



UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
327 SOUTH CHURCH STREET  
ROCKFORD, ILLINOIS 61101

CHAMBERS OF  
IAIN D. JOHNSTON  
UNITED STATES JUDGE

(779) 772-8607

February 8, 2021

The Honorable Robert Dow, Jr.  
United States District Court  
Northern District of Illinois  
219 South Dearborn Street  
Chicago, IL 60604

Re: Proposed Amendment to Rule 37(e)

Dear Bob:

Thank you for talking to me the other week about contacting the Advisory Committee on Civil Rules concerning Rule 37(e) as amended in 2015. This letter addresses one of those issues; namely, whether attorney's fees are available under Rule 37(e). This question relates to both the availability of attorney's fees as a or part of a curative measure under Rule 37(e)(1) as well as the availability under Rule 37(e)(2). I freely—and perhaps, proudly—admit that I may be the only person struggling with this issue. *DR Distribs. LLC v. 21 Century Smoking, Inc.*, No. 12 CV 50324, 2021 U.S. Dist. LEXIS 9513, at \*251 n.54 (N.D. Ill. Jan. 19, 2021). My friend, Tom Allman, thinks the issue is clear: attorney's fees are available. Thomas Y. Allman, *Dealing with Prejudice: How Amended Rule 37(e) has Refocused ESI Spoliation Measures*, 26 Rich. J. L. & Tech. 1, 64-66 (2020). But, if the Advisory Committee will humor me, please let me explain my thinking.

Let's start with some basic construction. The Federal Rules of Civil Procedure are construed using the same canons as construing statutes. *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1125 (9th Cir. 2017). One rule of construction is that courts cannot read language into a statute. *Bates v. United States*, 522 U.S. 23, 29 (1997). Another rule is that if a term or phrase is used elsewhere in the same statute but not included in another section of the statute, the presumption is that the absence was intentional. *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003); *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 452 (2002).

Every other section of Rule 37 specifically authorizes attorney's fees as a remedy. Fed. R. Civ. P. 37(a)(5)(A); Fed. R. Civ. P. 37(b)(2)(C); Fed. R. Civ. P. 37(c)(1)(A),(2); Fed. R. Civ. P. 37(d)(3). But Rule 37(e) is silent as to the availability of attorney's

fees. *Snider v. Danfoss*, 15 CV 4748, 2017 U.S. Dist. LEXIS 107591, at \*12 (N.D. Ill. July 12, 2017). And even the extremely extensive and helpful Advisory Committee Notes to the 2015 amendments say nothing at all about the availability of attorney's fees. *Id.*; see also *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387 n.23 (1983) (clear legislative history weighs against *expression unius et exclusion alterius*). Applying the rules of construction, a reasonable jurist—hopefully I fall within that description—may conclude that because attorney's fees are specifically provided for in all of the other sections of Rule 37 but not in section (e), that they are unavailable under Rule 37(e). The silence is deafening, at least to me.

Personally, I think the amendments to Rule 37(e) may have swung the pendulum a little too far against sanctions for spoliation. But I don't want to fight that battle now. If attorney's fees are unavailable, an innocent party that should have obtained ESI, but did not, would be left without a complete remedy. So, despite my belief that attorney's fees are unavailable under Rule 37(e), I think they should be.

Before courts and litigants expend more time and money litigating this issue, I recommend Rule 37(e) be amended as follows:

"If electronically stored information that should have been preserved in 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, such as the payment of reasonable expenses, including attorney's fees; 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, in addition to the payment of reasonable expenses, including attorney's fees:

- (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."

If the Advisory Committee has any questions about this issue, I'd be happy to discuss them.

Thanks for your consideration of this matter.

Sincerely,



Iain D. Johnston