

1 **Rule 37. Discovery and disclosure motions; Sanctions.**

2 (a) Motion for order compelling disclosure or discovery.

3 (a)(1) A party may move to compel disclosure or discovery and for appropriate
4 sanctions if another party:

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

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

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

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

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

14 (a)(2) A motion may be made to the court in which the action is pending, or, on
15 matters relating to a deposition or a document subpoena, to the court in the district
16 where the deposition is being taken or where the subpoena was served. A motion for an
17 order to a nonparty witness shall be made to the court in the district where the
18 deposition is being taken or where the subpoena was served.

19 (a)(3) The moving party must attach a copy of the request for discovery, the
20 disclosure, or the response at issue. The moving party must also attach a certification
21 that the moving party has in good faith conferred or attempted to confer with the other
22 affected parties in an effort to secure the disclosure or discovery without court action
23 and that the discovery being sought is proportional under Rule 26(b)(2).

24 (b) Motion for protective order.

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

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

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

37 (c)(1) that the discovery not be had;

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

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

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

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

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

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

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

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

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

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

58 (d) Expenses and sanctions for motions. If the motion to compel or for a protective
59 order is granted, or if a party provides disclosure or discovery or withdraws a disclosure
60 or discovery request after a motion is filed, the court may order the party, witness or

61 attorney to pay the reasonable expenses and attorney fees incurred on account of the
62 motion if the court finds that the party, witness, or attorney did not act in good faith or
63 asserted a position that was not substantially justified. A motion to compel or for a
64 protective order does not suspend or toll the time to complete standard discovery.

65 (e) Failure to comply with order.

66 (e)(1) Sanctions by court in district where deposition is taken. Failure to follow an
67 order of the court in the district in which the deposition is being taken or where the
68 document subpoena was served is contempt of that court.

69 (e)(2) Sanctions by court in which action is pending. Unless the court finds that the
70 failure was substantially justified, the court in which the action is pending may impose
71 appropriate sanctions for the failure to follow its orders, including the following:

72 (e)(2)(A) deem the matter or any other designated facts to be established in
73 accordance with the claim or defense of the party obtaining the order;

74 (e)(2)(B) prohibit the disobedient party from supporting or opposing designated
75 claims or defenses or from introducing designated matters into evidence;

76 (e)(2)(C) stay further proceedings until the order is obeyed;

77 (e)(2)(D) dismiss all or part of the action, strike all or part of the pleadings, or render
78 judgment by default on all or part of the action;

79 (e)(2)(E) order the party or the attorney to pay the reasonable expenses, including
80 attorney fees, caused by the failure;

81 (e)(2)(F) treat the failure to obey an order, other than an order to submit to a physical
82 or mental examination, as contempt of court; and

83 (e)(2)(G) instruct the jury regarding an adverse inference.

84 (f) Expenses on failure to admit. If a party fails to admit the genuineness of any
85 document or the truth of any matter as requested under Rule 36, and if the party
86 requesting the admissions proves the genuineness of the document or the truth of the
87 matter, the party requesting the admissions may apply to the court for an order requiring
88 the other party to pay the reasonable expenses incurred in making that proof, including
89 reasonable attorney fees. The court shall make the order unless it finds that:

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

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

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

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

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

96 (g) Failure of party to attend at own deposition. The court on motion may take any
97 action authorized by paragraph (e)(2) if a party or an officer, director, or managing agent
98 of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a
99 party fails to appear before the officer taking the deposition, after proper service of the
100 notice. The failure to act described in this paragraph may not be excused on the ground
101 that the discovery sought is objectionable unless the party failing to act has applied for a
102 protective order under paragraph (b).

103 (h) Failure to disclose. If a party fails to disclose a witness, document or other
104 material as required by Rule 26(a) or Rule 26(d)(1), or to amend a prior response to
105 discovery as required by Rule 26(d)(4), that party shall not be permitted to use the
106 witness, document or other material at any hearing unless the failure to disclose is
107 harmless or the party shows good cause for the failure to disclose. In addition to or in
108 lieu of this sanction, the court on motion may take any action authorized by paragraph
109 (e)(2).

110 (i) Failure to preserve evidence. Nothing in this rule limits the inherent power of the
111 court to take any action authorized by paragraph (e)(2) if a party destroys, conceals,
112 alters, tampers with or fails to preserve a document, tangible item, electronic data or
113 other evidence in violation of a duty. Absent exceptional circumstances, a court may not
114 impose sanctions under these rules on a party for failing to provide electronically stored
115 information lost as a result of the routine, good-faith operation of an electronic
116 information system.

117 **Advisory Committee Notes**

118 The 2011 amendments to Rule 37 make two principal changes. First, the amended
119 Rule 37 consolidates provisions for motions for a protective order (formerly set forth in
120 Rule 26(c)) with provisions for motions to compel. By consolidating the standards for
121 these two motions in a single rule, the Advisory Committee sought to highlight some of

122 the parallels and distinctions between the two types of motions and to present them in a
123 single rule.

124 Second, the amended Rule 37 incorporates the new Rule 26 standard of
125 "proportionality" as a principal criterion on which motions to compel or for a protective
126 order should be evaluated. As to motions to compel, Rule 37(a)(3) requires that a party
127 moving to compel discovery certify to the court "that the discovery being sought is
128 proportional under Rule 26(b)(2)." Rule 37(b) makes clear that a lack of proportionality
129 may be raised as ground for seeking a protective order, indicating that "the party
130 seeking the discovery has the burden of demonstrating that the information being
131 sought is proportional."

132