

1 Rule 37. Failure to make or cooperate in discovery; sanctions.

2 (a) Motion for order compelling discovery. A party, upon reasonable notice to other
3 parties and all persons affected thereby, may apply for an order compelling discovery as
4 follows:

5 (a)(1) Appropriate court. An application for an order to a party may be made to the
6 court in which the action is pending, or, on matters relating to a deposition, to the court
7 in the district where the deposition is being taken. An application for an order to a
8 deponent who is not a party shall be made to the court in the district where the
9 deposition is being taken.

10 (a)(2) Motion.

11 (a)(2)(A) If a party fails to make a disclosure required by Rule 26(a), any other party
12 may move to compel disclosure and for appropriate sanctions. The motion must include
13 a certification that the movant has in good faith conferred or attempted to confer with the
14 party not making the disclosure in an effort to secure the disclosure without court action.

15 (a)(2)(B) If a deponent fails to answer a question propounded or submitted under
16 Rule 30 or 31, or a corporation or other entity fails to make a designation under Rule
17 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or
18 if a party, in response to a request for inspection submitted under Rule 34, fails to
19 respond that inspection will be permitted as requested or fails to permit inspection as
20 requested, the discovering party may move for an order compelling an answer, or a
21 designation, or an order compelling inspection in accordance with the request. The
22 motion must include a certification that the movant has in good faith conferred or
23 attempted to confer with the person or party failing to make the discovery in an effort to
24 secure the information or material without court action. When taking a deposition on oral
25 examination, the proponent of the question may complete or adjourn the examination
26 before applying for an order.

27 (a)(3) Evasive or incomplete disclosure, answer, or response. For purposes of this
28 subdivision an evasive or incomplete disclosure, answer, or response is to be treated as
29 a failure to disclose, answer, or respond.

30 (a)(4) Expenses and sanctions.

31 (a)(4)(A) If the motion is granted, or if the disclosure or requested discovery is
32 provided after the motion was filed, the court shall, after opportunity for hearing, require
33 the party or deponent whose conduct necessitated the motion or the party or attorney
34 advising such conduct or both of them to pay to the moving party the reasonable
35 expenses incurred in obtaining the order, including attorney fees, unless the court finds
36 that the motion was filed without the movant's first making a good faith effort to obtain
37 the disclosure or discovery without court action, or that the opposing party's
38 nondisclosure, response, or objection was substantially justified, or that other
39 circumstances make an award of expenses unjust.

40 (a)(4)(B) If the motion is denied, the court may enter any protective order authorized
41 under Rule 26(c) and shall, after opportunity for hearing, require the moving party or the
42 attorney or both of them to pay to the party or deponent who opposed the motion the
43 reasonable expenses incurred in opposing the motion, including attorney fees, unless
44 the court finds that the making of the motion was substantially justified or that other
45 circumstances make an award of expenses unjust.

46 (a)(4)(C) If the motion is granted in part and denied in part, the court may enter any
47 protective order authorized under Rule 26(c) and may, after opportunity for hearing,
48 apportion the reasonable expenses incurred in relation to the motion among the parties
49 and persons in a just manner.

50 (b) Failure to comply with order.

51 (b)(1) Sanctions by court in district where deposition is taken. If a deponent fails to
52 be sworn or to answer a question after being directed to do so by the court in the district
53 in which the deposition is being taken, the failure may be considered a contempt of that
54 court.

55 (b)(2) Sanctions by court in which action is pending. If a party fails to obey an order
56 entered under Rule 16(b) or if a party or an officer, director, or managing agent of a
57 party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party
58 fails to obey an order to provide or permit discovery, including an order made under
59 Subdivision (a) of this rule or Rule 35, ~~or if a party fails to obey an order entered under~~
60 ~~Rule 16(b),~~ unless the court finds that the failure was substantially justified, the court in

61 which the action is pending may ~~make such orders take such action~~ in regard to the
62 failure as are just, ~~and among others including~~ the following:

63 (b)(2)(A) ~~an order that the matters regarding which the order was made or any other~~
64 ~~designated facts shall be taken~~ deem the matter or any other designated facts to be
65 established for the purposes of the action in accordance with the claim of the party
66 obtaining the order;

67 (b)(2)(B) ~~an order refusing to allow prohibit~~ the disobedient party ~~to support or~~
68 ~~oppose from supporting or opposing~~ designated claims or defenses; or ~~prohibiting him~~
69 from introducing designated matters in evidence;

70 (b)(2)(C) ~~an order striking out strike~~ pleadings or parts thereof, staying further
71 proceedings until the order is obeyed, dismissing the action or proceeding or any part
72 thereof, or rendering a judgment by default against the disobedient party;

73 (b)(2)(D) ~~in lieu of any of the foregoing orders or in addition thereto, an order treating~~
74 ~~as a contempt of court the failure to obey any orders except an order to submit to a~~
75 ~~physical or mental examination;~~

76 (b)(2)(E) ~~where a party has failed to comply with an order under Rule 35(a), such~~
77 ~~orders as are listed in Paragraphs (A), (B), and (C) of this subdivision, unless the party~~
78 ~~failing to comply is unable to produce such person for examination.~~

79 ~~In lieu of any of the foregoing orders or in addition thereto, the court shall require the~~
80 ~~party failing to obey the order or the attorney or both of them to pay the reasonable~~
81 ~~expenses, including attorney fees, caused by the failure, unless the court finds that the~~
82 ~~failure was substantially justified or that other circumstances make an award of~~
83 ~~expenses unjust.~~

84 (b)(2)(D) order the party or the attorney to pay the reasonable expenses, including
85 attorney fees, caused by the failure;

86 (b)(2)(E) treat the failure to obey an order, other than an order to submit to a
87 physical or mental examination, as contempt of court; and

88 (b)(2)(F) instruct the jury regarding an adverse inference.

89 (c) Expenses on failure to admit. If a party fails to admit the genuineness of any
90 document or the truth of any matter as requested under Rule 36, and if the party
91 requesting the admissions thereafter proves the genuineness of the document or the

92 truth of the matter, the party requesting the admissions may apply to the court for an
93 order requiring the other party to pay the reasonable expenses incurred in making that
94 proof, including reasonable attorney fees. The court shall make the order unless it finds
95 that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission
96 sought was of no substantial importance, or (3) the party failing to admit had reasonable
97 ground to believe that he might prevail on the matter, or (4) there was other good
98 reason for the failure to admit.

99 (d) Failure of party to attend at own deposition or serve answers to interrogatories or
100 respond to request for inspection. If a party or an officer, director, or managing agent of
101 a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a
102 party fails (1) to appear before the officer who is to take the deposition, after being
103 served with a proper notice, or (2) to serve answers or objections to interrogatories
104 submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a
105 written response to a request for inspection submitted under Rule 34, after proper
106 service of the request, the court ~~in which the action is pending on motion may make~~
107 ~~such orders in regard to the failure as are just, and among others it may take any action~~
108 ~~authorized under Paragraphs (A), (B), and (C) of Subdivision (b)(2) of this rule. In lieu of~~
109 ~~any order or in addition thereto, the court shall require the party failing to act or the~~
110 ~~party's attorney or both to pay the reasonable expenses, including attorney's fees,~~
111 ~~caused by the failure, unless the court finds that the failure was substantially justified or~~
112 ~~that other circumstances make an award of expenses unjust on motion may take any~~
113 action authorized by Subdivision (b)(2).

114 The failure to act described in this subdivision may not be excused on the ground
115 that the discovery sought is objectionable unless the party failing to act has applied for a
116 protective order as provided by Rule 26(c).

117 (e) Failure to participate in the framing of a discovery plan. If a party or attorney fails
118 to participate in good faith in the framing of a discovery plan by agreement as is
119 required by Rule 26(f), the court ~~may, after opportunity for hearing, require such party or~~
120 ~~attorney to pay to any other party the reasonable expenses, including attorney fees,~~
121 ~~caused by the failure~~ on motion may take any action authorized by Subdivision (b)(2).

122 (f) Failure to disclose. If a party fails to disclose a witness, document or other
123 material as required by Rule 26(a) or Rule 26(e)(1), or to amend a prior response to
124 discovery as required by Rule 26(e)(2), that party shall not be permitted to use the
125 witness, document or other material at any hearing unless the failure to disclose is
126 harmless or the party shows good cause for the failure to disclose. In addition to or in
127 lieu of this sanction, the court ~~may order any other sanction, including payment of~~
128 ~~reasonable costs and attorney fees, any order permitted under subpart (b)(2)(A), (B) or~~
129 ~~(C) and informing the jury of the failure to disclose~~ on motion may take any action
130 authorized by Subdivision (b)(2).

131 (g) Failure to preserve evidence. Nothing in this rule limits the inherent power of the
132 court to take any action authorized by Subdivision (b)(2) if a party destroys, conceals,
133 alters, tampers with or fails to preserve a document, tangible item, electronic data or
134 other evidence in violation of a duty. Absent exceptional circumstances, a court may not
135 impose sanctions under these rules on a party for failing to provide electronically stored
136 information lost as a result of the routine, good-faith operation of an electronic
137 information system.

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