Agenda

Advisory Committee on Rules of Civil Procedure

January 25, 2017

4:00 to 6:00 p.m.

Scott M. Matheson Courthouse

450 South State Street

Judicial Council Room

Administrative Office of the Courts, Suite N31

Welcome and approval of minutes	Tab 1	Jonathan Hafen
Comments to rules 7, 65C, 35	Tab 2	Nancy Sylvester
FRCP Rule 37(e). Failure to Preserve ESI	Tab 3	Paul Stancil, Judge Stone, Judge Pullan
Rules 7 and 101: filed vs. served and pro se litigants	Tab 4	Nancy Sylvester

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

Meeting Schedule:

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 – November 16, 2016

PRESENT: Jonathan Hafen, John Baxter, Paul Stancil, Amber Mettler, Judge Kate Toomey, Judge Andrew Stone, James Hunnicutt, Rod Andreason, Dawn Hautamaki, Leslie Slaugh, Terri McIntosh, Kent Holmberg, Trystan Smith, Judge James Blanch

TELEPHONE: Derek Pullan

ABSENT: Lincoln Davies, Romaine Marshall, Barbara Townsend, Heather Sneddon

STAFF: Nancy Sylvester, Lauren Hosler

GUESTS: Linda Jones

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(1) WELCOME, APPROVAL OF MINUTES, REPORT FROM MEETING WITH UTAH SUPREME COURT

Chair Jonathan Hafen welcomed the committee and guests, and presented a summary of his last meeting with the Utah Supreme Court.

Judge Toomey moved to approve the minutes from the October 16, 2016 meeting, as amended; James Hunnicutt seconded. The motion was approved unanimously.

(2) RULE 5. INMATE MAILBOX RULE

Linda Jones presented on the proposed inmate mailbox rule. Ms. Jones explained the history and origin of the proposed amendment's Utah Rule of Appellate Procedure ("URAP") corollary—URAP 21(f). The proposed amendment and URAP 21(f) are premised on the fact that inmates do not have control over the time period between when a document is placed in the prison mail system and when the document is actually mailed. Mailing can be lengthy due to necessary screening procedures and inmates also do not have regular access to phone or internet to check the filing status of documents. Ms. Jones explained that URAP 21(f) was adopted in approximately 1997 in response to *State v. Parker*, 936 P.2d 1118 (Utah App. Ct. 1997). Ms. Jones noted that the United States Supreme Court has interpreted FRAP 4(a)(1) in a manner that is consistent with URAP 21(f) and the proposed amendment. *See Houston v. Lack*, 487 U.S. 266 (1988). Ms. Jones further noted that because URAP requires parties to also follow the Utah Rules of Civil Procedure, the proposed amendment furthers the goal of consistency between the appellate and district court rules of procedure.

Judge Blanch spoke about his recommendation that the proposed amendment be adopted within URCP 5 (Service and filing of pleadings and other papers), and that he sees no reason why the proposed amendment should not be adopted.

The Committee discussed the proposed amendment, including whether the proposed amendment necessitated additional time to respond to any filings made subject to the proposed rule and whether the proposed amendment should be moved to any existing paragraphs within Rule 5. Ultimately, the Committee reached a consensus that the proposed amendment be modified as follows and be added to the end of Rule 5 as a new subparagraph (g):

> **(g) Filing by inmate.** Pleadings and papers filed by an inmate confined in an institution are timely if they are deposited in the institution's internal mail system on or before the last day for filing. Timely deposit may be shown by a notarized statement or written declaration setting forth the date of deposit and stating that first-class postage has been prepaid. Response time will be calculated from the date the papers are received by the court.

Judge Toomey moved to approve the amendment as proposed above and send the proposed amendment out for public comment; Kent Holmberg seconded the motion. The Committee approved the motion unanimously.

(3) RULE 84. FORMS. (REPEAL)

Nancy Sylvester presented on the Utah Supreme Court's recommendation that the Committee consider repealing Rule 84 in light of the Management Committee of the Utah Judicial Council's recent decision to create a standing committee on court forms. Additionally, Ms. Sylvester noted that the current language of Rule 84 is problematic because the forms were never reviewed by the Utah Supreme Court for sufficiency.

The Committee discussed timing issues surrounding the proposed repeal of Rule 84. Leslie Slaugh noted that Rule 45 also refers to "court approved" forms, and added that repeal of Rule 84 without explanation about the new standing committee could create confusion among practitioners. Ms. Sylvester said she anticipated that both the new forms standing committee rule and Rule 84 would circulate for comment simultaneously.

The Committee reached a consensus to repeal Rules 84. Mr. Slaugh moved to adopt the proposal and send it out for public comment; Judge Toomey seconded. The motion passed unanimously.

Mr. Slaugh also moved to amend Rule 45 to replace "court approved subpoena form" with "approved subpoena form;" Judge Stone seconded the motion. The Committee unanimously approved the motion.

(4) FRCP Rule 37(e). Failure to Preserve ESI.

Paul Stancil and Judge Pullan presented on the proposed amendment to Rule 37(e), which was prompted by the recent changes to FRCP 37(e). The federal rule changes limit the sanctions available to the court in connection with a party's failure to preserve Electronically Stored Information ("ESI"). "Death penalty" sanctions (adverse inference instructions/presumptions or dismissal or default judgment) are no longer permitted for failure to preserve ESI absent a finding of "intent to deprive another party of the information's use in the litigation." Judge Pullan explained the issue is one of inherent authority of the courts. The Committee then discussed the interplay between judges' inherent authority, automated destruction of ESI and document retention policies, the steps required to destroy paper documents.

Judge Blanch reminded the committee of the guiding principal of consistency, which includes that the state rules be consistent with the federal rules. Judge Pullan read from the Committee note on the recent amendment to FRCP 37:

> 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.

The Committee further discussed issues of lawyers arguing to a jury about missing documents and whether/how the proposed rule would impact a judge's ability to give curative jury instructions under those circumstances. Judge Stone reiterated his belief that judges should not be restricted from instructing the factfinder that it "may" consider certain missing evidence. The committee discussed a variety of jury instructions that could be given under these circumstances. Judge Stone also raised the issue of difficulty proving intentional destruction. The Committee discussed whether you can infer intent from a preponderance of the evidence or whether it requires clear and convincing evidence.

Judge Pullan reiterated the importance of keeping the state rules close to the federal rules. He noted that case law develops very quickly in the federal courts on discovery issues, in stark contrast to Utah appellate authority on discovery issues, citing proportionality decisions as an example.

Mr. Hafen noted that the committee has always been reluctant to remove or limit judicial discretion in the rules, and suggested that Mr. Stancil further revise the proposal to better preserve judicial discretion and that the Committee revisit the proposal at a later date.

(5) Rule 60. *Logue v. Court of Appeals*, 2016 UT 44; discussion only.

Ms. Sylvester presented the issue, which is one of the interplay among the criminal, civil and appellate rules of civil procedure that results in litigants being precluded from raising potentially meritorious claims. Mr. Hafen and Ms. Sylvester have a meeting scheduled with the Utah Supreme Court to discuss this issue, and anticipate that the Court will form a subcommittee to further explore it. Mr. Hafen solicited the Committee for volunteers for the subcommittee, and Mr. Holmberg volunteered.

Mr. Hafen also noted that the Committee has been asked to remove language to the effect of "the committee has determined" from the advisory committee notes, and replace it with language similar to "the committee believes."

(6) ADJOURNMENT.

The remaining matters were deferred, and the Committee adjourned at 5:50pm. The next meeting will be held on January 25, 2017 at 4:00pm at the Administrative Office of the Courts, Level 3.

Tab 2

URCP 7

Posted by Judge Samuel D. McVey

The change to URCP rule 7 is very welcome. It should remove current confusion regarding what constitutes grounds for obtaining an order to show cause on the basis of non-compliance with an order.

However, there should also be a provision allowing orders to show cause why a matter should not be dismissed for failure to prosecute in a timely manner under various other rules and for other failures to comply with rules or statute. One might say the Court implicitly adopts those rules as orders in its case management scheme, but such an argument is debatable.

> **Nancy's comments:**
>
> *I'm not sure a change to address failures to prosecute will add something that's not already captured in Rule 41(b):*
>
> **(b) Involuntary dismissal; effect.** If the plaintiff fails to prosecute or to comply with these rules or any court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order otherwise states, a dismissal under this paragraph and any dismissal not under this rule, other than a dismissal for lack of jurisdiction, improper venue, or failure to join a party under Rule 19, operates as an adjudication on the merits.
>
> But I think what Judge McVey is suggesting is that the *court's* power to call an order to show cause hearing for failure to prosecute, although inherent for case management purposes, could be more explicitly set forth by amendment to this rule. Arguably, this is already captured in Utah Code section 78A-2-201 and in case law. *See, e.g. W. Water, LLC v. Olds, 2008 UT 18, ¶ 42, 184 P.3d 578, 590* ("[A] district court has inherent power 'to make, modify, and enforce rules for the regulation of the business before [it], ... to recall and control its process, [and] to direct and control its officers, including attorneys and such.'" quoting *In re Evans*, 42 Utah 282, 130 P. 217, 224 (1913)). I propose addressing his suggestion by advisory committee note, as follows: "Rule 7(q) is directed only at limitations on order to show cause hearings initiated by parties. Nothing in this rule is intended to limit or alter the inherent power of the court to initiate order to show cause hearings to assess whether cases should be dismissed for failure to prosecute or to otherwise manage the court's docket."

Posted by Brett Chambers

Comment on proposed Rule 7(q) addition. This may stem from my own lack of knowledge, but is there any indication whether an "existing order" will include oral orders from the court? In some cases there is a significant lapse between the court's

oral order and when counsel either agree to the language of the written order or go through an objection hearing on disputed language. May a party bring a 7(q) order to show cause prior to a written order? If this is already addressed in another rule or case law, I apologize. If not, it might be worth clarifying in a comment or in the rule.

Nancy's comments:

This is addressed earlier in the rule:

(j) Orders.

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

The Advisory Committee Notes also state the following: "The decision might not be written; an oral directive is an order. A clerk's minute entry of an oral decision is, when signed by the judge, treated the same as a written order."

Posted by James C. Jenkins

I suggest that the amendment to Rule 7(q) be modified to also include support by unsworn declaration as allowed by 75B-5-705. See below:

Draft: September 28, 2016

Rule 7(q)

Limit on order to show cause.

An application to the court for an order to show cause shall be made only for enforcement of an existing order or for sanctions for violating an existing order. An application for an order to show cause must be supported by an affidavit "or unsworn declaration" sufficient to show cause to believe a party has violated a court order.

78B-5-705 Unsworn declaration in lieu of affidavit.

(1) If the Utah Rules of Criminal Procedure, Civil Procedure, or Evidence require or permit a written declaration upon oath, an individual may, with like force and effect, provide an unsworn written declaration, subscribed and dated under penalty of this section, in substantially the following form:

"I declare (or certify, verify, or state) under criminal penalty of the State of Utah that the foregoing is true and correct.

Executed on (date).

(Signature)".

(2) A person who knowingly makes a false written statement as provided under Subsection (1) is guilty of a class B misdemeanor.

Nancy's comments:

This isn't a bad suggestion. An affidavit is a written statement of facts, sworn to and signed before a notary public or some other authority having the power to witness an oath, whereas an unsworn declaration is basically the same thing but does not require a notary. I can see an efficiency and cost-savings argument for including it in the rule; although arguably it's already permitted with the current language in light of 78B-5-705. I added Mr. Jenkins's suggestion to the rule.

URCP 65C

None.

URCP 35

Posted by Steve Johnson

60 days is a long time. Unnecessarily long. When a plaintiff is required to submit to an exam, an examiner should be able to provide a report within 28 days from the exam. To allow more than that will only drag out discovery. The trend has been to shorten discovery and encourage parties to exchange information earlier, not later.

Nancy's comments:

This was a policy discussion the committee already had; thus the second round of circulation for comment.

Posted by Nathan Whittaker

On line 12, consider replacing "shorter" with "earlier"—this is more consistent with the usage in other rules.

Nancy's comments:

I made this change.

Posted by Kevin Murphy

Regarding the proposed URCP 35 amendments, would you kindly further amend the rule, and associated deadlines, to clarify whether a URCP 35 examination is treated as "fact" or "expert" discovery. That is an issue of dispute, with some district court judges saying it is fact discovery–which closes prior to expert discovery, and some treating it as expert discovery–based on the comment stating that the Rule 35 report is to be treated as an expert report.

My own preference would be to treat a Rule 35 exam as expert discovery. A big reason, for me, is that oftentimes I like my Rule 35 examiner to utilize fact discovery materials, including depositions, to aid in performing the exam and in forming his or her opinions.

Thank you.

Nancy's comments:

The committee already determined that this report will be part of fact discovery. But how the examiner is ultimately treated depends on what the report is going to be used for: expert testimony, fact discovery, or both.

Posted by Michael Stahler

Just a comment about this rule change from the defense perspective that you can share with the Rules Committee, who are mostly commercial litigators or judges and don't work with this rule.

We've always felt that the IME component is an expert discovery tool. The physician is a paid expert by the defense who examines the Plaintiff for purposes of expert discovery, not fact discovery. Fact discovery in such a case involves a review of the existing medical records and perhaps testimony of the treating physicians. The IME physician is retained specifically to examine the records and testimony before offering her own expert opinion on the Plaintiff. We have always used the IME physician as a retained expert and disclosed her opinions in expert discovery.

The timing also is such that an IME usually comes late in fact discovery or in expert discovery. Often medical providers do not provide records or offer depositions until late in fact discovery. That now means that the defense may lose the option of an IME unless fact discovery gets extended, which the courts don't always want to do.

We've run into Plaintiffs who insist that this is a fact discovery tool as a means of forcing the case to move. However, we again do not make an assessment as to the need for an IME until later in fact discovery. We think it is best to have the IME report produced within the set time as set by the rules and that the IME take place either in fact or expert discovery.

We bring this opinion not from an abstract view but from the practical perspective of attorneys who work with this everyday. The rule may make sense on paper, but in a practical sense it does not always work this way.

Nancy's comments:

Please see my last comment.

1 **Rule 7. Pleadings allowed; motions, memoranda, hearings, orders.**
2 **(a) Pleadings.** Only these pleadings are allowed:
3 (a)(1) a complaint;
4 (a)(2) an answer to a complaint;
5 (a)(3) an answer to a counterclaim designated as a counterclaim;
6 (a)(4) an answer to a crossclaim;
7 (a)(5) a third-party complaint;
8 (a)(6) an answer to a third-party complaint; and
9 (a)(7) a reply to an answer if ordered by the court.
10 **(b) Motions.** A request for an order must be made by motion. The motion must be in writing unless
11 made during a hearing or trial, must state the relief requested, and must state the grounds for the relief
12 requested. Except for the following, a motion must be made in accordance with this rule.
13 (b)(1) A motion, other than a motion described in paragraphs (b)(2), (b)(3) or (b)(4), made in
14 proceedings before a court commissioner must follow Rule 101.
15 (b)(2) A request under Rule 26 for extraordinary discovery must follow Rule 37(a).
16 (b)(3) A request under Rule 37 for a protective order or for an order compelling disclosure or
17 discovery—but not a motion for sanctions—must follow Rule 37(a).
18 (b)(4) A request under Rule 45 to quash a subpoena must follow Rule 37(a).
19 (b)(5) A motion for summary judgment must follow the procedures of this rule as supplemented
20 by the requirements of Rule 56.
21 **(c) Name and content of motion.**
22 (c)(1) The rules governing captions and other matters of form in pleadings apply to motions and
23 other papers. The moving party must title the motion substantially as: "Motion [short phrase
24 describing the relief requested]." The motion must include the supporting memorandum. The motion
25 must include under appropriate headings and in the following order:
26 (c)(1)(A) a concise statement of the relief requested and the grounds for the relief requested;
27 and
28 (c)(1)(B) one or more sections that include a concise statement of the relevant facts claimed
29 by the moving party and argument citing authority for the relief requested.
30 (c)(2) If the moving party cites documents, interrogatory answers, deposition testimony, or other
31 discovery materials, relevant portions of those materials must be attached to or submitted with the
32 motion.
33 (c)(3) If the motion is for relief authorized by Rule 12(b) or 12(c), Rule 56 or Rule 65A, the motion
34 may not exceed 25 pages, not counting the attachments, unless a longer motion is permitted by the
35 court. Other motions may not exceed 15 pages, not counting the attachments, unless a longer motion
36 is permitted by the court.
37 **(d) Name and content of memorandum opposing the motion.**

38 (d)(1) A nonmoving party may file a memorandum opposing the motion within 14 days after the
39 motion is filed. The nonmoving party must title the memorandum substantially as: "Memorandum
40 opposing motion [short phrase describing the relief requested]." The memorandum must include
41 under appropriate headings and in the following order:
42 (d)(1)(A) a concise statement of the party's preferred disposition of the motion and the
43 grounds supporting that disposition;
44 (d)(1)(B) one or more sections that include a concise statement of the relevant facts claimed
45 by the nonmoving party and argument citing authority for that disposition; and
46 (d)(1)(C) objections to evidence in the motion, citing authority for the objection.
47 (d)(2) If the non-moving party cites documents, interrogatory answers, deposition testimony, or
48 other discovery materials, relevant portions of those materials must be attached to or submitted with
49 the memorandum.
50 (d)(3) If the motion is for relief authorized by Rule 12(b) or 12(c), Rule 56 or Rule 65A, the
51 memorandum opposing the motion may not exceed 25 pages, not counting the attachments, unless a
52 longer memorandum is permitted by the court. Other opposing memoranda may not exceed 15
53 pages, not counting the attachments, unless a longer memorandum is permitted by the court.
54 **(e) Name and content of reply memorandum.**
55 (e)(1) Within 7 days after the memorandum opposing the motion is filed, the moving party may file
56 a reply memorandum, which must be limited to rebuttal of new matters raised in the memorandum
57 opposing the motion. The moving party must title the memorandum substantially as "Reply
58 memorandum supporting motion [short phrase describing the relief requested]." The memorandum
59 must include under appropriate headings and in the following order:
60 (e)(1)(A) a concise statement of the new matter raised in the memorandum opposing the
61 motion;
62 (e)(1)(B) one or more sections that include a concise statement of the relevant facts claimed
63 by the moving party not previously set forth that respond to the opposing party's statement of
64 facts and argument citing authority rebutting the new matter;
65 (e)(1)(C) objections to evidence in the memorandum opposing the motion, citing authority for
66 the objection; and
67 (e)(1)(D) response to objections made in the memorandum opposing the motion, citing
68 authority for the response.
69 (e)(2) If the moving party cites documents, interrogatory answers, deposition testimony, or other
70 discovery materials, relevant portions of those materials must be attached to or submitted with the
71 memorandum.
72 (e)(3) If the motion is for relief authorized by Rule 12(b) or 12(c), Rule 56 or Rule 65A, the reply
73 memorandum may not exceed 15 pages, not counting the attachments, unless a longer

74 memorandum is permitted by the court. Other reply memoranda may not exceed 10 pages, not
75 counting the attachments, unless a longer memorandum is permitted by the court.
76 **(f) Objection to evidence in the reply memorandum; response.** If the reply memorandum includes
77 an objection to evidence, the nonmoving party may file a response to the objection no later than 7 days
78 after the reply memorandum is filed. If the reply memorandum includes evidence not previously set forth,
79 the nonmoving party may file an objection to the evidence no later than 7 days after the reply
80 memorandum is filed, and the moving party may file a response to the objection no later than 7 days after
81 the objection is filed. The objection or response may not be more than 3 pages.
82 **(g) Request to submit for decision.** When briefing is complete or the time for briefing has expired,
83 either party may file a "Request to Submit for Decision, but, if no party files a request, the motion will not
84 be submitted for decision. The request to submit for decision must state whether a hearing has been
85 requested and the dates on which the following documents were filed:
86 (g)(1) the motion;
87 (g)(2) the memorandum opposing the motion, if any;
88 (g)(3) the reply memorandum, if any; and
89 (g)(4) the response to objections in the reply memorandum, if any.
90 **(h) Hearings.** The court may hold a hearing on any motion. A party may request a hearing in the
91 motion, in a memorandum or in the request to submit for decision. A request for hearing must be
92 separately identified in the caption of the document containing the request. The court must grant a
93 request for a hearing on a motion under Rule 56 or a motion that would dispose of the action or any claim
94 or defense in the action unless the court finds that the motion or opposition to the motion is frivolous or
95 the issue has been authoritatively decided.
96 **(i) Notice of supplemental authority.** A party may file notice of citation to significant authority that
97 comes to the party's attention after the party's motion or memorandum has been filed or after oral
98 argument but before decision. The notice may not exceed 2 pages. The notice must state the citation to
99 the authority, the page of the motion or memorandum or the point orally argued to which the authority
100 applies, and the reason the authority is relevant. Any other party may promptly file a response, but the
101 court may act on the motion without waiting for a response. The response may not exceed 2 pages.
102 **(j) Orders.**
103 **(j)(1) Decision complete when signed; entered when recorded.** However designated, the
104 court's decision on a motion is complete when signed by the judge. The decision is entered when
105 recorded in the docket.
106 **(j)(2) Preparing and serving a proposed order.** Within 14 days of being directed by the court to
107 prepare a proposed order confirming the court's decision, a party must serve the proposed order on
108 the other parties for review and approval as to form. If the party directed to prepare a proposed order
109 fails to timely serve the order, any other party may prepare a proposed order confirming the court's
110 decision and serve the proposed order on the other parties for review and approval as to form.

111 **(j)(3) Effect of approval as to form.** A party's approval as to form of a proposed order certifies
112 that the proposed order accurately reflects the court's decision. Approval as to form does not waive
113 objections to the substance of the order.
114 **(j)(4) Objecting to a proposed order.** A party may object to the form of the proposed order by
115 filing an objection within 7 days after the order is served.
116 **(j)(5) Filing proposed order.** The party preparing a proposed order must file it:
117 (j)(5)(A) after all other parties have approved the form of the order (The party preparing the
118 proposed order must indicate the means by which approval was received: in person; by
119 telephone; by signature; by email; etc.);
120 (j)(5)(B) after the time to object to the form of the order has expired (The party preparing the
121 proposed order must also file a certificate of service of the proposed order.); or
122 (j)(5)(C) within 7 days after a party has objected to the form of the order (The party preparing
123 the proposed order may also file a response to the objection.).
124 **(j)(6) Proposed order before decision prohibited; exceptions.** A party may not file a proposed
125 order concurrently with a motion or a memorandum or a request to submit for decision, but a
126 proposed order must be filed with:
127 (j)(6)(A) a stipulated motion;
128 (j)(6)(B) a motion that can be acted on without waiting for a response;
129 (j)(6)(C) an ex parte motion;
130 (j)(6)(D) a statement of discovery issues under Rule 37(a); and
131 (j)(6)(E) the request to submit for decision a motion in which a memorandum opposing the
132 motion has not been filed.
133 **(j)(7) Orders entered without a response; ex parte orders.** An order entered on a motion
134 under paragraph (l) or (m) can be vacated or modified by the judge who made it with or without
135 notice.
136 **(j)(8) Order to pay money.** An order to pay money can be enforced in the same manner as if it
137 were a judgment.
138 **(k) Stipulated motions.** A party seeking relief that has been agreed to by the other parties may file a
139 stipulated motion which must:
140 (k)(1) be titled substantially as: "Stipulated motion [short phrase describing the relief requested];
141 (k)(2) include a concise statement of the relief requested and the grounds for the relief requested;
142 (k)(3) include a signed stipulation in or attached to the motion and;
143 (k)(4) be accompanied by a request to submit for decision and a proposed order that has been
144 approved by the other parties.
145 **(l) Motions that may be acted on without waiting for a response.**
146 (l)(1) The court may act on the following motions without waiting for a response:
147 (l)(1)(A) motion to permit an over-length motion or memorandum;

148 (l)(1)(B) motion for an extension of time if filed before the expiration of time;
149 (l)(1)(C) motion to appear pro hac vice; and
150 (l)(1)(E) other similar motions.
151 (l)(2) A motion that can be acted on without waiting for a response must:
152 (l)(2)(A) be titled as a regular motion;
153 (l)(2)(B) include a concise statement of the relief requested and the grounds for the relief
154 requested;
155 (l)(2)(C) cite the statute or rule authorizing the motion to be acted on without waiting for a
156 response; and
157 (l)(2)(D) be accompanied by a request to submit for decision and a proposed order.
158 **(m) Ex parte motions.** If a statute or rule permits a motion to be filed without serving the motion on
159 the other parties, the party seeking relief may file an ex parte motion which must:
160 (m)(1) be titled substantially as: "Ex parte motion [short phrase describing the relief requested];
161 (m)(2) include a concise statement of the relief requested and the grounds for the relief
162 requested;
163 (m)(3) cite the statute or rule authorizing the ex parte motion;
164 (m)(4) be accompanied by a request to submit for decision and a proposed order.
165 **(n) Motion in opposing memorandum or reply memorandum prohibited.** A party may not make a
166 motion in a memorandum opposing a motion or in a reply memorandum. A party who objects to evidence
167 in another party's motion or memorandum may not move to strike that evidence. Instead, the party must
168 include in the subsequent memorandum an objection to the evidence.
169 **(o) Overlength motion or memorandum.** The court may permit a party to file an overlength motion
170 or memorandum upon a showing of good cause. An overlength motion or memorandum must include a
171 table of contents and a table of authorities with page references.
172 **(p) Limited statement of facts and authority.** No statement of facts and legal authorities beyond
173 the concise statement of the relief requested and the grounds for the relief requested required in
174 paragraph (c) is required for the following motions:
175 (p)(1) motion to allow an over-length motion or memorandum;
176 (p)(2) motion to extend the time to perform an act, if the motion is filed before the time to perform
177 the act has expired;
178 (p)(3) motion to continue a hearing;
179 (p)(4) motion to appoint a guardian ad litem;
180 (p)(5) motion to substitute parties;
181 (p)(6) motion to refer the action to or withdraw it from alternative dispute resolution under Rule 4-
182 510.05;
183 (p)(7) motion for a conference under Rule 16; and
184 (p)(8) motion to approve a stipulation of the parties.

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

189 **Advisory Committee Notes**

190 **New note:**

191 2017 Amendments

192 Rule 7(q) is directed only at limitations on order to show cause hearings initiated by parties. Nothing
193 in this rule is intended to limit or alter the inherent power of the court to initiate order to show cause
194 hearings to assess whether cases should be dismissed for failure to prosecute or to otherwise manage
195 the court's docket.

1 **Rule 65C. Post-conviction relief.**

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

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

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

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

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

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

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

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

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

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

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

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

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

37 (e)(3) a copy of the pleadings filed by the petitioner in any prior post-conviction or other civil
38 proceeding that adjudicated the legality of the conviction or sentence; and
39 (e)(4) a copy of all relevant orders and memoranda of the court.
40 **(f) Memorandum of authorities.** The petitioner shall not set forth argument or citations or discuss
41 authorities in the petition, but these may be set out in a separate memorandum, two copies of which shall
42 be filed with the petition.
43 **(g) Assignment.** On the filing of the petition, the clerk shall promptly assign and deliver it to the judge
44 who sentenced the petitioner. If the judge who sentenced the petitioner is not available, the clerk shall
45 assign the case in the normal course.
46 **(h)(1) Summary dismissal of claims.** The assigned judge shall review the petition, and, if it is
47 apparent to the court that any claim has been adjudicated in a prior proceeding, or if any claim in the
48 petition appears frivolous on its face, the court shall forthwith issue an order dismissing the claim, stating
49 either that the claim has been adjudicated or that the claim is frivolous on its face. The order shall be sent
50 by mail to the petitioner. Proceedings on the claim shall terminate with the entry of the order of dismissal.
51 The order of dismissal need not recite findings of fact or conclusions of law.
52 (h)(2) A claim is frivolous on its face when, based solely on the allegations contained in the
53 pleadings and attachments, it appears that:
54 (h)(2)(A) the facts alleged do not support a claim for relief as a matter of law;
55 (h)(2)(B) the claim has no arguable basis in fact; or
56 (h)(2)(C) the claim challenges the sentence only and the sentence has expired prior to the
57 filing of the petition.
58 (h)(3) If a claim is not frivolous on its face but is deficient due to a pleading error or failure to
59 comply with the requirements of this rule, the court shall return a copy of the petition with leave to
60 amend within 21 days. The court may grant one additional 21-day period to amend for good cause
61 shown.
62 (h)(4) The court shall not review for summary dismissal the initial post-conviction petition in a
63 case where the petitioner is sentenced to death.
64 **(i) Service of petitions.** If, on review of the petition, the court concludes that all or part of the petition
65 should not be summarily dismissed, the court shall designate the portions of the petition that are not
66 dismissed and direct the clerk to serve a copy of the petition, attachments and memorandum by mail
67 upon the respondent. If the petition is a challenge to a felony conviction or sentence, the respondent is
68 the state of Utah represented by the Attorney General. In all other cases, the respondent is the
69 governmental entity that prosecuted the petitioner.
70 **(j) Appointment of pro bono counsel.** If any portion of the petition is not summarily dismissed, the
71 court may, upon the request of an indigent petitioner, appoint counsel on a pro bono basis to represent
72 the petitioner in the post-conviction court or on post-conviction appeal. In determining whether to appoint
73 counsel the court shall consider whether the petition or the appeal contains factual allegations that will

74 require an evidentiary hearing and whether the petition involves complicated issues of law or fact that
75 require the assistance of counsel for proper adjudication.
76 **(k) Answer or other response.** Within 30 days after service of a copy of the petition upon the
77 respondent, or within such other period of time as the court may allow, the respondent shall answer or
78 otherwise respond to the portions of the petition that have not been dismissed and shall serve the answer
79 or other response upon the petitioner in accordance with Rule 5(b). Within 30 days (plus time allowed for
80 service by mail) after service of any motion to dismiss or for summary judgment, the petitioner may
81 respond by memorandum to the motion. No further pleadings or amendments will be permitted unless
82 ordered by the court.
83 **(l) Hearings.** After pleadings are closed, the court shall promptly set the proceeding for a hearing or
84 otherwise dispose of the case. The court may also order a prehearing conference, but the conference
85 shall not be set so as to delay unreasonably the hearing on the merits of the petition. At the prehearing
86 conference, the court may:
87 (l)(1) consider the formation and simplification of issues;
88 (l)(2) require the parties to identify witnesses and documents; and
89 (l)(3) require the parties to establish the admissibility of evidence expected to be presented at the
90 evidentiary hearing.
91 **(m) Presence of the petitioner at hearings.** The petitioner shall be present at the prehearing
92 conference if the petitioner is not represented by counsel. The prehearing conference may be conducted
93 by means of telephone or video conferencing. The petitioner shall be present before the court at hearings
94 on dispositive issues but need not otherwise be present in court during the proceeding. The court may
95 conduct any hearing at the correctional facility where the petitioner is confined.
96 **(n) Discovery; records.**
97 (n)(1) Discovery under Rules 26 through 37 shall be allowed by the court upon motion of a party
98 and a determination that there is good cause to believe that discovery is necessary to provide a party
99 with evidence that is likely to be admissible at an evidentiary hearing.
100 (n)(2) The court may order either the petitioner or the respondent to obtain any relevant transcript
101 or court records.
102 (n)(3) All records in the criminal case under review, including the records in an appeal of that
103 conviction, are deemed part of the trial court record in the petition for post-conviction relief. A record
104 from the criminal case retains the security classification that it had in the criminal case.
105 **(o) Orders; stay.**
106 (o)(1) If the court vacates the original conviction or sentence, it shall enter findings of fact and
107 conclusions of law and an appropriate order. If the petitioner is serving a sentence for a felony
108 conviction, the order shall be stayed for 7 days. Within the stay period, the respondent shall give
109 written notice to the court and the petitioner that the respondent will pursue a new trial, pursue a new

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

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 the shorter of 60 days after the examination or 7 days prior to the close of fact discovery, 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), but need not provide a separate Rule 26(a)(4) report if the report under this rule contains all the information required by Rule 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.

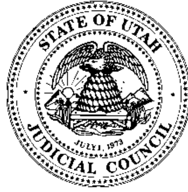
The parties and the trial court should refrain from the use of the phrase "independent medical examiner," using instead the neutral appellation "medical examiner," "Rule 35 examiner," or the like.

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.

37 The former requirement of Rule 35(c) providing for the production of prior reports on other examinees
38 by the examiner was a source of great confusion and controversy. It is the Ccommittee's view that this
39 provision is better eliminated, and in the amended rule there is no longer an automatic requirement for the
40 production of prior reports of other examinations. Medical examiners will be treated as other expert
41 witnesses are treated, with the required disclosure under Rule 26 and the option of a report or a
42 deposition.
43 A report must be provided for all examinations under this rule. The Rule 35 report is expected to
44 include the same type of content and observations that would be included in a medical record generated
45 by a competent medical professional following an examination of a patient, but need not otherwise
46 include the matters required to be included in a Rule 26(a)(4) expert report. If the examiner is going to be
47 called as an expert witness at trial, then the designation and disclosures under Rule 26(a)(4) are also
48 required, and the opposing party has the option of requiring, in addition to the Rule 35(b) report, the
49 expert's report or deposition under Rule 26(a)(4)(C). The rule permits a party who furnishes a report
50 under Rule 35 to include within it the expert disclosures required under Rule 26(a)(4) in order to avoid the
51 potential need to generate a separate Rule 26 (a)(4) report later if the opposing party elects a report
52 rather than a deposition. But submitting such a combined report will not limit the opposing party's ability to
53 elect a deposition if the Rule 35 examiner is designated as an expert.
54

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: January 21, 2017
Re: Rule 37(e)

Following the committee's last meeting, Judge Stone and Judge Pullan engaged in a robust discussion regarding the proposal to amend Rule 37(e) in conformity with the 2015 federal amendments. Those amendments addressed failure to preserve ESI. What follows is the judges' discussion and included in your materials is the version of Rule 37 the committee was working from in November.

JUDGE STONE'S E-MAIL REGARDING FRCP 37(e)

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

1) I think it is based on a logically flawed premise: that, as a matter of law, any loss of information that does not occur with the specific intent to conceal it from an opponent in litigation cannot justify an inference that the information was adverse to the party that lost it;

2) It assumes that the determination of intentional destruction is clear-cut and binary;

3) It adopts a view of the judge's role in preliminary fact finding that is inconsistent with how the Utah Supreme Court views that role in other contexts; and,

4) I cannot recall any other place in the Rules of Civil Procedure or even Evidence that restricts the judge's discretion with respect to how the jury is to be instructed.

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

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

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

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

My second point complicates this problem further. Because the permissive instruction is prohibited except in cases where there is an affirmative finding that the party that "should have" preserved the documents but failed "acted with the intent to deprive another," a much larger class of cases are implicated. What about reckless behavior? Is it unreasonable to believe that some persons, in some contexts, might take less care of negative information than they do with documents that reflect positively on them? What is the standard of proof for showing "intent to deprive another"? Because the conduct is fraudulent in nature there's probably a pretty good argument that it's clear and convincing. Can we really say, categorically, that absent clear and convincing evidence of intent to deprive, there is no case that would justify an inference? Recall as well that we are working here with the absence of evidence—because the document is gone, there is often very little evidence about the reason it is gone.

Assume the case that the committee seemed to be focused on, in which the missing document and negative inference is case-dispositive. (I think this is the rare exception in actual practice). Plaintiff has made the not-insubstantial showings that the document existed and that it "should have been preserved." The Court considers all the evidence and concludes that it, personally, cannot conclude (by whatever standard is to be applied) that the documents were lost with the intent to deprive the plaintiff. But significantly, the Court also concludes that a reasonable jury might come to the opposite conclusion as to intent. Under the rule's proposed text, the default position is innocence.

Here, the case is disposed of because the case relies on an inference that the Court is prohibited from instructing the jury it may, but is not required to, make. It would make no sense to send a case to a jury on an inference that the Court is prohibited, under an express rule, from instructing the jury it is allowed to make. So in this example a case is resolved in the defendant's favor, because the defendant destroyed a document it should have preserved. I do not think that is consistent with current Utah law on the inferences the court is required to make at this stage -- this rule flips that principle on its head.

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

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

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

2) If the distinction between ESI and other documents is to be retained, delete the reference to a permissive ("may") adverse inference instruction from those sanctions listed as restricted to intentional deprivation cases, and make clear that the court and the jury remain free to make such inferences in appropriate cases.

3) Adopt a shifting burdens approach:

a. Once the party seeking the document shows its existence and the fact that it should have been preserved, the burden of explanation for its loss should shift to the party that lost the document. If mere negligent loss of the document does not support a reasonable inference that it was adverse (a point I don't think follows logically in every

case, see above), at least require the party at fault to prove by preponderance that the loss was merely negligent. This would require some explanation for the loss instead of the "we dunno" approach I often see. That at least gives the other party fair grounds to attack an actual explanation.

b. Absent an affirmative finding by the court of mere negligence or less, the "may infer" instruction should be available in appropriate cases, at the court's discretion. For the life of me, I have a hard time thinking of other means of alleviating prejudice that will actually matter at trial.

c. If the party seeking the inference proves (again, probably by clear and convincing evidence) an intent to deprive, the harsher sanctions under the current rule (beyond the permissive inference instruction) should become available.

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

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

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

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

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

JUDGE PULLAN'S RESPONSE TO JUDGE STONE'S E-MAIL

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

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

- First, the electronically stored information "should have been preserved." In other words, the ESI was lost or destroyed after the common law duty to preserve or some other duty to preserve (i.e. statutory, regulatory, or court order) arose. In Judge Stone's hypothetical, the policy of the company to delete negative emails is adopted "long before any threatened litigation"—before there was any duty to preserve. Rule 37(e) would have no application to these facts.

- Second, the ESI is lost because a party failed to take reasonable steps to preserve it.

- Third, the ESI cannot be restored or replaced through additional discovery. Before courts resort to sanctions, the focus should be on recovery of lost information so that the case can be tried on the merits and not on presumptions about the content of missing evidence.

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

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

The rule does not forbid the jury from being the fact finder about intent to deprive. The comment provides: "This finding [of intent to deprive] may be made by the court when

ruling on a pretrial motion, when presiding at a bench trial, or when deciding whether to give an adverse inference instruction at trial. If a court were to conclude that the intent finding should be made by a jury, the court's instruction should make clear that the jury may infer from the loss of the information that it was unfavorable to the party that lost it only if the jury first finds that the party acted with the intent to deprive another party of the information's use in the litigation." FRCP 37(e)(2), Comment.

Having said this, the objection that courts should never be in the business of making findings about why the ESI was lost and "intent to deprive" disregards the fact that we are dealing with a judicial discovery sanction. In this context, courts are uniquely qualified to determine intent and have done so under Utah Rule 37(b) for many years. These discovery sanctions have always required a judicial determination that a party had engaged in intentional, willful, or persistent dilatory conduct.

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

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

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

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

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

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

In conclusion, my position is:

1. Adopt rule 37(e) as is. Eliminate the uncertainty surrounding the nuclear sanctions. Allow Utah to benefit from a uniform standard and the case law that is already developing in the federal courts.

2. If a change is made, eliminate the prohibition of "may presume" instructions. This would allow for the flexibility Judge Stone desires.

3. Don't address burdens of proof in the rule. The drafters of the federal rule expressly avoided this issue. See, FRCP 37(e)(2), Comment. Judges should be permitted to have flexibility to decide this issue on a case by case basis.

JUDGE STONE'S REPLY TO JUDGE PULLAN'S MEMO RE FRCP 37(e)

I appreciate Judge Pullan's thoughtful response to my email. I thought I would offer a brief reply.

The logical assumption that no inference arises based on a merely negligent failure to preserve is only supportable if one assumes no other facts regarding the original set of documents or their preservation. If any outside fact makes it more likely than not that a negative document is lost than a positive one, the correct inference is that the lost document was most probably negative. With a lot of effort to recall my symbolic logic, I could show my math, but I won't attempt that here. Instead, take my original

example. Litigation is threatened or commences. The preservation memo goes out, but the IT director for the marketing department is out sick for the ten days after the memo. 100 documents are lost as a result. One is at issue. Based on my original assumptions, there's a 70% chance that that document was negative.

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

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

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

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

Finally, I continue to believe that a special rule for ESI is now, with all respect, quaint. Those 675,000 documents cited by Microsoft and mentioned by Judge Pullan? Sounds like a lot, but they would fit in your pocket. A gigabyte will hold just under 30,000 email files. If you add in other types of files such as powerpoint and spreadsheet files, the average (from what I can tell, unweighted for frequency) is about 5,000 documents per gigabyte. So Microsoft's 675,000 documents per exhibit drops to 135 gigabytes. My iPhone holds 124. That data can be searched in a matter of seconds. Yes, ESI can be lost through automated processes—the flip side is that, unlike physical documents, ESI can be preserved throughout an enterprise in automated fashion. Cloud storage is cheap and mathematically far more reliable than physical storage. Compare the rate of cloud

storage (pennies per gigabyte per month) to costs for storing the old banker's boxes of documents. Compare the reliability rates of preserving electronic data with the handwritten "shred dates" on stacks of boxes curated by part-time college kids. Why are we cutting a break for those who fail to preserve electronic data and not those who fail to preserve physical documents? Why restrict judges' ability to adapt sanctions for ESI, when we have trusted them to address those issues with respect to physical documents?

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

> (e)(1) Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
>
> (e)(1)(A) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
>
> (e)(1)(B) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
>
> (e)(1)(B)(1) presume, based on the failure to preserve alone, that the lost information was unfavorable to the party;
>
> (e)(1)(B)(2) instruct the jury that, based on the failure to preserve alone, it may or must presume the information was unfavorable to the party; or
>
> (e)(1)(B)(3) dismiss the action or enter a default judgment.
>
> (e)(1)(C) Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.
>
> (e)(1)(D) Nothing in this rule bars a court from considering, or instructing a jury that it may consider, a failure to preserve electronically stored information, along with all other evidence in the case, in inferring the content of the lost information or any other fact at issue in the case.

This is not entirely inconsistent with the federal rule's comments. Those comments state that the federal rule permits a court to allow "the parties to present evidence to the jury concerning the loss and likely relevance of information and [to instruct] the jury

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

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

3 **(a) Statement of discovery issues.**

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

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

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

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

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

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

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

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

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

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

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

22 **(a)(3) Objection length and content.** No more than 7 days after the statement is filed, any other
23 party may file an objection to the statement of discovery issues. The objection must be no more than
24 4 pages, not including permitted attachments, and must address the issues raised in the statement.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) Motion for sanctions. Except as provided in paragraph (e), ~~U~~unless the court finds that the failure was substantially justified, the court, upon motion, may impose appropriate sanctions for the failure to follow its orders, including the following:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Advisory Committee Notes

New note (add to Advisory Committee Notes):

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

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

Federal Rules of Civil Procedure Rule 37

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

Currentness

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) Failure to Comply with a Court Order.

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

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

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

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

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

(iii) striking pleadings in whole or in part;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CREDIT(S)

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

ADVISORY COMMITTEE NOTES

1937 Adoption

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

1948 Amendment

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

1970 Amendment

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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).

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

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

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

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

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

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

2000 Amendment

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

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

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

GAP Report

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

2006 Amendment

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

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

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

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

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

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

2007 Amendment

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

2013 Amendment

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

Changes Made After Publication and Comment

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

2015 Amendment

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Notes of Decisions (2801)

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

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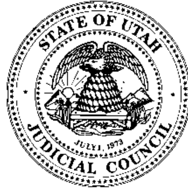
Tab 4



Administrative Office of the Courts

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

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

MEMORANDUM

To: Civil Rules Committee
From: Nancy Sylvester
Date: January 21, 2017
Re: Rules 7 and 101: "filed" versus "served"

Both Mary Jane Ciccarello and Brent Johnson raised concerns about the "filed" versus "served" language in Rule 7. At the September meeting, Mary Jane addressed how the term "filed" unfairly impacts pro se litigants and requested that where it is used to calculate response time it should be changed to "served." She also raised the same concern with Rule 101, which uses the term, "filed and served." Using both terms, she said, is even more confusing. She requested uniformity between the two rules.

Attached are the two rules with the proposed amendments. Because service happens simultaneously with filing when both parties are represented, this should have no impact on attorneys' current practice in that situation. Rule 6(c) also already controls when service is made by mail and at least one party is unrepresented.

1 **Rule 7. Pleadings allowed; motions, memoranda, hearings, orders.**
2 **(a) Pleadings.** Only these pleadings are allowed:
3 (a)(1) a complaint;
4 (a)(2) an answer to a complaint;
5 (a)(3) an answer to a counterclaim designated as a counterclaim;
6 (a)(4) an answer to a crossclaim;
7 (a)(5) a third-party complaint;
8 (a)(6) an answer to a third-party complaint; and
9 (a)(7) a reply to an answer if ordered by the court.
10 **(b) Motions.** A request for an order must be made by motion. The motion must be in writing unless
11 made during a hearing or trial, must state the relief requested, and must state the grounds for the relief
12 requested. Except for the following, a motion must be made in accordance with this rule.
13 (b)(1) A motion, other than a motion described in paragraphs (b)(2), (b)(3) or (b)(4), made in
14 proceedings before a court commissioner must follow Rule 101.
15 (b)(2) A request under Rule 26 for extraordinary discovery must follow Rule 37(a).
16 (b)(3) A request under Rule 37 for a protective order or for an order compelling disclosure or
17 discovery—but not a motion for sanctions—must follow Rule 37(a).
18 (b)(4) A request under Rule 45 to quash a subpoena must follow Rule 37(a).
19 (b)(5) A motion for summary judgment must follow the procedures of this rule as supplemented
20 by the requirements of Rule 56.
21 **(c) Name and content of motion.**
22 (c)(1) The rules governing captions and other matters of form in pleadings apply to motions and
23 other papers. The moving party must title the motion substantially as: "Motion [short phrase
24 describing the relief requested]." The motion must include the supporting memorandum. The motion
25 must include under appropriate headings and in the following order:
26 (c)(1)(A) a concise statement of the relief requested and the grounds for the relief requested;
27 and
28 (c)(1)(B) one or more sections that include a concise statement of the relevant facts claimed
29 by the moving party and argument citing authority for the relief requested.
30 (c)(2) If the moving party cites documents, interrogatory answers, deposition testimony, or other
31 discovery materials, relevant portions of those materials must be attached to or submitted with the
32 motion.
33 (c)(3) If the motion is for relief authorized by Rule 12(b) or 12(c), Rule 56 or Rule 65A, the motion
34 may not exceed 25 pages, not counting the attachments, unless a longer motion is permitted by the
35 court. Other motions may not exceed 15 pages, not counting the attachments, unless a longer motion
36 is permitted by the court.
37 **(d) Name and content of memorandum opposing the motion.**

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

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

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

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

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

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

(e) Name and content of reply memorandum.

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

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

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

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

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

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

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

74 memorandum is permitted by the court. Other reply memoranda may not exceed 10 pages, not
75 counting the attachments, unless a longer memorandum is permitted by the court.
76 **(f) Objection to evidence in the reply memorandum; response.** If the reply memorandum includes
77 an objection to evidence, the nonmoving party may file a response to the objection no later than 7 days
78 after the reply memorandum is ~~filed~~served. If the reply memorandum includes evidence not previously set
79 forth, the nonmoving party may file an objection to the evidence no later than 7 days after the reply
80 memorandum is ~~filed~~served, and the moving party may file a response to the objection no later than 7
81 days after the objection is ~~filed~~served. The objection or response may not be more than 3 pages.
82 **(g) Request to submit for decision.** When briefing is complete or the time for briefing has expired,
83 either party may file a "Request to Submit for Decision, but, if no party files a request, the motion will not
84 be submitted for decision. The request to submit for decision must state whether a hearing has been
85 requested and the dates on which the following documents were filed:
86 (g)(1) the motion;
87 (g)(2) the memorandum opposing the motion, if any;
88 (g)(3) the reply memorandum, if any; and
89 (g)(4) the response to objections in the reply memorandum, if any.
90 **(h) Hearings.** The court may hold a hearing on any motion. A party may request a hearing in the
91 motion, in a memorandum or in the request to submit for decision. A request for hearing must be
92 separately identified in the caption of the document containing the request. The court must grant a
93 request for a hearing on a motion under Rule 56 or a motion that would dispose of the action or any claim
94 or defense in the action unless the court finds that the motion or opposition to the motion is frivolous or
95 the issue has been authoritatively decided.
96 **(i) Notice of supplemental authority.** A party may file notice of citation to significant authority that
97 comes to the party's attention after the party's motion or memorandum has been filed or after oral
98 argument but before decision. The notice may not exceed 2 pages. The notice must state the citation to
99 the authority, the page of the motion or memorandum or the point orally argued to which the authority
100 applies, and the reason the authority is relevant. Any other party may promptly file a response, but the
101 court may act on the motion without waiting for a response. The response may not exceed 2 pages.
102 **(j) Orders.**
103 **(j)(1) Decision complete when signed; entered when recorded.** However designated, the
104 court's decision on a motion is complete when signed by the judge. The decision is entered when
105 recorded in the docket.
106 **(j)(2) Preparing and serving a proposed order.** Within 14 days of being directed by the court to
107 prepare a proposed order confirming the court's decision, a party must serve the proposed order on
108 the other parties for review and approval as to form. If the party directed to prepare a proposed order
109 fails to timely serve the order, any other party may prepare a proposed order confirming the court's
110 decision and serve the proposed order on the other parties for review and approval as to form.

111 **(j)(3) Effect of approval as to form.** A party's approval as to form of a proposed order certifies
112 that the proposed order accurately reflects the court's decision. Approval as to form does not waive
113 objections to the substance of the order.
114 **(j)(4) Objecting to a proposed order.** A party may object to the form of the proposed order by
115 filing an objection within 7 days after the order is served.
116 **(j)(5) Filing proposed order.** The party preparing a proposed order must file it:
117 (j)(5)(A) after all other parties have approved the form of the order (The party preparing the
118 proposed order must indicate the means by which approval was received: in person; by
119 telephone; by signature; by email; etc.);
120 (j)(5)(B) after the time to object to the form of the order has expired (The party preparing the
121 proposed order must also file a certificate of service of the proposed order.); or
122 (j)(5)(C) within 7 days after a party has objected to the form of the order (The party preparing
123 the proposed order may also file a response to the objection.).
124 **(j)(6) Proposed order before decision prohibited; exceptions.** A party may not file a proposed
125 order concurrently with a motion or a memorandum or a request to submit for decision, but a
126 proposed order must be filed with:
127 (j)(6)(A) a stipulated motion;
128 (j)(6)(B) a motion that can be acted on without waiting for a response;
129 (j)(6)(C) an ex parte motion;
130 (j)(6)(D) a statement of discovery issues under Rule 37(a); and
131 (j)(6)(E) the request to submit for decision a motion in which a memorandum opposing the
132 motion has not been filed.
133 **(j)(7) Orders entered without a response; ex parte orders.** An order entered on a motion
134 under paragraph (l) or (m) can be vacated or modified by the judge who made it with or without
135 notice.
136 **(j)(8) Order to pay money.** An order to pay money can be enforced in the same manner as if it
137 were a judgment.
138 **(k) Stipulated motions.** A party seeking relief that has been agreed to by the other parties may file a
139 stipulated motion which must:
140 (k)(1) be titled substantially as: "Stipulated motion [short phrase describing the relief requested];
141 (k)(2) include a concise statement of the relief requested and the grounds for the relief requested;
142 (k)(3) include a signed stipulation in or attached to the motion and;
143 (k)(4) be accompanied by a request to submit for decision and a proposed order that has been
144 approved by the other parties.
145 **(l) Motions that may be acted on without waiting for a response.**
146 (l)(1) The court may act on the following motions without waiting for a response:
147 (l)(1)(A) motion to permit an over-length motion or memorandum;

148 (l)(1)(B) motion for an extension of time if filed before the expiration of time;
149 (l)(1)(C) motion to appear pro hac vice; and
150 (l)(1)(E) other similar motions.
151 (l)(2) A motion that can be acted on without waiting for a response must:
152 (l)(2)(A) be titled as a regular motion;
153 (l)(2)(B) include a concise statement of the relief requested and the grounds for the relief
154 requested;
155 (l)(2)(C) cite the statute or rule authorizing the motion to be acted on without waiting for a
156 response; and
157 (l)(2)(D) be accompanied by a request to submit for decision and a proposed order.
158 **(m) Ex parte motions.** If a statute or rule permits a motion to be filed without serving the motion on
159 the other parties, the party seeking relief may file an ex parte motion which must:
160 (m)(1) be titled substantially as: "Ex parte motion [short phrase describing the relief requested];
161 (m)(2) include a concise statement of the relief requested and the grounds for the relief
162 requested;
163 (m)(3) cite the statute or rule authorizing the ex parte motion;
164 (m)(4) be accompanied by a request to submit for decision and a proposed order.
165 **(n) Motion in opposing memorandum or reply memorandum prohibited.** A party may not make a
166 motion in a memorandum opposing a motion or in a reply memorandum. A party who objects to evidence
167 in another party's motion or memorandum may not move to strike that evidence. Instead, the party must
168 include in the subsequent memorandum an objection to the evidence.
169 **(o) Overlength motion or memorandum.** The court may permit a party to file an overlength motion
170 or memorandum upon a showing of good cause. An overlength motion or memorandum must include a
171 table of contents and a table of authorities with page references.
172 **(p) Limited statement of facts and authority.** No statement of facts and legal authorities beyond
173 the concise statement of the relief requested and the grounds for the relief requested required in
174 paragraph (c) is required for the following motions:
175 (p)(1) motion to allow an over-length motion or memorandum;
176 (p)(2) motion to extend the time to perform an act, if the motion is filed before the time to perform
177 the act has expired;
178 (p)(3) motion to continue a hearing;
179 (p)(4) motion to appoint a guardian ad litem;
180 (p)(5) motion to substitute parties;
181 (p)(6) motion to refer the action to or withdraw it from alternative dispute resolution under Rule 4-
182 510.05;
183 (p)(7) motion for a conference under Rule 16; and
184 (p)(8) motion to approve a stipulation of the parties.

185 **(q) Limit on order to show cause.**
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187
188
189 **Advisory Committee Notes**
190 Proposed Advisory Committee Note
191 The 2017 amendments to Rule 7 replace “filed” with “served” where response time was calculated
192 from filing. It is the advisory committee’s view that the term “filed” may be prejudicial to self-represented
193 litigants who do not have the benefit of electronic filing. For example, when a document is filed with the
194 court, it has not always been clear to a self-represented litigant when the time for response runs. But
195 response time from service is clearer. This amendment is not intended to supplant Rule 5(b), which
196 governs how, when, and to whom service is made, nor Rule 6(c), which provides for the addition of 3
197 days when service is made by mail.

Rule 101. Motion practice before court commissioners.

(a) Written motion required. An application to a court commissioner for an order must be by motion which, unless made during a hearing, must be made in accordance with this rule. A motion must be in writing and state succinctly and with particularity the relief sought and the grounds for the relief sought. Any evidence necessary to support the moving party's position must be presented by way of one or more affidavits or declarations or other admissible evidence. The moving party may also file a supporting memorandum.

(b) Time to file and serve. The moving party must file the motion and any supporting papers with the clerk of the court and obtain a hearing date and time. The moving party must serve the responding party with the motion and supporting papers, together with notice of the hearing at least 28 days before the hearing. If service is more than 90 days after the date of entry of the most recent appealable order, service may not be made through counsel.

(c) Response. Any other party may file a response, consisting of any responsive memorandum, affidavit(s) or declaration(s). The response must be~~ filed and~~ served on the moving party at least 14 days before the hearing.

(d) Reply. The moving party may file a reply, consisting of any reply memorandum, affidavit(s) or declaration(s). The reply must be ~~filed and ~~served on the responding party at least 7 days before the hearing. The contents of the reply must be limited to rebuttal of new matters raised in the response to the motion.

(e) Counter motion. Responding to a motion is not sufficient to grant relief to the responding party. A responding party may request affirmative relief by way of a counter motion. A counter motion need not be limited to the subject matter of the original motion. All of the provisions of this rule apply to counter motions except that a counter motion must be ~~filed and ~~served with the response. Any response to the counter motion must be ~~filed and ~~served no later than the reply to the motion. Any reply to the response to the counter motion must be ~~filed and ~~served at least 3 business days before the hearing. The reply must be served in a manner that will cause the reply to be actually received by the party responding to the counter motion (i.e. hand-delivery, fax or other electronic delivery as allowed by rule or agreed by the parties) at least 3 business days before the hearing. A separate notice of hearing on counter motions is not required.

(f) Necessary documentation. Motions and responses regarding temporary orders concerning alimony, child support, division of debts, possession or disposition of assets, or litigation expenses, must be accompanied by verified financial declarations with documentary income verification attached as exhibits, unless financial declarations and documentation are already in the court's file and remain current. Attachments for motions and responses regarding child support and child custody must also include a child support worksheet.

(g) No other papers. No moving or responding papers other than those specified in this rule are permitted.

(h) Exhibits; objection to failure to attach.

(h)(1) Except as provided in paragraph (h)(3) of this rule, any documents such as tax returns, bank statements, receipts, photographs, correspondence, calendars, medical records, forms, or photographs must be supplied to the court as exhibits to one or more affidavits (as appropriate) establishing the necessary foundational requirements. Copies of court papers such as decrees, orders, minute entries, motions, or affidavits, already in the court's case file, may not be filed as exhibits. Court papers from cases other than that before the court, such as protective orders, prior divorce decrees, criminal orders, information or dockets, and juvenile court orders (to the extent the law does not prohibit their filing), may be submitted as exhibits.

(h)(2) If papers or exhibits referred to in a motion or necessary to support the moving party's position are not served with the motion, the responding party may file and serve an

objection to the defect with the response. If papers or exhibits referred to in the response or necessary to support the responding party's position are not served with the response, the moving party may file and serve an objection to the defect with the reply. The defect must be cured within 2 business days after notice of the defect or at least 3 business days before the hearing, whichever is earlier.

(h)(3) Voluminous exhibits which cannot conveniently be examined in court may not be filed as exhibits, but the contents of such documents may be presented in the form of a summary, chart or calculation under Rule 1006 of the Utah Rules of Evidence. Unless they have been previously supplied through discovery or otherwise and are readily identifiable, copies of any such voluminous documents must be supplied to the other parties at the time of the filing of the summary, chart or calculation. The originals or duplicates of the documents must be available at the hearing for examination by the parties and the commissioner. Collections of documents, such as bank statements, checks, receipts, medical records, photographs, e-mails, calendars and journal entries, that collectively exceed ten pages in length must be presented in summary form. Individual documents with specific legal significance, such as tax returns, appraisals, financial statements and reports prepared by an accountant, wills, trust documents, contracts, or settlement agreements must be submitted in their entirety.

(i) Length. Initial and responding memoranda may not exceed 10 pages of argument without leave of the court. Reply memoranda may not exceed 5 pages of argument without leave of the court. The total number of pages submitted to the court by each party may not exceed 25 pages, including affidavits, attachments and summaries, but excluding financial declarations and income verification. The court commissioner may permit the party to file an over-length memorandum upon ex parte application and showing of good cause.

(j) Late filings; sanctions. If a party files or serves papers beyond the time required in this rule, the court commissioner may hold or continue the hearing, reject the papers, impose costs and attorney fees caused by the failure and by the continuance, and impose other sanctions as appropriate.

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

(l) Hearings.

(l)(1) The court commissioner may not hold a hearing on a motion for temporary orders before the deadline for an appearance by the respondent under Rule 12.

(l)(2) Unless the court commissioner specifically requires otherwise, when the statement of a person is set forth in an affidavit, declaration or other document accepted by the commissioner, that person need not be present at the hearing. The statements of any person not set forth in an affidavit, declaration or other acceptable document may not be presented by proffer unless the person is present at the hearing and the commissioner finds that fairness requires its admission.

(m) Motions to judge. The following motions must be to the judge to whom the case is assigned: motion for alternative service; motion to waive 90-day waiting period; motion to waive divorce education class; motion for leave to withdraw after a case has been certified as ready for trial; and motions in limine. A court may provide that other motions be considered by the judge.

(n) Objection to court commissioner's recommendation. A recommendation of a court commissioner is the order of the court until modified by the court. A party may object to the recommendation by filing an objection under Rule 108.

Proposed Advisory Committee Note

The 2017 amendments to Rule 101 replace “filed and served” with simply “served.” It is the advisory committee’s view that the term “filed” in that phrase is unnecessary and may be confusing. Paragraph (b) governs when to file and serve motions in practice before commissioners and Rule 5(e) sets forth the documents that must be filed with the court.