

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

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

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

8 (a)(1)(A) fails to disclose, fails to respond to a discovery request, or makes an order
9 to a party 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 may be made to the court in which the action is pending, or, on
18 matters relating to a deposition or a document subpoena, to the court in the district
19 where the deposition is being taken. ~~An application~~ or where the subpoena was served.
20 A motion for an order to a ~~deponent who is not a party~~nonparty witness shall be made
21 to the court in the district where the deposition is being taken or where the subpoena
22 was served.

23 (a)(2) ~~Motion.~~

24 ~~(a)(2)(A) If a party fails to make a disclosure required by Rule 26(a), any other party~~
25 ~~may move to compel disclosure and for appropriate sanctions.~~3) The motion moving
26 party must include attach a copy of the request for discovery, the disclosure, or the
27 response at issue. The moving party must also attach a certification that the
28 ~~movant~~moving party has in good faith conferred or attempted to confer with the ~~party~~
29 ~~not making the disclosure~~ other affected parties in an effort to secure the disclosure or
30 discovery without court action.

31 ~~(a)(2)(B) If a deponent fails to answer a question propounded or submitted and that~~
32 ~~the discovery being sought is proportional under Rule 30 or 31, or a corporation or other~~
33 ~~entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer~~
34 ~~an interrogatory submitted under Rule 33, or if a party, in response to a request for~~
35 ~~inspection submitted under Rule 34, fails to respond that inspection will be permitted as~~
36 ~~requested or fails to permit inspection as requested, the discovering party may move for~~
37 ~~an order compelling an answer, or a designation, or an order compelling inspection in~~
38 ~~accordance with the request. The motion must include a certification that the movant~~
39 ~~has in good faith conferred or attempted to confer with the person or party failing to~~
40 ~~make the discovery in an effort to secure the information or material without court~~
41 ~~action. When taking a deposition on oral examination, the proponent of the question~~
42 ~~may complete or adjourn the examination before applying for an order.~~26(b)(2).

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

46 ~~(a)(4)-(b) Motion for protective order.~~

47 ~~(b)(1) A party or the person from whom discovery is sought may move for an order~~
48 ~~of protection from discovery. The moving party shall attach to the motion a copy of the~~
49 ~~request for discovery or the response at issue. The moving party shall also attach a~~
50 ~~certification that the moving party has in good faith conferred or attempted to confer with~~
51 ~~other affected parties to resolve the dispute without court action.~~

52 ~~(b)(2) If the motion raises issues of proportionality under Rule 26(b)(2), the party~~
53 ~~seeking the discovery has the burden of demonstrating that the information being~~
54 ~~sought is proportional.~~

55 ~~(c) Orders. The court may make any order to require disclosure or discovery or to~~
56 ~~protect a party or person from discovery being conducted in bad faith or from~~
57 ~~annoyance, embarrassment, oppression, or undue burden or expense, or to achieve~~
58 ~~proportionality under Rule 26(b)(2), including one or more of the following:~~

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

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

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

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

66 (c)(5) that discovery be conducted with no one present except persons designated
67 by the court;

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

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

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

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

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

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

80 (d) Expenses and sanctions-

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

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

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

104 ~~(be)~~ Failure to comply with order.

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

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

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

120 ~~(be)~~(2)(B) prohibit the disobedient party from supporting or opposing designated
121 claims or defenses or from introducing designated matters ~~in~~into evidence;

122 ~~(be)~~(2)(C) ~~strike pleadings or parts thereof~~, stay further proceedings until the order is
123 obeyed;

124 (e)(2)(D) dismiss all or part of the action, strike all or ~~proceeding or any~~ part
125 ~~thereof of the pleadings~~, or render judgment by default against on all or part of the
126 ~~disobedient party~~action;

127 (be)(2)(DE) order the party or the attorney to pay the reasonable expenses,
128 including attorney fees, caused by the failure;

129 (be)(2)(EF) treat the failure to obey an order, other than an order to submit to a
130 physical or mental examination, as contempt of court; and

131 (be)(2)(FG) instruct the jury regarding an adverse inference.

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

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

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

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

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

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

148 (g) Failure of party to attend at own deposition ~~or serve answers to interrogatories or~~
149 ~~respond to request for inspection. If.~~ The court on motion may take any action

150 authorized by paragraph (e)(2) if a party or an officer, director, or managing agent of a
151 party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party
152 fails ~~(1) to appear before the officer~~ who is to take~~taking~~ the deposition, after ~~being~~
153 ~~served with a proper notice, or (2) to serve answers or objections to interrogatories~~
154 ~~submitted under Rule 33, after proper service of the~~ interrogatories, or (3) to serve a

155 ~~written response to a request for inspection submitted under Rule 34, after proper~~
156 ~~service of the request, the court . on motion may take any action authorized by~~
157 ~~Subdivision (b)(2).~~

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

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

165 ~~(f) Failure to disclose.~~(h) Failure to disclose. If a party fails to disclose a witness,
166 document or other material as required by Rule 26(a) or Rule 26(~~ed~~)(1), or to amend a
167 prior response to discovery as required by Rule 26(~~e~~)(~~2d~~)(4), that party shall not be
168 permitted to use the witness, document or other material at any hearing unless the
169 failure to disclose is harmless or the party shows good cause for the failure to disclose.
170 In addition to or in lieu of this sanction, the court on motion may take any action
171 authorized by ~~Subdivision (b)paragraph (e)~~(2).

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

179 Advisory Committee Notes

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

186 Second, the amended Rule 37 incorporates the new Rule 26 standard of
187 "proportionality" as a principal criterion on which motions to compel or for a protective
188 order should be evaluated. As to motions to compel, Rule 37(a)(3) requires that a party
189 moving to compel discovery certify to the court "that the discovery being sought is
190 proportional under Rule 26(b)(2)." Rule 37(b) makes clear that a lack of proportionality
191 may be raised as ground for seeking a protective order, indicating that "the party
192 seeking the discovery has the burden of demonstrating that the information being
193 sought is proportional."
194