

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

*Effective: 5/1/2021*

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

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

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

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

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

(D) protection from discovery; or

(E) compelling discovery from a party who fails to make full and complete ~~discovery~~[disclosure](#).

**(2) Statement of discovery issues length and content.** The statement of discovery issues must be no more than ~~four~~<sup>4</sup> pages, not including permitted attachments, and must include in the following order:

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

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

(C) a statement regarding proportionality under [Rule 26\(b\)\(3\)](#)~~26(b)(2)~~; ~~and~~

(D) if the statement requests extraordinary discovery, a statement certifying that the party has reviewed and approved a discovery budget; ~~and~~

(E) if objection was made under Rule 45(e)(4), a statement certifying that the statement of discovery issues has been served on the person subject to the subpoena or a non-party affected by the subpoena.

**(3) Objection length and content.** No more than seven<sup>7</sup> days after the statement is filed, any other party may file an objection to the statement of discovery issues. If a person subject to a subpoena or a non-party affected by a subpoena timely filed an objection under Rule 45(e)(4), the person subject to the subpoena or the non-party affected by the subpoena may file an objection to the statement of discovery issues.

The objection must be no more than four<sup>4</sup> pages, not including permitted attachments, and must address the issues raised in the statement.

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

**(5) Proposed order.** Each party, or a person subject to a subpoena or a non-party affected by a subpoena, must file a proposed order concurrently with its statement or objection.

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

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

(B) conduct a hearing, preferably remotely and if remotely, then consistent with the safeguards in Rule 43(b); or

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

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

- 50 (A) that the discovery not be had or that additional discovery be had;
- 51 (B) that the discovery may be had only on specified terms and conditions,  
52 including a designation of the time or place;
- 53 (C) that the discovery may be had only by a method of discovery other than that  
54 selected by the party seeking discovery;
- 55 (D) that certain matters not be inquired into, or that the scope of the discovery be  
56 limited to certain matters;
- 57 (E) that discovery be conducted with no one present except persons designated by  
58 the court;
- 59 (F) that a deposition after being sealed be opened only by order of the court;
- 60 (G) that a trade secret or other confidential information not be disclosed or be  
61 disclosed only in a designated way;
- 62 (H) that the parties simultaneously deliver specified documents or information  
63 enclosed in sealed envelopes to be opened as directed by the court;
- 64 (I) that a question about a statement or opinion of fact or the application of law to  
65 fact not be answered until after designated discovery has been completed or until  
66 a pretrial conference or other later time;
- 67 (J) that the costs, expenses and attorney fees of discovery be allocated among the  
68 parties as justice requires; or
- 69 (K) that a party pay the reasonable costs, expenses, and attorney fees incurred on  
70 account of the statement of discovery issues if the relief requested is granted or  
71 denied, or if a party provides discovery or withdraws a discovery request after a  
72 statement of discovery issues is filed and if the court finds that the party, witness,  
73 or attorney did not act in good faith or asserted a position that was not  
74 substantially justified.

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

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

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

(1) deem the matter or any other designated facts to be established in accordance with the claim or defense of the party obtaining the order;

(2) prohibit the disobedient party from supporting or opposing designated claims or defenses or from introducing designated matters into evidence;

(3) stay further proceedings until the order is obeyed;

(4) dismiss all or part of the action, strike all or part of the pleadings, or render judgment by default on all or part of the action;

(5) order the party or the attorney to pay the reasonable costs, expenses, and attorney fees, caused by the failure;

~~(6) treat the failure to obey an order, other than an order to submit to a physical or mental examination, as contempt of court; and~~

~~(6)~~ instruct the jury regarding an adverse inference.

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

(1) the request was held objectionable pursuant to [Rule 36\(a\)](#);

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

(3) there were reasonable grounds to believe that the party failing to admit might prevail on the matter;

(4) that the request was not proportional under [Rule 26\(b\)\(3\)](#)~~26(b)(2)~~; or

(5) there were other good reasons for the failure to admit.

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

**(e) Failure to preserve evidence.** Nothing in this rule limits the inherent power of the court to take any action authorized by paragraph (b) if a party destroys, conceals, alters, tampers with, or fails to preserve a document, tangible item, electronic data, or other evidence in violation of a duty. Absent exceptional circumstances, a 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.

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### Advisory Committee Notes

The 2011 amendments to Rule 37 make two principal changes. First, the amended Rule 37 consolidates provisions for motions for a protective order (formerly set forth in Rule 26(c)) with provisions for motions to compel.

126 Second, the amended Rule 37 incorporates the new Rule 26 standard of “proportionality”<sup>11</sup>  
127 as a principal criterion on which motions to compel or for a protective order should be  
128 evaluated.

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

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