

## **Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions**

### **(a) MOTION FOR ORDER COMPELLING DISCLOSURE OR DISCOVERY.**

#### **(1) *In General.***

(A) *Certification of Good Faith Effort.* Before any motion to compel discovery is filed, the affected parties or counsel must meet in person for a reasonable period of time in an effort to resolve the disputed matter. The movant must accompany any motion to compel disclosure or discovery with a certification that despite a good faith effort to secure it, the disclosure or discovery material sought has not been provided.

(B) *Content of Certification.* This certification must set out specific facts describing the good faith effort, including a statement of the date, time and place of the meeting required by Rule 37(a)(1)(A), and must be placed immediately below the signature of the attorney or party signing the motion.

(C) *Requirement of Meeting Waived.* The requirement of a meeting is waived if:

(i) the motion concerns a failure to serve any response to a Rule 33, 34, or 36 discovery request, a failure to appear for a deposition, or a Rule 35 examination, and the motion is accompanied by a copy of a letter, sent at least 10 days before the motion was filed, asking that the opposing counsel or party respond to the discovery request or that the deponent or examinee appear for a rescheduled deposition or examination;

(ii) the movant certifies that, despite having sent to the opposing counsel or party, at least 10 days before the motion was filed, a letter (a copy of which must be attached to the motion) proposing a time and place for a meeting, and despite having made 2 telephone calls to the office of the opposing counsel or party (the date and time of each call must be specified in the motion), the movant has been unable to convene a meeting to resolve the disputed disclosure or discovery matter; or

(iii) a meeting is prohibited by any court order.

(D) *Format of Motion to Compel.* Any motion to compel disclosure or discovery must set out 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 out the reason or reasons the answer or response is inadequate.

(2) *Appropriate Court.* A motion for an order to a party must be made to this court, or, on matters relating to a deposition, to the court in the jurisdiction where the deposition is being taken. A motion for an order to a nonparty must be made in the court where the discovery is or will be taken.

#### **(3) *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.

(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 asked under Rule 30 or 31;

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

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

(iv) a party fails to produce documents, electronically stored information, or tangible things, or fails to respond that inspection will be permitted—or fails to permit inspection—as requested under Rule 34.

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

(4) *Evasive or Incomplete Disclosure, Answer or Response.* For purposes of Rule 37(a), an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.

(5) *Payment of Expenses; Protective Orders.*

(A) *If the Motion is Granted (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 must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant’s reasonable expenses incurred in making the motion, including attorney’s fees. But the court must not order this payment if:

(i) the movant filed the motion before attempting in good faith effort to obtain the disclosure or discovery without court action;

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

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

(B) *If the Motion Is Denied.* If the motion is denied, the court may issue any protective order authorized under Rule 26(c) and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney’s fees. But the court must not order this payment if the motion was substantially justified or 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 issue any protective order authorized under Rule 26(c) and may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion.

(b) FAILURE TO COMPLY WITH A COURT ORDER.

(1) *Sanctions Sought in the Jurisdiction Where the Deposition Is Taken.* If the court where the discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court. If a deposition-related motion is transferred to the court where the action is pending, and that court orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of either the court where the discovery is taken or the court where the action is pending.

(2) *Sanctions Sought in This Court.*

(A) *For Not Obeying a Discovery Order.* If a party or a party’s officer, director, or managing agent—or a witness designated under Rule 30(b)(6) or 31(a)(4)—fails to obey an order to provide or permit discovery, including an order under Rule 26(e), 35, or 37(a), the court may issue further just orders. They may include the following:

(i) directing that the matter embraced in the order or other designated facts be taken as established for the purposes of the action, as the prevailing party claims;

(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(iii) striking pleadings in whole or in part;

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

(v) dismissing the action or proceeding in whole or in part;

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

(vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

(B) *For Not Producing a Person for Examination.* If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for examination, the court may issue any of the orders listed in Rule 37(b)(2)(A)(i) – (vi), unless the disobedient party shows that it cannot produce the other person.

(C) *Payment of Expenses.* Instead of or in addition to the orders above, the court must order the disobedient, 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.

(c) FAILURE TO DISCLOSE, TO SUPPLEMENT AN EARLIER RESPONSE, OR TO ADMIT.

(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 instead of this sanction, the court, on motion and after giving an opportunity to be heard:

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

(B) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i) – (vi).

(2) *Failure to Admit.* If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court must so order unless:

(A) the request was held objectionable under Rule 36(a);

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

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

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

(d) PARTY'S FAILURE TO ATTEND ITS OWN DEPOSITION, SERVE ANSWER 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 a party's officer, director, or managing agent—or a person designated under Rule 30(b)(6) or 31(a)(4)—fails, after being served with a proper notice, to appear for that person's deposition; or

(ii) a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve answers, objections, or a 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 Rule 37(d)(1)(A) is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order 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) FAILURE TO PRESERVE ELECTRONICALLY STORED INFORMATION. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information’s use in the litigation may:

(A) presume that the lost information was unfavorable to the party; or

(B) dismiss the action or enter a default judgment.

(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 TO 2018 AMENDMENTS

The rule has been amended to conform to Civil Rule 37. Subsection (a)(1)(C)(iii) has been added because one self-represented party may be subject to a stay-away order that precludes an in-person meeting about discovery issues.

## 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.