

1 **Rule 37. Discovery and disclosure motions; Sanctions~~Failure to make or~~
2 ~~cooperate in discovery; sanctions.~~**

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

6 (a)(1) A party may move to compel disclosure or discovery and ~~Appropriate court. An~~
7 ~~application for appropriate sanctions if another party:~~

8 (a)(1)(A) fails to disclose, fails to respond to a discovery request, or makes an
9 evasive or incomplete disclosure or response to a request for discovery;

10 (a)(1)(B) fails to disclose, fails to respond to a discovery request, fails to supplement
11 a disclosure or response or makes a supplemental disclosure or response without an
12 adequate explanation of why the additional or correct information was not previously
13 provided;

14 (a)(1)(C) objects to a discovery request ;

15 (a)(1)(D) impedes, delays, or frustrates the fair examination of a witness; or

16 (a)(1)(E) otherwise fails to make full and complete disclosure or discovery.

17 (a)(2) A motion ~~order to a party~~ may be made to the court in which the action is
18 pending, or, on matters relating to a deposition or a document subpoena, to the court in
19 the district where the deposition is being taken or where the subpoena was served. A
20 motion. ~~An application~~ for an order to a nonparty witness ~~deponent who is not a party~~
21 shall be made to the court in the district where the deposition is being taken or where
22 the subpoena was served.

23 (a)(3) The moving ~~2) Motion.~~

24 (a)(2)(A) If a party must attach a copy of the request for discovery, the ~~fails to make a~~
25 ~~disclosure, or the response at issue. The moving~~ required by Rule 26(a), any other party
26 must also attach ~~may move to compel disclosure and for appropriate sanctions. The~~
27 ~~motion must include~~ a certification that the moving party ~~movant~~ has in good faith
28 conferred or attempted to confer with the other affected parties ~~party not making the~~
29 ~~disclosure~~ in an effort to secure the disclosure or discovery without court action and that
30 the discovery being sought is proportional under Rule 26(b)(2).

31 ~~(a)(2)(B) If a deponent fails to answer a question propounded or submitted under~~
32 ~~Rule 30 or 31, or a corporation or other entity fails to make a designation under Rule~~
33 ~~30(b) **Motion for protective order.**~~

34 ~~(b)(1) A)(6) or 31(a), or a party or the person from whom discovery is sought fails to~~
35 ~~answer an interrogatory submitted under Rule 33, or if a party, in response to a request~~
36 ~~for inspection submitted under Rule 34, fails to respond that inspection will be permitted~~
37 ~~as requested or fails to permit inspection as requested, the discovering party may move~~
38 ~~for an order of protection from discovery compelling an answer, or a designation, or an~~
39 ~~order compelling inspection in accordance with the request. The moving party shall~~
40 ~~attach to the motion a copy of the request for discovery or the response at issue. The~~
41 ~~moving party shall also attach must include a certification that the moving party movant~~
42 ~~has in good faith conferred or attempted to confer with other affected parties to resolve~~
43 ~~the dispute the person or party failing to make the discovery in an effort to secure the~~
44 ~~information or material without court action.~~

45 ~~(b)(2) If When taking a deposition on oral examination, the motion raises issues of~~
46 ~~proportionality under Rule 26(b)(2), proponent of the party seeking the discovery has~~
47 ~~the burden of demonstrating that the information being sought is proportional.~~

48 ~~(c) Orders. The court question may make any complete or adjourn the examination~~
49 ~~before applying for an order to require disclosure or discovery or to protect a party or~~
50 ~~person from discovery being conducted in bad faith or from annoyance,~~
51 ~~embarrassment, oppression, or undue burden or expense, or to achieve proportionality~~
52 ~~under Rule 26(b)(2), including one or more of the following: -~~

53 ~~(c)(1) that the discovery not be had;~~

54 ~~(c)(2) that the discovery may be had only on specified terms and conditions,~~
55 ~~including a designation of the time or place;~~

56 ~~(c)(3) that the discovery may be had only by a method of discovery other than that~~
57 ~~selected by the party seeking discovery;~~

58 ~~(c)(4) that certain matters not be inquired into, or that the scope of the discovery be~~
59 ~~limited to certain matters;~~

60 ~~(c)(5) that discovery be conducted with no one present except persons designated~~
61 ~~by the court;~~

62 (c)(6) that a deposition after being sealed be opened only by order of the court;

63 (c)(7) that a trade secret or other confidential research, development, or commercial
64 information not be disclosed or be disclosed only in a designated way;

65 (c)(8) that the parties simultaneously file specified documents or information
66 enclosed in sealed envelopes to be opened as directed by the court;

67 (c)(9) that a question about a statement or opinion of fact or the application of law to
68 fact not be answered until after designated discovery has been completed or until a
69 pretrial conference or other later time; or

70 (c)(10) that the costs, expenses and attorney fees of discovery be allocated among
71 the parties as justice requires.

72 (c)(11) If a protective order terminates a deposition, it shall be resumed only upon
73 the order of the court in which the action is pending.

74 ~~(d) (a)(3) Evasive or incomplete disclosure, answer, or response. For purposes of~~
75 ~~this subdivision an evasive or incomplete disclosure, answer, or response is to be~~
76 ~~treated as a failure to disclose, answer, or respond.~~

77 ~~(a)(4) Expenses and sanctions for motions.-~~

78 ~~(a)(4)(A) If the motion to compel or for a protective order is granted, or if a party~~
79 ~~provides the disclosure or requested discovery or withdraws a disclosure or discovery~~
80 ~~request is provided after the motion is was filed, the court may order the party, witness~~
81 ~~or attorney shall, after opportunity for hearing, require the party or deponent whose~~
82 ~~conduct necessitated the motion or the party or attorney advising such conduct or both~~
83 ~~of them to pay to the moving party the reasonable expenses and attorney fees incurred~~
84 ~~on account of the motion if in obtaining the order, including attorney fees, unless the~~
85 ~~court finds that the party, witness, or attorney did not act in motion was filed without the~~
86 ~~movant's first making a good faith or asserted a position that was not effort to obtain the~~
87 ~~disclosure or discovery without court action, or that the opposing party's nondisclosure,~~
88 ~~response, or objection was substantially justified, A, or that other circumstances make~~
89 ~~an award of expenses unjust.~~

90 ~~(a)(4)(B) If the motion is denied, the court may enter any protective order authorized~~
91 ~~under Rule 26(c) and shall, after opportunity for hearing, require the moving party or the~~
92 ~~attorney or both of them to pay to the party or deponent who opposed the motion to~~

93 ~~compel or the reasonable expenses incurred in opposing the motion, including attorney~~
94 ~~fees, unless the court finds that the making of the motion was substantially justified or~~
95 ~~that other circumstances make an award of expenses unjust.~~

96 ~~(a)(4)(C) If the motion is granted in part and denied in part, the court may enter any~~
97 ~~protective order authorized under Rule 26(c) and may, after opportunity for a protective~~
98 ~~order does not suspend or toll the time to complete standard discovery hearing,~~
99 ~~apportion the reasonable expenses incurred in relation to the motion among the parties~~
100 ~~and persons in a just manner.~~

101 ~~(e)~~ **Failure to comply with order.**

102 ~~(e)~~(1) Sanctions by court in district where deposition is taken. ~~Failure if a deponent~~
103 ~~fails to follow an order of be sworn or to answer a question after being directed to do so~~
104 ~~by the court in the district in which the deposition is being taken or where the document~~
105 ~~subpoena was served is, the failure may be considered a~~ contempt of that court.

106 ~~(e)(2) Sanctions by court in which action is pending. Unless~~(2) Sanctions by court
107 ~~in which action is pending. If a party fails to obey an order entered under Rule 16(b) or if~~
108 ~~a party or an officer, director, or managing agent of a party or a person designated~~
109 ~~under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to~~
110 ~~provide or permit discovery, including an order made under Subdivision (a) of this rule~~
111 ~~or Rule 35, unless~~ the court finds that the failure was substantially justified, the court in
112 which the action is pending may impose appropriate sanctions for ~~take such action in~~
113 ~~regard to~~ the failure to follow its orders as are just, including the following:

114 ~~(e)~~(2)(A) deem the matter or any other designated facts to be established ~~for the~~
115 ~~purposes of the action~~ in accordance with the claim or defense of the party obtaining the
116 order;

117 ~~(e)~~(2)(B) prohibit the disobedient party from supporting or opposing designated
118 claims or defenses or from introducing designated matters into ~~in~~ evidence;

119 ~~(e)~~(2)(C) ~~strike pleadings or parts thereof,~~ stay further proceedings until the order is
120 obeyed;

121 ~~(e)(2)(D),~~ dismiss all or part of the action, strike all or ~~proceeding or any part of the~~
122 ~~pleading thereof,~~ or render judgment by default on all or part of ~~against~~ the
123 ~~action~~ disobedient party;

124 ~~(e)~~(2)(~~ED~~) order the party or the attorney to pay the reasonable expenses,
125 including attorney fees, caused by the failure;

126 ~~(e)~~(2)(~~FE~~) treat the failure to obey an order, other than an order to submit to a
127 physical or mental examination, as contempt of court; and

128 ~~(e)~~(2)(~~GF~~) instruct the jury regarding an adverse inference.

129 ~~(f)~~ **Expenses on failure to admit.** If a party fails to admit the genuineness of any
130 document or the truth of any matter as requested under Rule 36, and if the party
131 requesting the admissions ~~thereafter~~ proves the genuineness of the document or the
132 truth of the matter, the party requesting the admissions may apply to the court for an
133 order requiring the other party to pay the reasonable expenses incurred in making that
134 proof, including reasonable attorney fees. The court shall make the order unless it finds
135 that: ~~(1) the request was held objectionable pursuant to Rule 36(a), or (2) the~~
136 ~~admission sought was of no substantial importance, or (3) the party failing to admit had~~
137 ~~reasonable ground to believe that he might prevail on the matter, or (4) there was other~~
138 ~~good reason for the failure to admit.~~

139 ~~(f)(1) the request was held objectionable pursuant to Rule 36(a);~~

140 ~~(f)(2) the admission sought was of no substantial importance;~~

141 ~~(f)(3) there were reasonable grounds to believe that the party failing to admit might~~
142 ~~prevail on the matter;~~

143 ~~(f)(4) that the request is not proportional under Rule 26(b)(2); or~~

144 ~~(f)(5) there were other good reasons for the failure to admit.~~

145 ~~(g)~~ **Failure of party to attend at own deposition.** ~~The court on motion may take~~
146 ~~any action authorized by paragraph (e)(2) if or serve answers to interrogatories or~~
147 ~~respond to request for inspection. If~~ a party or an officer, director, or managing agent of
148 a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a
149 party fails ~~(1) to appear before the officer taking who is to take~~ the deposition, after
150 ~~being served with a proper notice, or (2) to serve answers or objections to~~
151 ~~interrogatories submitted under Rule 33, after~~ proper service of the notice.
152 ~~interrogatories, or (3) to serve a written response to a request for inspection submitted~~
153 ~~under Rule 34, after proper service of the request, the court . on motion may take any~~
154 ~~action authorized by Subdivision (b)(2).~~

155 The failure to act described in this ~~paragraph subdivision~~ may not be excused on the
156 ground that the discovery sought is objectionable unless the party failing to act has
157 applied for a protective order ~~under paragraph (b). as provided by Rule 26(c).~~

158 ~~(h) Failure to disclose.~~ ~~(e) Failure to participate in the framing of a discovery plan. If~~
159 ~~a party or attorney fails to participate in good faith in the framing of a discovery plan by~~
160 ~~agreement as is required by Rule 26(f), the court on motion may take any action~~
161 ~~authorized by Subdivision (b)(2).~~

162 ~~(f) Failure to disclose.~~ If a party fails to disclose a witness, document or other
163 material as required by Rule 26(a) or Rule 26(~~d~~~~e~~)(1), or to amend a prior response to
164 discovery as required by Rule 26(~~d~~~~e~~)(2), that party shall not be permitted to use the
165 witness, document or other material at any hearing unless the failure to disclose is
166 harmless or the party shows good cause for the failure to disclose. In addition to or in
167 lieu of this sanction, the court on motion may take any action authorized by paragraph
168 ~~(e) Subdivision (b)(2).~~

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

176 **Advisory Committee Notes**

177 The 2011 amendments to Rule 37 make two principal changes. First, the amended
178 Rule 37 consolidates provisions for motions for a protective order (formerly set forth in
179 Rule 26(c)) with provisions for motions to compel. By consolidating the standards for
180 these two motions in a single rule, the Advisory Committee sought to highlight some of
181 the parallels and distinctions between the two types of motions and to present them in a
182 single rule.

183 Second, the amended Rule 37 incorporates the new Rule 26 standard of
184 "proportionality" as a principal criterion on which motions to compel or for a protective
185 order should be evaluated. As to motions to compel, Rule 37(a)(3) requires that a party

Rule 37.

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186 [moving to compel discovery certify to the court "that the discovery being sought is](#)
187 [proportional under Rule 26\(b\)\(2\)." Rule 37\(b\) makes clear that a lack of proportionality](#)
188 [may be raised as ground for seeking a protective order, indicating that "the party](#)
189 [seeking the discovery has the burden of demonstrating that the information being](#)
190 [sought is proportional."](#)
191