designate a newspaper of general circulation in the county in which publication is required.

(e) Proof of service.

(e)(1)The person effecting service must file proof of service stating the date, place, and manner of service, including a copy of the summons. If service is made by a person other than by an attorney, sheriff, constable, United States Marshal, or by the sheriff’s, constable’s or marshal's deputy, the proof of service must be by affidavit or declaration under penalty of Utah Code Section 78B-5-705.

(e)(2) Proof of service in a foreign country 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)(4)(C), proof of service must include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court.

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

Advisory Committee Notes

Effective November 1, 2016

Tab 3

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: October 20, 2016
Re: Rule 15

The Supreme Court would like the committee to take another look at Rule 15, specifically a committee note, before it adopts the rule on November 1. The court revised the language in paragraph (c)(3) to provide greater clarity since the paragraph appeared to only provide for the substitution—not the addition—of a defendant in an amended pleading. As you'll recall, the committee decided to keep the federal language due to the body of case law explaining that the language "changes the party" includes adding a party. The Supreme Court changed the language to "the amendment adds a party, substitutes a party, or changes the name of the party against whom a claim is asserted…."

To convey that this change was not substantively different from the meaning in the federal rule, the Supreme Court requested an explanatory committee note. The one I've drafted for your review reads as follows:

> The 2016 amendments to Utah Rule of Civil Procedure 15(c) adopt the meaning and much of the language of Federal Rule 15(c) regarding the relation-back of an amended pleading when the amended pleading adds a new party. Although the Utah Supreme Court strives to maintain conformity with the federal rules where appropriate, paragraph (c)(3) differs slightly for purposes of clarity.

450 South State Street / P.O. Box 140241 / Salt Lake City, Utah 84114-0241 / Tel: 801-578-3808 / Fax: 801-578-3843 / email: nancyjs@utcourts.gov

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 adds a party, substitutes a party, or changes the name of the party 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.

Advisory Committee Notes

The 2016 amendments to Utah Rule of Civil Procedure 15(c) adopt the meaning and much of the language of Federal Rule 15(c) regarding the relation-back of an amended pleading when the amended pleading adds a new party. Although the Utah Supreme Court strives to maintain conformity with the federal rules where appropriate, paragraph (c)(3) differs slightly for purposes of clarity.

Tab 4

URCP 34

Posted by Nathan Whittaker

~~Rule 34:~~

~~Replace "shall" with "must" in lines 15, 16, 19, 20 (2x), 26, 31, and 32.~~

Posted by Clark Fetzer

~~Rule 34~~

~~In the following sentence of the proposed amendment to subparagraph (b)(2), there is no previous mention of "the search": "An objection that states the limits that have controlled the search qualifies as a statement that the items have been withheld."~~

Nancy's suggested edit:

An objection that states the limits that have controlled ~~the~~ a search for responsive items qualifies as a statement that the items have been withheld.

Posted by J. Bogart

I think the change in Rule 34 will be helpful. It should obviate the problem of having to confer to find out if objections make any difference to the production. Requiring specificity in the basis of objections may reduce discovery conflict and speed production.

URCP 35

Nancy's notes:

Most of the commenters opined that the 28-day period is too short and recommended a 60-day period instead. Many commenters thought one report was preferable to two. Commenters also discussed the difficulty in getting doctors to do Rule 35 exams, fairness to all sides, producing the video of the examination, specificity regarding to whom the report is disclosed, vagueness, work product privilege (separate exam), and we received a suggested edit from the Utah Defense Lawyers Association.

Posted by Michael Carter (r.e. specificity)

Rule 35 (b) Report.

The revised rule provides that "The party requesting the examination must disclose a detailed written report of the examiner, within 28 days after the examination, ..."

This language does not specify to whom (e.g. subject of the examination; opposing counsel; the court) the report is to be disclosed. It would seem appropriate in making these revisions, that this specificity is added.

Posted by Joseph J Joyce (r.e. time period and need for change)

The requirement that the Rule 35 physician produce a report within 28 days is not realistic in light of practical experience. The vast majority of physicians willing to perform such exams have full time practices and often use outside vendors to transcribe the report. Rarely is a physician able to produce the report within 30 days. 60 days would be preferred.

It also important to note the Rule 35 exam provides the defense with its only opportunity to medically challenge causation, treatment and prognosis. The rules continued implementations of requirements has placed a chilling effect on the number of physicians willing to perform Rule 35 exams. From the quibbling over semantics regarding the naming of the examination, to the recording of the examination and now to the time limit to produce the report, appears all directed in limiting the use of Rule 35 exams. Has the committee reviewed or experienced inequities in the current use of Rule 35 exams? In the personal injury arena, the plaintiff has potentially unlimited access to choosing his/her physician. The plaintiff may chose as may physicians as wanted. The defense in personal injury cases is now limited to a handful of physicians willing to perform the exams based primarily on the limitations imposed by the rules.

Is the committee aware that many plaintiffs are being instructed by their attorneys not to fill out any paper work requested by the Rule 35 examiner? Plaintiffs are also instructed not to give any oral history even though the exams are being recorded. If the court orders the exam, shouldn't the plaintiff be required to cooperate? Should that be addressed in the rule? Who is requesting the changes to be made and why? I try as many personal cases as anyone in the state and the current (and former) Rule 35 seems to work just fine. I doubt any of the district court judges who are trying the personal injury cases would disagree.

Bottom line, please reconsider enlarging the time to produce the report.

Posted by Jeffrey Eisenberg (r.e. only one report plus extension)

I respectfully disagree with the notion that most plaintiff attorneys are interfering with the defense Rule 35 exam. Some defense lawyers also use the Rule 35 process in ways I feel is unfair .However, I will not go into detail as that is not the issue presented for comment.

On the merits of the Rule change, I feel that whatever the time limit is for reports, it would be preferable to have only one report. My experience in over 30 years in practice leads me to believe that the proposed amendment to the rule to allow for a

second report to supplement the first will likely result in the first report being cursory and unhelpful. I believe it would be better (and simpler) to allow 28 days for the report , but allow defense counsel to seek an extension of up to 14 days upon motion and a declaration from the Rule 35 examiner explaining why more time is needed.

Posted by Julia Houser (r.e. producing the video of the examination)

There should be a requirement that the party videotaping the examination must produce a copy of an unedited copy of the video, and a corresponding 28-day time frame in which the party videotaping the examination is required to disclose a copy of the video. I have a current case in which opposing counsel has refused to produce the video and a motion to compel will be necessary. A provision in the rule addressing and clarifying this requirement will be very helpful to all parties in understanding the duty to produce the video.

Posted by Sade' Turner (r.e. time period)

The 28 day written report requirement is not practical or realistic as it relates to the proposed change to Rule 35. Rule 35 examinations now usually occurring during the end of fact discovery after the parties have obtained the medical records to avoid duplicate review of records and provide the examiner with all relevant information. The practical effect of this type of mandatory requirement is physicians, especially those who maintain an active medical practice, simply will no longer perform Rule 35 examinations. I struggle to see why such a short time frame is being proposed. If there is a time frame, a bare minimum of 60 days is essential.

To illustrate, I recently had an instance where a expert was going on vacation for 2.5 weeks after the examination. He was able to do the examination, but clearly there is no way he could have done the report within 28 days.

When comparing this to the 28 day requirement in Rule 26, that rule is seldom followed as it relates to depositions and it is challenging with respect to a report election. Thankfully I have had the good fortune to work with colleagues who for the most part are willing to reciprocate reasonable extensions with Rule 26. There are too many variables to put this type of a strict time frame for report production on Rule 35.

Posted by John P. Lowrance (r.e. only one report plus extension)

The biggest issue with former URCP Rule 35 is that it clearly indicated that a report had to be generated and be provided to the party being examined, but was silent as to when said report had to be provided. This caused gamesmanship and strategic calendaring to not have to provide the report until a party designated its experts. 28 days seems appropriate to encourage prompt turn around on these reports. If

circumstances require an extension, the parties are able to typically work this out without court involvement.

The right to this report is due to the highly invasive nature of a forced physical examination of a party and personal privacy rights. Many on the defense bar would argue that the plaintiff foregoes those rights when filing an action for personal injury, but a thorough review of our nation's case law and a simple read of our constitution on this subject defeat these arguments handily.

My biggest complaint regarding the current proposed rule is this new concept that allows one report to be provided and then a second "clean up" report be written at the time expert designations are required, if a report is elected in lieu of a deposition. The proposed rule suggests that the initial report should include the "type of content and observations that would be included in a medical record generated by a competent medical professional following an examination of a patient", however this cannot be accomplished due to the very fact that a doctor/patient relationship isn't formed in a URCP Rule 35 exam. In fact, all Rule 35 examiners clearly state that no doctor/patient relationship has been formed. Because the same doctor/patient relationship doesn't exist, and therefore the same concerns aren't in play, it is a fiction to purport to require the same from a Rule 35 examiner.

The initial report should be final report, absent addendum reports, at the time of expert designations. There is no need for a Rule 35 examiner to be able to write a second "clean up" report.

As written, it appears that someone on the defense bar closely linked with the insurance industry has added some very favorable pro-insurance/pro-defense language to URCP Rule 35. If this proposal stemmed from recommendations from a defense attorney, sitting on the rules committee, who is in-house counsel for a major insurance company, I would request that the rules committee more fully analyze this major change from former URCP Rule 35.

Once again, the only issue that needed to be addressed in URCP Rule 35 was the timing of when the report needed to be produced.

Posted by Kathryn Tunacik Smith (r.e. time period and only one report)

I agree with Ms. Turner and Mr. Joyce that a 28 day deadline for the disclosure of the report is unworkable for many physicians and will result in further limiting of physicians willing to do the reports. I also think that the creation of two different reports will be problematic and will likely result in disputes over whether the second report inappropriately adds information that should have been disclosed in the initial report. I think one report is preferable and a 60 day deadline is more workable.

Posted by Larry White (r.e. time period)

Rule 35 – The 28 day deadline for providing a written report from an examining physician is not realistic. I agree that 60 days is a more reasonable time based on my experience which is longer than I want to put in writing.

Posted by Richard Glauser (r.e. time period)

I too think the 28 day requirement for a rule 35 report is a bad idea. It is tough to find physicians willing to get involved in the legal arena and this is just one more headache they have to deal with. It seems this is a very harsh fix to a non-existent problem. The IME reports are almost always given before experts are disclosed and disclosed again when complying with rule 26 which triggers the demand for a deposition if desired. The new requirement just creates one more trap for attorneys and Doctors.

Posted by BR Burbidge (r.e. time period and work product privilege)

The time for the filing of the report is too short. In addition, a problem encountered is that the plaintiff will have an exam done often after the initiation of litigation and defense counsel has no want of knowing it has been done, (work product privilege). There are no similar requirements placed on the plaintiff for an expert exam.

Posted by mark@ethingtonlaw.com (r.e. vagueness and only one report)

In the Comments it says that the doctor, in his first report, only has to give what would what would normally be found in a medical record until after the election. What is normal is pretty vague and subjective, although I would have to say that most medical records are very short and brief, and really don't say much. this may make it difficult to make an informed election. In addition, seeing as one of the main purposes of the new Rule 26 was to do away with unnecessary discovery, it would seem that the more detailed the first report is, the greater likelihood that counsel will simply elect not to do any further discovery at all. However, with the way the comments are written, it only encourages additional discovery.

Posted by Mike Walk (r.e. time period and fairness to defense)

Establishing a requirement of 28 days after an examination shifts the burden of proof between the parties. The report should be required to be produced when an election for a report is made or at the earliest at the Rule 26 expert disclosure. Although plaintiff generally has the burden of proof, (burden to prove injuries and that they are causally related to the event claimed) this will require defendant to complete their discovery and disclose their evidence before plaintiff has disclosed their evidence to establish a prima facie case. So, rather than defendant defending claims established by plaintiff's evidence, defendant will be required to affirmatively assert defenses that may or may not be needed in a particular case. Plaintiff has up to 4 years to prepare their case and obtain evidence to prove their case but leave defendant with months to mount a defense.

Retained medical experts on both sides should be treated equal, there is not a justifiable reason to treat physicians, hired by a defendant, as a different category. Retained physicians experts hired by plaintiffs should also be required to produce the same report at the designated time so that both parties are on a level-playing field, rather than giving the plaintiff's side another tactical advantage. Plaintiff's already have a built in advantage as they can doctor shop until they find a physician who gives an opinion favorable to their case. Defendant is generally only allowed one physician in each area of expertise.

Allowing plaintiff to obtain both a report and a deposition of an IME doctor is contrary to the stated goals of the 2011 amendments, namely reducing cost. If you allow both the report and the deposition, you have either increased the cost of litigation to the parties or eliminated the stated goal.

Posted by Utah Defense Lawyers Association (r.e. suggested edit, time period, specificity)

It is the opinion of the Utah Defense Lawyers Association that the changes to Rule 35 should read as follows:

UDLA Rule 35 Revision:

(b) Report. The party requesting the examination must disclose a detailed written **encounter note** of the examiner t**o be produced no later than 60 days** after the examination setting out the examiner's findings, including results of all tests performed **at the Rule 35 examination, general findings from the Rule 35 examination**, and other matters that would routinely be included in an examination record generated by a medical professional. If the party requesting the examination wishes to call the examiner as an expert witness, the party must disclose the examiner as an expert in the time and manner as required by Rule 26(a)(4).

There is also a redline strike through version for those who would like a copy.

Compare comment version:

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

Posted by Grace Acosta (r.e. time period)

28 days to produce a report is unrealistic. I often times do not get the report from the doctor for up to 60 days. I would propose that the person requesting the examination should produce the report to the other side within 28 days of receipt of the report from the doctor. That would push the case along but also recognize the reality that doctors are outside vendors who do this in addition to their practice. If we continue to put restrictions on doctors then we run the risk of further reducing the number of doctors willing to even conduct the examination. This forces defense counsel to find doctors outside Utah–only further increasing costs.

Posted by Todd A. Turnblom (r.e. time period)

As many others have said, a 28 day from the exam deadline is not practical. However much we as attorneys would like to insist doctors meet our deadlines, the realities of their practice mean this is a deadline that would be seldom met. I expect 28 days is a deadline that will either be routinely stipulated around or ignored, or will simply operate to deprive defendants of a medical expert. A longer deadline of 60 is more realistic. Requiring a shorter report that only contains exam findings helps to alleviate the problem and makes this more consistent with expert disclosures, but doesn't help overall, as it will simply add another thing the doctor will have to comply with and creates more costs as they have to repeatedly look at the case.

In a more general sense, we often hear the claim that "real" practicing doctors are the ones would make the best expert, and decrying "professional" experts, a sentiment most attorney who retain doctors for these exams agree with. However, a real practicing doctor has to see normal patients regularly and frequently during the day to keep their business afloat. Rule 35 exams require the doctor to do a comprehensive exam, review records from other providers, often very voluminous records, as well as depositions and other discovery. Juggling this with a normal practice means it will take more time than attorneys wishing to shorten time would like. The changes that have been made to Rule 35 and the discovery rules in general have already made it more difficulty to get a medical doctor to do Rule 35 exams. Costs for these exams have increased as we are compelled to do the exams earlier and often requires in multiple addenda to reports as discovery is completed and new records arrive. Adding a short deadline to a process that already aggravates doctors will only drive more away from providing expert assistance. I think that our justice system would be better served by reaching out to the medical profession and working out ways to get more cooperation from other professionals, than to simply demand a shortened deadline.

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

(a) Scope.

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

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

(b) Procedure and limitations.

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

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

(c) Form of documents and electronically stored information.

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

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

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

Advisory Committee Notes

The 2016 amendments to paragraph (b)(2) adopt 1) the specificity requirement in the 2015 amendments to Federal Rule of Civil Procedure 34(b)(2)(B), 2) a portion of Federal Rule 34(b)(2)(C) dealing with the basis for an objection to production, and 3) some clarifying language from the federal note.

Rule 35. Physical and mental examination of persons.

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

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

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

Advisory Committee Notes

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

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

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

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

The former requirement of Rule 35(c) providing for the production of prior reports on other examinees by the examiner was a source of great confusion and controversy. It is the ~~C~~committee's view that this provision is better eliminated, and in the amended rule there is no longer an automatic requirement for the

production of prior reports of other examinations. ~~Medical examiners will be treated as other expert witnesses are treated, with the required disclosure under Rule 26 and the option of a report or a deposition.~~

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

Tab 5

Administrative Office of the Courts

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

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

MEMORANDUM

To: Civil Rules Committee
From: Nancy Sylvester
Date: October 20, 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.

Following our last meeting, Paul Stancil asked me to look into case law on "the inherent power of the court" to sanction parties (this language is found in paragraph (e)). Paul said that it is worthwhile to look at the interplay between the court's inherent power and the proposed language in paragraph (e)(1). Attached is a memo my extern, Randall Morris, prepared with this research.

450 South State Street / P.O. Box 140241 / Salt Lake City, Utah 84114-0241 / Tel: 801-578-3808 / Fax: 801-578-3843 / email: nancyjs@utcourts.gov

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: Nancy Sylvester
From: Randy Morris
Date: September 30, 2016
Re: Rule 37(e) and "inherent power"

The Utah Supreme Court in *Goggin* strongly suggested that courts have the inherent power to sanction both attorneys and parties. "It is well established that courts have inherent powers to sanction attorneys. And although we have never held that courts possess a similar inherent power to sanction parties, we have suggested that such a power may exist. Specifically, in upholding a court's award of attorney fees as a sanction for an *attorney's* bad behavior, we noted that 'such awards are within the inherent powers of the court and are in fact imposed regularly as a means of controlling the conduct of attorneys *and litigants.*' Additionally, the Utah Court of Appeals has expressly held that, under the court's inherent sanction power, courts may properly award attorney fees that were caused by the opposing *party's* misbehavior." *Goggin v. Goggin*, 2013 UT 16, ¶ 35. If the inherent sanction power of courts extends to parties, then it exists independent of any statutory grant of authority. *See Maxwell v. Woodall*, 2014 UT App 125, ¶ 6. Based on Justice Durham's opinion in *Goggin* and other considerations, I believe the sanction powers of courts *does* extend to parties that don't properly preserve electronically stored information.

Doctrine of Unclean Hands

"The doctrine of unclean hands expresses the principle that 'a party [who] comes into equity for relief ... must show that his ... conduct has been fair, equitable, and honest as to the particular controversy in issue.' In other words, a party will not be permitted to take advantage of his own wrongdoing or claim the benefit of his own fraud." *Goggin v. Goggin*, 2013 UT 16, ¶ 60. This is exactly the principle being incorporated into Rule 37(e). Rule 37(e)(1)(A) – (C) only applies to "electronically stored information that should have been preserved in the anticipation or conduct of litigation." When a party fails to follow basic discovery rules, putting the opposing party at a disadvantage, that party should not benefit from their own wrongdoing. Rule 37(e)(1)(B)(1) – (3) allows the court to correct the effects of such misconduct by removing the advantage gained by the wrongdoing party.

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Statutory Grant of Sanction Powers

"Every court has authority to:
…
(3) provide for the orderly conduct of proceedings before it or its officers;
(4) compel obedience to its judgments, orders, and process, and to the orders of a judge out of court, in a pending action or proceeding;
(5) control in furtherance of justice the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it in every matter;" Utah Code Ann. § 78A-2-201. The court has authority granted by statute to control the proceedings before it and maintain order. This authority would be meaningless without an enforcement mechanism. *See Barnard v. Wassermann*, 855 P.2d 243, 249 (Utah 1993). Allowing for the mishandling or destruction of electronically stored information without balancing it with a remedy would make 78A-2-201 meaningless. Rule 37(e)(1)(B)(1) – (3) provides a remedy that allows the court to maintain order in the proceedings before it.

Discovery Sanctions Currently – Rule 37

Currently, courts "are given broad discretion regarding the imposition of discovery sanctions." *Darrington v. Wade*, 812 P.2d 452, 457 (Utah.Ct.App.1991). Case law allows for discovery sanctions under Rule 37 when a court finds "willfulness, bad faith, or fault" in the non-complying party. *See Morton v. Cont'l Baking Co.*, 938 P.2d 271, 274 (Utah 1997). Rule 37(e)(1)(A) continues to give the courts broad discretion. The only limitation is that the measures taken must be "no greater than necessary to cure the prejudice." When the court finds that the noncompliant party acted with intent, it allows for three extreme measures: (1) a presumption that the lost information was unfavorable to the party, (2) instructions to the jury to presume that the lost information was unfavorable to the party, (3) dismissing the action or entering a default judgment. The third remedy, dismissing the action, has been found to be within the courts' discretion under the current language of Rule 37. *See Morton v. Cont'l Baking Co.*, 938 P.2d 271, 274 (Utah 1997). In the context of sanctions for destruction of electronic data, the court has also held that a default judgment was appropriate following the destruction of a laptop, even without a finding that the destruction was willful. *Daynight, LLC v. Mobilight, Inc.*, 248 P.3d 1010. Given the broad discretion granted to the courts under the current language of Rule 37, all the remedies provided in Rule 37(e)(1)(B)(1) – (3) should be available under current law, especially since Rule 37(e)(1) & (2) are less drastic than dismissal of the case.

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

(a) Statement of discovery issues.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(e) Failure to preserve evidence. Except as provided in paragraph (e)(1), ~~N~~nothing in this rule limits the inherent power of the court to take any action authorized by paragraph (b) if a party destroys, conceals, alters, tampers with or fails to preserve a document, tangible item, ~~electronic data~~ or other evidence in violation of a duty.

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

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

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

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

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

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

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

Advisory Committee Notes

New note (add to Advisory Committee Notes):

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

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

Federal Rules of Civil Procedure Rule 37

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

Currentness

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) Failure to Comply with a Court Order.

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

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

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

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

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

(iii) striking pleadings in whole or in part;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CREDIT(S)

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

ADVISORY COMMITTEE NOTES

1937 Adoption

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

1948 Amendment

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

1970 Amendment

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1980 Amendment

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

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

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

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

1987 Amendment

The amendments are technical. No substantive change is intended.

1993 Amendment

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2000 Amendment

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

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

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

GAP Report

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

2006 Amendment

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

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

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

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

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

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

2007 Amendment

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

2013 Amendment

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

Changes Made After Publication and Comment

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

2015 Amendment

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Notes of Decisions (2801)

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

End of Document

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: October 20, 2016
Re: Tier 2 vs. Tier 3 and pleading up

Frank Carney raised a discussion point with Jonathan Hafen about a decision that Judge Kara Petit recently issued. The plaintiff pleaded his case as a Tier 2, got a $641,000 verdict, and then wanted to amend up (after verdict) to make it Tier 3. Judge Petit followed what the rules committee thought was the proper outcome in such a situation and denied the motion.

Jonathan asked that I bring this issue to you for discussion.

450 South State Street / P.O. Box 140241 / Salt Lake City, Utah 84114-0241 / Tel: 801-578-3808 / Fax: 801-578-3843 / email: nancyjs@utcourts.gov

Rule 26. General provisions governing disclosure and discovery.

(a) Disclosure. This rule applies unless changed or supplemented by a rule governing disclosure and discovery in a practice area.

(a)(1) Initial disclosures. Except in cases exempt under paragraph (a)(3), a party shall, without waiting for a discovery request, serve on the other parties:

(a)(1)(A) the name and, if known, the address and telephone number of:

(a)(1)(A)(i) each individual likely to have discoverable information supporting its claims or defenses, unless solely for impeachment, identifying the subjects of the information; and

(a)(1)(A)(ii) each fact witness the party may call in its case-in-chief and, except for an adverse party, a summary of the expected testimony;

(a)(1)(B) a copy of all documents, data compilations, electronically stored information, and tangible things in the possession or control of the party that the party may offer in its case-in-chief, except charts, summaries and demonstrative exhibits that have not yet been prepared and must be disclosed in accordance with paragraph (a)(5);

(a)(1)(C) a computation of any damages claimed and a copy of all discoverable documents or evidentiary material on which such computation is based, including materials about the nature and extent of injuries suffered;

(a)(1)(D) a copy of any agreement under which any person may be liable to satisfy part or all of a judgment or to indemnify or reimburse for payments made to satisfy the judgment; and

(a)(1)(E) a copy of all documents to which a party refers in its pleadings.

(a)(2) Timing of initial disclosures. The disclosures required by paragraph (a)(1) shall be served on the other parties:

(a)(2)(A) by the plaintiff within 14 days after filing of the first answer to the complaint; and

(a)(2)(B) by the defendant within 42 days after filing of the first answer to the complaint or within 28 days after that defendant's appearance, whichever is later.

(a)(3) Exemptions.

(a)(3)(A) Unless otherwise ordered by the court or agreed to by the parties, the requirements of paragraph (a)(1) do not apply to actions:

(a)(3)(A)(i) for judicial review of adjudicative proceedings or rule making proceedings of an administrative agency;

(a)(3)(A)(ii) governed by Rule 65B or Rule 65C;

(a)(3)(A)(iii) to enforce an arbitration award;

(a)(3)(A)(iv) for water rights general adjudication under Title 73, Chapter 4, Determination of Water Rights.

(a)(3)(B) In an exempt action, the matters subject to disclosure under paragraph (a)(1) are subject to discovery under paragraph (b).

(a)(4) Expert testimony.

(a)(4)(A) Disclosure of expert testimony. A party shall, without waiting for a discovery request, serve on the other parties the following information regarding any person who may be used at trial to present evidence under Rule 702 of the Utah Rules of Evidence and who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony: (i) the expert's name and qualifications, including a list of all publications authored within the preceding 10 years, and a list of any other cases in which the expert has testified as an expert at trial or by deposition within the preceding four years, (ii) a brief summary of the opinions to which the witness is expected to testify, (iii) all data and other information that will be relied upon by the witness in forming those opinions, and (iv) the compensation to be paid for the witness's study and testimony.

(a)(4)(B) Limits on expert discovery. Further discovery may be obtained from an expert witness either by deposition or by written report. A deposition shall not exceed four hours and the party taking the deposition shall pay the expert's reasonable hourly fees for attendance at the deposition. A report shall be signed by the expert and shall contain a complete statement of all opinions the expert will offer at trial and the basis and reasons for them. Such an expert may not testify in a party's case-in-chief concerning any matter not fairly disclosed in the report. The party offering the expert shall pay the costs for the report.

(a)(4)(C) Timing for expert discovery.

(a)(4)(C)(i) The party who bears the burden of proof on the issue for which expert testimony is offered shall serve on the other parties the information required by paragraph (a)(4)(A) within seven days after the close of fact discovery. Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within 28 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted.

(a)(4)(C)(ii) The party who does not bear the burden of proof on the issue for which expert testimony is offered shall serve on the other parties the information required by paragraph (a)(4)(A) within seven days after the later of (A) the date on which the election under paragraph (a)(4)(C)(i) is due, or (B) receipt of the written report or the taking of the expert's deposition pursuant to paragraph (a)(4)(C)(i). Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within 28 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted.

(a)(4)(C)(iii) If the party who bears the burden of proof on an issue wants to designate rebuttal expert witnesses it shall serve on the other parties the information required by paragraph (a)(4)(A) within seven days after the later of (A) the date on which the election under paragraph (a)(4)(C)(ii) is due, or (B) receipt of the written report or the taking of the expert's deposition pursuant to paragraph (a)(4)(C)(ii). Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within 28 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted.

(a)(4)(D) Multiparty actions. In multiparty actions, all parties opposing the expert must agree on either a report or a deposition. If all parties opposing the expert do not agree, then further discovery of the expert may be obtained only by deposition pursuant to paragraph (a)(4)(B) and Rule 30.

(a)(4)(E) Summary of non-retained expert testimony. If a party intends to present evidence at trial under Rule 702 of the Utah Rules of Evidence from any person other than an expert witness who is retained or specially employed to provide testimony in the case or a person whose duties as an employee of the party regularly involve giving expert testimony, that party must serve on the other parties a written summary of the facts and opinions to which the witness is expected to testify in accordance with the deadlines set forth in paragraph (a)(4)(C). A deposition of such a witness may not exceed four hours.

(a)(5) Pretrial disclosures.

(a)(5)(A) A party shall, without waiting for a discovery request, serve on the other parties:

(a)(5)(A)(i) the name and, if not previously provided, the address and telephone number of each witness, unless solely for impeachment, separately identifying witnesses the party will call and witnesses the party may call;

(a)(5)(A)(ii) the name of witnesses whose testimony is expected to be presented by transcript of a deposition and a copy of the transcript with the proposed testimony designated; and

(a)(5)(A)(iii) a copy of each exhibit, including charts, summaries and demonstrative exhibits, unless solely for impeachment, separately identifying those which the party will offer and those which the party may offer.

(a)(5)(B) Disclosure required by paragraph (a)(5) shall be served on the other parties at least 28 days before trial. At least 14 days before trial, a party shall serve and file counter designations of deposition testimony, objections and grounds for the objections to the use of a deposition and to the admissibility of exhibits. Other than objections under Rules 402 and 403 of the Utah Rules of Evidence, objections not listed are waived unless excused by the court for good cause.

(b) Discovery scope.

(b)(1) In general. Parties may discover any matter, not privileged, which is relevant to the claim or defense of any party if the discovery satisfies the standards of proportionality set forth below. Privileged matters that are not discoverable or admissible in any proceeding of any kind or character include all information in any form provided during and created specifically as part of a request for an investigation, the investigation, findings, or conclusions of peer review, care review, or quality assurance processes of any organization of health care providers as defined in the Utah Health Care Malpractice Act for the purpose of evaluating care provided to reduce morbidity and mortality or to improve

the quality of medical care, or for the purpose of peer review of the ethics, competence, or professional conduct of any health care provider.

(b)(2) Proportionality. Discovery and discovery requests are proportional if:

(b)(2)(A) the discovery is reasonable, considering the needs of the case, the amount in controversy, the complexity of the case, the parties' resources, the importance of the issues, and the importance of the discovery in resolving the issues;

(b)(2)(B) the likely benefits of the proposed discovery outweigh the burden or expense;

(b)(2)(C) the discovery is consistent with the overall case management and will further the just, speedy and inexpensive determination of the case;

(b)(2)(D) the discovery is not unreasonably cumulative or duplicative;

(b)(2)(E) the information cannot be obtained from another source that is more convenient, less burdensome or less expensive; and

(b)(2)(F) the party seeking discovery has not had sufficient opportunity to obtain the information by discovery or otherwise, taking into account the parties' relative access to the information.

(b)(3) Burden. The party seeking discovery always has the burden of showing proportionality and relevance. To ensure proportionality, the court may enter orders under Rule 37.

(b)(4) Electronically stored information. A party claiming that electronically stored information is not reasonably accessible because of undue burden or cost shall describe the source of the electronically stored information, the nature and extent of the burden, the nature of the information not provided, and any other information that will enable other parties to evaluate the claim.

(b)(5) Trial preparation materials. A party may obtain otherwise discoverable documents and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials and that the party is unable without undue hardship to obtain substantially equivalent materials by other means. In ordering discovery of such materials, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.

(b)(6) Statement previously made about the action. A party may obtain without the showing required in paragraph (b)(5) a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement about the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order under Rule 37. A statement previously made is (A) a written statement signed or approved by the person making it, or (B) a stenographic, mechanical, electronic, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(b)(7) Trial preparation; experts.

(b)(7)(A) Trial-preparation protection for draft reports or disclosures. Paragraph (b)(5) protects drafts of any report or disclosure required under paragraph (a)(4), regardless of the form in which the draft is recorded.

(b)(7)(B) Trial-preparation protection for communications between a party's attorney and expert witnesses. Paragraph (b)(5) protects communications between the party's attorney and any witness required to provide disclosures under paragraph (a)(4), regardless of the form of the communications, except to the extent that the communications:

(b)(7)(B)(i) relate to compensation for the expert's study or testimony;

(b)(7)(B)(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(b)(7)(B)(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(b)(7)(C) Expert employed only for trial preparation. Ordinarily, a party may not, by interrogatories or otherwise, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. A party may do so only:

(b)(7)(C)(i) as provided in Rule 35(b); or

(b)(7)(C)(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(b)(8) Claims of privilege or protection of trial preparation materials.

(b)(8)(A) Information withheld. If a party withholds discoverable information by claiming that it is privileged or prepared in anticipation of litigation or for trial, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced in a manner that, without revealing the information itself, will enable other parties to evaluate the claim.

(b)(8)(B) Information produced. If a party produces information that the party claims is privileged or prepared in anticipation of litigation or for trial, the producing party may notify any receiving party of the claim and the basis for it. After being notified, a receiving party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

(c) Methods, sequence and timing of discovery; tiers; limits on standard discovery; extraordinary discovery.

(c)(1) Methods of discovery. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; requests for admission; and subpoenas other than for a court hearing or trial.

(c)(2) Sequence and timing of discovery. Methods of discovery may be used in any sequence, and the fact that a party is conducting discovery shall not delay any other party's discovery. Except for cases exempt under paragraph (a)(3), a party may not seek discovery from any source before that party's initial disclosure obligations are satisfied.

(c)(3) Definition of tiers for standard discovery. Actions claiming $50,000 or less in damages are permitted standard discovery as described for Tier 1. Actions claiming more than $50,000 and less than $300,000 in damages are permitted standard discovery as described for Tier 2. Actions claiming $300,000 or more in damages are permitted standard discovery as described for Tier 3. Absent an accompanying damage claim for more than $300,000, actions claiming non-monetary relief are permitted standard discovery as described for Tier 2.

(c)(4) Definition of damages. For purposes of determining standard discovery, the amount of damages includes the total of all monetary damages sought (without duplication for alternative theories) by all parties in all claims for relief in the original pleadings.

(c)(5) Limits on standard fact discovery. Standard fact discovery per side (plaintiffs collectively, defendants collectively, and third-party defendants collectively) in each tier is as follows. The days to complete standard fact discovery are calculated from the date the first defendant's first disclosure is due and do not include expert discovery under paragraphs(a)(4)(C) and (D).

Tier	Amount of Damages	Total Fact Deposition Hours	Rule 33 Interrogatories including all discrete subparts	Rule 34 Requests for Production	Rule 36 Requests for Admission	Days to Complete Standard Fact Discovery
1	$50,000 or less	3	0	5	5	120
2	More than $50,000 and less than $300,000 or non-monetary relief	15	10	10	10	180
3	$300,000 or more	30	20	20	20	210

(c)(6) Extraordinary discovery. To obtain discovery beyond the limits established in paragraph (c)(5), a party shall file:

(c)(6)(A) before the close of standard discovery and after reaching the limits of standard discovery imposed by these rules, a stipulated statement that extraordinary discovery is necessary and proportional under paragraph (b)(2) and that each party has reviewed and approved a discovery budget; or

(c)(6)(B) before the close of standard discovery and after reaching the limits of standard discovery imposed by these rules, a request for extraordinary discovery under Rule 37(a).

(d) Requirements for disclosure or response; disclosure or response by an organization; failure to disclose; initial and supplemental disclosures and responses.

(d)(1) A party shall make disclosures and responses to discovery based on the information then known or reasonably available to the party.

(d)(2) If the party providing disclosure or responding to discovery is a corporation, partnership, association, or governmental agency, the party shall act through one or more officers, directors, managing agents, or other persons, who shall make disclosures and responses to discovery based on the information then known or reasonably available to the party.

(d)(3) A party is not excused from making disclosures or responses because the party has not completed investigating the case or because the party challenges the sufficiency of another party's disclosures or responses or because another party has not made disclosures or responses.

(d)(4) If a party fails to disclose or to supplement timely a disclosure or response to discovery, that party may not use the undisclosed witness, document or material at any hearing or trial unless the failure is harmless or the party shows good cause for the failure.

(d)(5) If a party learns that a disclosure or response is incomplete or incorrect in some important way, the party must timely serve on the other parties the additional or correct information if it has not been made known to the other parties. The supplemental disclosure or response must state why the additional or correct information was not previously provided.

(e) Signing discovery requests, responses, and objections. Every disclosure, request for discovery, response to a request for discovery and objection to a request for discovery shall be in writing and signed by at least one attorney of record or by the party if the party is not represented. The signature of the attorney or party is a certification under Rule 11. If a request or response is not signed, the receiving party does not need to take any action with respect to it. If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, may take any action authorized by Rule 11 or Rule 37(b).

(f) Filing. Except as required by these rules or ordered by the court, a party shall not file with the court a disclosure, a request for discovery or a response to a request for discovery, but shall file only the certificate of service stating that the disclosure, request for discovery or response has been served on the other parties and the date of service.

Advisory Committee Notes

Legislative Note