

Rule 37. Failure to Make Disclosure or Cooperate in Discovery: Sanctions

(a) Motion for order compelling disclosure or discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling disclosure or discovery as set forth below. The movant shall accompany the motion to compel with a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure or discovery in an effort to secure the disclosure or discovery without court action. Any motion to compel disclosure or discovery must set forth verbatim the question propounded and the answer given, or a description of the other disclosure required or discovery requested and the response to this request. The motion must also set forth the reason or reasons the answer or response is inadequate.

(1) Appropriate court. A motion for an order to a party shall be made to this Court. A motion for an order to a person who is not a party shall be made to the court in the jurisdiction where the discovery is being, or is to be, taken.

(2) Motion.

(A) If a party fails to make a disclosure required by SCR-Dom Rel 26(a), any other party may move to compel disclosure and for appropriate sanctions.

(B) If a deponent fails to answer a question propounded or submitted under SCR-Dom Rel 30 or 31, or a corporation or other entity fails to make a designation under SCR-Dom Rel 30(b)(5) or 31(a)(2), or a party fails to answer an interrogatory submitted under SCR-Dom Rel 33, or if a party, in response to a request for inspection submitted under SCR-Dom Rel 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. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

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

(4) Expenses and sanctions.

(A) If the motion is granted or if the disclosure or requested discovery is provided after the motion was filed, the Court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees, unless the Court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.

(B) If the motion is denied, the Court may enter any protective order authorized under SCR-Dom Rel 26(c) and shall, after affording an opportunity to be heard, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the Court finds that the making of 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, the Court may enter any protective order authorized under SCR-Dom Rel 26(c) and may, after affording an

opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to comply with order.

(1) Sanctions by court in jurisdiction where deposition is taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the jurisdiction in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) Sanctions by this Court. If a party or an officer, director, or managing agent of a party or a person designated under SCR-Dom Rel 30(b)(5) or 31(a)(2) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under paragraph (a) of this Rule or SCR-Dom Rel 35, or if a party fails to obey an order entered under SCR-Dom Rel 26(f), the Court may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matter regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of Court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under SCR-Dom Rel 35(a) requiring that party to produce another for examination, such orders as are listed in subparagraphs (A), (B), and (C) of this paragraph, unless the party failing to comply shows that party is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the Court shall require the 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 admit.

(1) A party that without substantial justification fails to disclose information required by SCR-Dom Rel 26(a)(1) or 26(f) shall not be permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed, absent a showing of good cause. In addition to or in lieu of this sanction, the Court, on motion and after affording an opportunity to be heard, 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 subparagraphs (b)(2)(A), (B), and (C) of this Rule.

(2) If a party fails to admit the genuineness of any document or the truth of any matter as requested under SCR-Dom Rel 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the

requesting party may apply to the Court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The Court shall make the order unless it finds that (A) the request was held objectionable pursuant to SCR-Dom Rel 36(a), or (B) the admission sought was of no substantial importance, or (C) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or (D) there was other good reason for the failure to admit.

(d) Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection. If a party or an officer, director, or managing agent of a party or a person designated under SCR-Dom Rel 30(b)(5) or 31(a)(2) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under SCR-Dom Rel 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under SCR-Dom Rel 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 subparagraphs (b)(2)(A), (B), and (C) of this Rule. 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 the other circumstances make an award of expenses unjust.

The failure to act described in this paragraph may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has a pending motion for a protective order as provided by SCR-Dom Rel 26(c).

(e) [Vacant].

(f) Expenses against United States or District of Columbia. Except to the extent permitted by statute, expenses and fees may not be awarded against the United States or the District of Columbia under this Rule.

COMMENT

In subparagraph (a)(4), the phrase "after affording an opportunity to be heard" is intended to make it clear that the Court may award expenses or impose other sanctions for a party's failure to disclose, answer, or respond to a discovery request after consideration of written submissions, or after a hearing.