

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

3 *Effective: 5/1/2021*

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

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

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

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

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

10 (D) protection from discovery; or

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

13 **(2) Statement of discovery issues length and content.** The statement of discovery
14 issues must be no more than [four](#)⁴ pages, not including permitted attachments, and
15 must include in the following order:

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

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

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

22 (D) if the statement requests extraordinary discovery, a statement certifying that
23 the party has reviewed and approved a discovery budget; [and](#)

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

27 **(3) Objection length and content.** No more than seven⁷ days after the statement is
28 filed, any other party may file an objection to the statement of discovery issues. If a
29 person subject to a subpoena or a non-party affected by a subpoena timely filed an
30 objection under Rule 45(e)(4), the person subject to the subpoena or the non-party
31 affected by the subpoena may file an objection to the statement of discovery issues.

32 The objection must be no more than four⁴ pages, not including permitted
33 attachments, and must address the issues raised in the statement.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

95 ~~(67)~~ instruct the jury regarding an adverse inference.

96 **(c) Motion for costs, expenses_z and attorney fees on failure to admit.** If a party fails to
97 admit the genuineness of a document or the truth of a matter as requested under
98 Rule [36](#), and if the party requesting the admissions proves the genuineness of the
99 document or the truth of the matter, the party requesting the admissions may file a
100 motion for an order requiring the other party to pay the reasonable costs, expenses_z and

101 attorney fees incurred in making that proof. The court must enter the order unless it
102 finds that:

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

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

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

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

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

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

116 **(e) Failure to preserve evidence.** Nothing in this rule limits the inherent power of the
117 court to take any action authorized by paragraph (b) if a party destroys, conceals, alters,
118 tampers with, or fails to preserve a document, tangible item, electronic data, or other
119 evidence in violation of a duty. Absent exceptional circumstances, a court may not
120 impose sanctions under these rules on a party for failing to provide electronically stored
121 information lost as a result of the routine, good-faith operation of an electronic
122 information system.

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124 **Advisory Committee Notes**

125 The 2011 amendments to Rule 37 make two principal changes. First, the amended Rule
126 37 consolidates provisions for motions for a protective order (formerly set forth in Rule
127 26(c)) with provisions for motions to compel.

128 Second, the amended Rule 37 incorporates the new Rule 26 standard of
129 "proportionality" as a principal criterion on which motions to compel or for a protective
130 order should be evaluated.

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

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