

1 **Rule 37. Statement of discovery issues; Sanctions; Failure to admit, to attend**
2 **deposition or to preserve evidence.**

3 **(a) Statement of discovery issues.**

4 (1) A party or the person from whom discovery is sought may request that the judge
5 enter an order regarding any discovery issue, including:

6 (A) failure to disclose under Rule [26](#);

7 (B) extraordinary discovery under Rule [26](#);

8 (C) a subpoena under Rule [45](#);

9 (D) protection from discovery; or

10 (E) compelling discovery from a party who fails to make full and complete
11 discovery.

12 **(2) Statement of discovery issues length and content.** The statement of discovery
13 issues must be no more than 4 pages, not including permitted attachments, and
14 must include in the following order:

15 (A) the relief sought and the grounds for the relief sought stated succinctly and
16 with particularity;

17 (B) a certification that the requesting party has in good faith conferred or
18 attempted to confer with the other affected parties in person or by telephone in
19 an effort to resolve the dispute without court action;

20 (C) a statement regarding proportionality under Rule [26\(b\)\(2\)](#); and

21 (D) if the statement requests extraordinary discovery, a statement certifying that
22 the party has reviewed and approved a discovery budget.

23 **(3) Objection length and content.** No more than 7 days after the statement is filed,
24 any other party may file an objection to the statement of discovery issues. The

25 objection must be no more than 4 pages, not including permitted attachments, and
26 must address the issues raised in the statement.

27 **(4) Permitted attachments.** The party filing the statement must attach to the
28 statement only a copy of the disclosure, request for discovery or the response at
29 issue.

30 **(5) Proposed order.** Each party must file a proposed order concurrently with its
31 statement or objection.

32 **(6) Decision.** Upon filing of the objection or expiration of the time to do so, either
33 party may and the party filing the statement must file a Request to Submit for
34 Decision under Rule 7(g). The court will promptly:

35 (A) decide the issues on the pleadings and papers;

36 (B) conduct a hearing, preferably remotely and if remotely, then consistent with
37 the safeguards in Rule 43(b)~~by telephone conference or other electronic~~
38 ~~communication~~; or

39 (C) order additional briefing and establish a briefing schedule.

40 **(7) Orders.** The court may enter orders regarding disclosure or discovery or to
41 protect a party or person from discovery being conducted in bad faith or from
42 annoyance, embarrassment, oppression, or undue burden or expense, or to achieve
43 proportionality under Rule 26(b)(2), including one or more of the following:

44 (A) that the discovery not be had or that additional discovery be had;

45 (B) that the discovery may be had only on specified terms and conditions,
46 including a designation of the time or place;

47 (C) that the discovery may be had only by a method of discovery other than that
48 selected by the party seeking discovery;

49 (D) that certain matters not be inquired into, or that the scope of the discovery be
50 limited to certain matters;

51 (E) that discovery be conducted with no one present except persons designated
52 by the court;

53 (F) that a deposition after being sealed be opened only by order of the court;

54 (G) that a trade secret or other confidential information not be disclosed or be
55 disclosed only in a designated way;

56 (H) that the parties simultaneously deliver specified documents or information
57 enclosed in sealed envelopes to be opened as directed by the court;

58 (I) that a question about a statement or opinion of fact or the application of law to
59 fact not be answered until after designated discovery has been completed or until
60 a pretrial conference or other later time;

61 (J) that the costs, expenses and attorney fees of discovery be allocated among the
62 parties as justice requires; or

63 (K) that a party pay the reasonable costs, expenses, and attorney fees incurred on
64 account of the statement of discovery issues if the relief requested is granted or
65 denied, or if a party provides discovery or withdraws a discovery request after a
66 statement of discovery issues is filed and if the court finds that the party, witness,
67 or attorney did not act in good faith or asserted a position that was not
68 substantially justified.

69 **(8) Request for sanctions prohibited.** A statement of discovery issues or an
70 objection may include a request for costs, expenses and attorney fees but not a
71 request for sanctions.

72 **(9) Statement of discovery issues does not toll discovery time.** A statement of
73 discovery issues does not suspend or toll the time to complete standard discovery.

74 **(b) Motion for sanctions.** Unless the court finds that the failure was substantially
75 justified, the court, upon motion, may impose appropriate sanctions for the failure to
76 follow its orders, including the following:

- 77 (1) deem the matter or any other designated facts to be established in accordance
78 with the claim or defense of the party obtaining the order;
- 79 (2) prohibit the disobedient party from supporting or opposing designated claims or
80 defenses or from introducing designated matters into evidence;
- 81 (3) stay further proceedings until the order is obeyed;
- 82 (4) dismiss all or part of the action, strike all or part of the pleadings, or render
83 judgment by default on all or part of the action;
- 84 (5) order the party or the attorney to pay the reasonable costs, expenses, and
85 attorney fees, caused by the failure;
- 86 (6) treat the failure to obey an order, other than an order to submit to a physical or
87 mental examination, as contempt of court; and
- 88 (7) instruct the jury regarding an adverse inference.

89 **(c) Motion for costs, expenses and attorney fees on failure to admit.** If a party fails to
90 admit the genuineness of a document or the truth of a matter as requested under
91 Rule [36](#), and if the party requesting the admissions proves the genuineness of the
92 document or the truth of the matter, the party requesting the admissions may file a
93 motion for an order requiring the other party to pay the reasonable costs, expenses and
94 attorney fees incurred in making that proof. The court must enter the order unless it
95 finds that:

- 96 (1) the request was held objectionable pursuant to Rule [36\(a\)](#);
- 97 (2) the admission sought was of no substantial importance;
- 98 (3) there were reasonable grounds to believe that the party failing to admit might
99 prevail on the matter;
- 100 (4) that the request was not proportional under Rule [26\(b\)\(2\)](#); or
- 101 (5) there were other good reasons for the failure to admit.

102 **(d) Motion for sanctions for failure of party to attend deposition.** If a party or an
103 officer, director, or managing agent of a party or a person designated under
104 Rule [30\(b\)\(6\)](#) to testify on behalf of a party fails to appear before the officer taking the
105 deposition after service of the notice, any other party may file a motion for sanctions
106 under paragraph (b). The failure to appear may not be excused on the ground that the
107 discovery sought is objectionable unless the party failing to appear has filed a statement
108 of discovery issues under paragraph (a).

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

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117 **Advisory Committee Notes**

118 The 2011 amendments to Rule 37 make two principal changes. First, the amended Rule
119 37 consolidates provisions for motions for a protective order (formerly set forth in Rule
120 26(c)) with provisions for motions to compel. ~~By consolidating the standards for these~~
121 ~~two motions in a single rule, the Advisory Committee sought to highlight some of the~~
122 ~~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 ~~Paragraph (h) and its predecessors have long authorized the court to take the drastic~~
133 ~~steps authorized by paragraph (e)(2) for failure to disclose as required by the rules or~~
134 ~~for failure to amend a response to discovery. The federal counterpart to this provision is~~
135 ~~similar. Yet the courts historically have limited those more drastic sanctions to~~
136 ~~circumstances in which a party fails to comply with a court order, persists in dilatory~~
137 ~~conduct, or acts in bad faith.~~

138 ~~The 2011 amendments have brought new attention to paragraph (h). Those~~
139 ~~amendments, which emphasized greater and earlier disclosure, also emphasized the~~
140 ~~enforcement of that requirement by prohibiting the party from using the undisclosed~~
141 ~~information as evidence at a hearing. The committee intends that courts should impose~~
142 ~~sanctions under (e)(2) for failure to disclose in only the most egregious circumstances.~~
143 ~~In most circumstances exclusion of the evidence seems an adequate sanction for failure~~
144 ~~to disclose or failure to amend discovery.~~

145 ~~2015 Amendments.~~

146 Paragraph (a) adopts the expedited procedures for statements of discovery issues
147 formerly found in Rule 4-502 of the Code of Judicial Administration. Statements of
148 discovery issues replace discovery motions, and paragraph (a) governs unless the judge
149 orders otherwise.

150 ~~Former paragraph (a)(2), which directed a motion for a discovery order against a~~
151 ~~nonparty witness to be filed in the judicial district where the subpoena was served or~~
152 ~~deposition was to be taken, has been deleted. A statement of discovery issues related to~~
153 ~~a nonparty must be filed in the court in which the action is pending.~~

154 ~~Former paragraph (h), which prohibited a party from using at a hearing information not~~
155 ~~disclosed as required, was deleted because the effect of non-disclosure is adequately~~

156 | ~~governed by Rule 26(d). See also The Townhomes At Pointe Meadows Owners~~
157 | ~~Association v. Pointe Meadows Townhomes, LLC, 2014 UT App 52 ¶14. The process for~~
158 | ~~resolving disclosure issues is included in paragraph (a).~~

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