

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery: Sanctions**37.01 Motion for Order Compelling Disclosure or Discovery**

(a) Appropriate Court. An application for an order to a party shall be made to the court in which the action is pending. An application for an order to a person who is not a party shall be made to the court in the county where the discovery is being, or is to be, taken.

(b) Specific Motions.

(1) *To Compel Disclosure.* If a party fails to make a disclosure required by Rule 26.01, any other party may move to compel disclosure and for appropriate sanctions.

(2) *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:

(A) a deponent fails to answer a question propounded or submitted under Rules 30 or 31;

(B) a corporation or other entity fails to make a designation under Rule 30.02(f) or 31.01(c);

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

(D) a party fails to produce documents or fails to respond that inspection will be permitted - or fails to permit inspection - as requested under Rule 34.

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. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

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

(d) Expenses and Sanctions.

(1) If the motion is granted, or if the 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 fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the 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.

(2) If the motion is denied, the court may enter any protective order authorized under Rule 26.03 and shall, after affording an opportunity to be heard, require the moving party or the attorney filing 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 fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(3) If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26.03 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.

(Amended effective January 1, 1997; amended effective July 1, 2013; amended effective July 1, 2018.)

Advisory Committee Comment - 1996 Amendment

This change conforms the rule to its federal counterpart, consistent with the ongoing differences between the two rules.

Advisory Committee Comment - 2018 Amendments

Rule 37 is amended to adopt changes made to Federal Rule 37 in 2015. Rule 31.01(b)(2)(D) is amended to provide express authority for a motion for an order compelling discovery when a party fails to respond to a request either by the production of requested information or by the agreement to permit inspection. This amendment provides the means for enforcing the obligations under amended Rule 34.02.

37.02 Failure to Comply with Order

(a) Sanctions by Court in County 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 county in which the deposition is being taken, the failure may be considered a contempt of that court.

(b) Sanctions by Court in Which Action is Pending. If a party or an officer, director, employee, or managing agent of a party or a person designated in Rule 30.02(f) or 31.01 to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made pursuant to Rule 35 or 37.01, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(1) An order that the matters 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;

(2) 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;

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

(4) 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;

(5) Where a party has failed to comply with an order pursuant to Rule 35.01 requiring that party to produce another for examination, such orders as are listed herein in paragraphs (1), (2), and (3), unless the party failing to comply shows that 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 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.

37.03 Failure to Disclose, to Supplement an Earlier Response, or to Admit

(a) Failure to Disclose or Supplement. If a party fails to provide information or identify a witness as required by Rule 26.01 or 26.05, 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:

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

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

(3) may impose other appropriate sanctions, including any of the orders listed in Rule 37.02.

(b) Failure to Admit. If a party fails to admit the genuineness of any documents or the truth of any matter as requested pursuant to Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of any such 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 fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36.01, or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or (4) there was other good reason for the failure to admit.

(Amended effective July 1, 2013.)

37.04 Failure of a Party to Attend at Own Deposition or Serve Answers

If a party or an officer, director, employee, or managing agent of a party or a person designated in Rule 30.02(f) or 31.01 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 pursuant to Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted pursuant to Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, including any action authorized in Rule 37.02(b)(1), (2), and (3). 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 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 to act described herein may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26.03.

37.05 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:

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

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

- (1) presume that the lost information was unfavorable to the party;
- (2) instruct the jury that it may or must presume the information was unfavorable to the party; or
- (3) dismiss the action or enter a default judgment.

(Added effective July 1, 2007; amended effective July 1, 2018.)

Advisory Committee Comment - 2007 Amendment

Rule 37.05 is a new rule; it is identical to Fed. R. Civ. P. 37(f), adopted in 2006. It provides some protection against the automatic imposition of sanctions that might otherwise be required under the rules. This rule applies only to discovery of electronically stored information, and prevents the imposition of sanctions for spoliation of evidence where the loss of information arises from the routine operation of a computer system. The good-faith part of this test is important and is not met if a party fails to take appropriate steps to preserve data once a duty to preserve arises.

Advisory Committee Comment - 2018 Amendments

Rule 37.05 is amended to redefine the sanctions available for the failure to preserve electronically stored information ("ESI"). The amendment follows closely the amendment made to Fed. R. Civ. P. 37(e) in 2015 and is intended to create a clearer standard for imposition of sanctions for the failure to preserve electronically stored information. First, the rule looks to ameliorating any prejudice by allowing discovery to restore or replace the missing information. This might be accomplished by locating alternate copies of the information, or reconstructing backed up copies. In the absence of prejudice, the rule does not authorize the imposition of sanctions for loss of information. The rule does not limit other sanctions based on conduct other than failure to preserve ESI. If prejudice does occur, the amended rule requires that a remedial sanction be implemented - one that is designed and limited to curing the prejudice. Most often, this would be an order precluding evidence or limiting claims or defenses affected by the missing ESI. If the missing ESI was intentionally destroyed or otherwise made unavailable, the rule allows the more drastic sanctions of imposition of a presumption or either allowing or requiring a jury either to draw an adverse inference that the information was unfavorable to the party or, in egregious situations, dismiss the action or grant a default judgment.

By its terms, this rule applies only to failure to produce ESI where there is a duty to preserve it. There is no reason, however, that the courts should not, in the exercise of their discretion, follow this rule where there is the failure to preserve other evidence, such as physical evidence or documents in non-electronic form.

37.06 Failure to Participate in Framing a Discovery Plan

If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26.06, the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

(Added effective July 1, 2013.)