

Proposed Amendments to Rule 37

Rule 37 is amended as follows:

Rule 37. Failure ~~To to~~ Make Disclosure or **Disclosures** or to Cooperate in Discovery; Sanctions

(a) Motion for **an** Order Compelling Disclosure or Discovery. A party, upon reasonable

(1) In General. On notice to other parties and all persons affected thereby, ~~may apply~~ **persons, a party may move** for an order compelling disclosure or discovery ~~as follows:~~ **The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.** ~~(1) Motion.~~

(2) Specific Motions.

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

(B) **To Compel a Discovery Response.** A party seeking **discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:**

(i) a deponent fails to answer a question propounded or submitted **asked** under Rules 30 or 31, or;

(ii) a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or **(4)**;

(iii) a party fails to answer an interrogatory submitted under Rule 33; or if

(iv) a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested -- or fails to permit inspection -- as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. **under Rule 34.**

(C) Related to a Deposition. When taking a **an oral** deposition or oral examination, the proponent of the **, the party asking a** question may complete or adjourn the examination before applying **moving** for an order.

(23) Evasive or Incomplete Disclosure, Answer, or Response. For purposes of this subdivision **(a)**, an evasive or incomplete disclosure, answer, or response is to **must** be treated as a failure to disclose, answer, or respond.

(3)4 Payment of Expenses and Sanctions; Protective Orders.

(A) **If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing)**. If the motion is granted---or if the disclosure or requested discovery is provided after the motion was filed,---the court shall **must**, after ~~affording~~**giving** an opportunity to be heard, require the party or deponent whose conduct necessitated the motion ~~or~~, the party or attorney advising ~~such~~ **that** conduct, or both ~~of them~~ to pay ~~to the moving party~~ **the movant's** reasonable expenses incurred in making the motion, including attorney's fees, ~~unless~~. **But** the court finds ~~that~~ **must not order this payment if:**

(i) ~~the motion was~~ **movant** filed ~~without the movant's first making~~ **the motion before attempting in** good faith effort to obtain the disclosure or discovery without court action, ~~or that~~;

(ii) the opposing party's nondisclosure, response, or objection was substantially justified, ~~;~~ ~~or that~~

(iii) other circumstances make an award of expenses unjust.

(B) **If the Motion Is Denied**. If the motion is denied, the court may ~~enter~~ **issue** any protective order authorized under Rule 26(c) and shall **must**, after ~~affording~~**giving** an opportunity to be heard, require the ~~moving party or~~ **movant**, the attorney **filing the motion**, or both ~~of them~~ to pay ~~to the party or deponent who opposed the motion~~ **the its** reasonable expenses incurred in opposing the motion, including attorney's fees, ~~unless~~. **But** the court finds ~~that the making of~~ **must not order this**

payment if the motion was substantially justified or ~~that other~~ circumstances make an award of expenses unjust.

(C) If the **Motion Is Granted in Part and Denied in Part. If the** motion is granted in part and denied in part, the court may ~~enter~~ **issue** any protective order authorized under Rule 26(c) and may, after ~~affording~~ **giving** an opportunity to be heard, apportion the reasonable expenses incurred in relation to ~~for~~ the motion among the parties and persons in a just manner.

(b) Failure To ~~to~~ Comply With **with a Court Order: Sanctions.**

(1) Sanctions When the Deposition Is Taken. If the court orders a deponent fails to be sworn or to answer a question after being directed to do so by ~~and~~ the court **deponent fails to obey**, the failure may be considered a ~~as~~ **treated as** contempt of court.

(2) Sanctions in Other Discovery Matters.

(A) For Not Obeying a Discovery Order. If a party or ~~an~~ **a party's** officer, director, or managing agent of ~~--or~~ a party or person **witness** designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party ~~)(4)-~~ ~~-~~ fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 26(f), 35, or if ~~37~~ **(a party** fails to obey an order entered under Rule 26(f), the court may make such **issue further just** orders in regard to the failure as are just, and among others. **They may include** the following:

~~(1) An order~~**(i) directing** that the matters regarding which~~embraced in~~ the order was made or any other designated facts shall be taken to be ~~as~~ established for the purposes of the action in accordance with the claim of the party obtaining the order.,
as the prevailing party claims;

~~(2) An order refusing to allow the~~**(ii) prohibiting the** disobedient party to support or oppose~~from supporting or~~
opposing designated claims or defenses, or prohibiting that party from introducing designated matters in evidence.;

~~(3) An order~~**(iii) striking out pleadings or parts thereof, or in**
whole or in part;

(iv) staying further proceedings until the order is obeyed, or;

(v) dismissing the action or proceeding **in whole** or any**in** part thereof, or;

(vi) rendering a **default** judgment by default against the disobedient party.; **or**

~~(4) In lieu of any of the foregoing orders or in addition thereto, an order~~**(vii)** treating as a contempt of court the failure to obey any orders~~order~~ except an order to submit to a physical or mental examination.

~~(5) Where~~**(B) For Not Producing a Person for Examination.** If a party has failed~~fails~~ to comply with an order **under** Rule 35(a) requiring the party **it** to produce another **person** for examination, such ~~the court~~

may issue any of the orders as ~~are listed in paragraphs (1), Rule 37(b)(2) and (3) of this subdivision (b)(A)(i)-(vi)~~, unless the party failing to comply ~~disobedient party~~ shows that ~~that party is unable to~~ **it cannot** produce such ~~the other~~ person for examination.

In lieu of any **(C) Payment of Expenses. Instead** of **or in addition** ~~to~~ the foregoing orders or in addition thereto **above**, the court shall require **must order** the **disobedient** party failing to obey the order or, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) ~~Failure to Disclose; False or Misleading Disclosure; Refusal~~, **to Supplement an Earlier Response, or to Admit.**

~~(1) A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or in a motion any witness or information not so disclosed.~~ **(1) Failure to Disclose or Supplement. If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.** In addition to or in lieu **instead** of this

sanction, the court, on motion and after ~~affording~~**giving** an opportunity to be heard,:

(A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;

(B) may inform the jury of the party's failure; and

(C) may impose other appropriate sanctions. ~~In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under~~**orders listed in** Rule 37(b)(1), ~~(2) and (3) and may include informing the jury of the failure to make the disclosure~~**(A)(i)-(vi).**

(2) **Failure to Admit.** If a party fails to admit the ~~genuineness of any document or the truth of any matter as~~**what is** requested under Rule 36, and if the party ~~requesting the admissions thereafter~~**party later** proves the ~~genuineness of the~~**a document to be genuine** or the ~~truth of the matter~~ **true**, the requesting party may ~~apply to~~**move that** the court for an order requiring the other party **who failed to admit** pay the reasonable expenses, **including attorney's fees**, incurred in making that proof, ~~including reasonable attorney's fees~~. The court shall ~~make the~~**must so** order unless it finds that :

(A) the request was held objectionable ~~pursuant to~~**under** Rule 36(a), ~~or~~;

(B) the admission sought was of no substantial importance, ~~or~~;

(C) the party failing to admit had **a** reasonable ground to believe that ~~the party~~**it** might prevail on the matter; or

(D) there was other good reason for the failure to admit.

(d) Party's Failure of Party To to Attend at Its Own Deposition or, Serve Answers to Interrogatories, or Respond to a Request for Inspection.

(1) In General.

(A) Motion; Grounds for Sanctions. The court may, on motion, order sanctions if:

(i) a party or ~~an~~ **party's** officer, director, or managing agent of a party ~~--~~ or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party ~~fails (1) (4)--fails, after being served with proper notice,~~ to appear before the officer who is to take the **for that person's** deposition, ~~after being served with a proper notice,;~~ or ~~(2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories,~~ or ~~(3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request,~~ the court on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subdivisions ~~(b)(1), (b)(2) and (b)(3)~~ of this rule. Any motion specifying a failure under clause ~~(2) or (3)~~ of this subdivision shall include a certification that the movant has in good faith conferred or attempted to confer with the party failing to answer or respond in an effort to obtain such answer or response without court action. In lieu of any order or in addition thereto, the court shall require the party

~~failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.~~

~~The failure~~ **(ii) a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response.**

(B) Certification. A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action.

(2) Unacceptable Excuse for Failing to Act. A failure ~~described in this subdivision may~~ **Rule 37(d)(1)(A) is** ~~not be excused on the ground that the discovery sought is~~ **was** ~~objectionable, unless the party failing to act has applied~~ **a pending motion** ~~for a protective order as provided by~~ **under** Rule 26(c).

(3) Types of Sanctions. Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)-(vi). Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees,

caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(e) ~~[Abrogated]~~(f) **Failure to Provide** Electronically Stored Information. Absent exceptional circumstances, the court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

(g) **Failure to Participate in the Framing of a Discovery Plan**. If a party or a party's ~~its~~ attorney fails to participate in good faith in the ~~development and submission of~~ **developing and submitting** a proposed discovery plan as required by Rule 26(f), the court may, after **giving an** opportunity for hearing **to be heard**, require ~~such~~ **that** party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

(As amended Oct. 3, 1984, eff. Jan. 1, 1985; July 28, 1988, eff. Nov. 1, 1988; Aug. 29, 2000, eff. Jan. 1, 2001; Dec. 18, 2001, eff. Apr. 1, 2002; Nov. 27, 2007; eff. Jan. 1, 2008; ~~_____, 2009, eff. _____, 2010.~~)

Advisory Committee Note

The language of Rule 37 has been amended as part of the general restyling of these rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.