

Alabama Rules of Civil Procedure

V. DEPOSITIONS AND DISCOVERY

Rule 37.

Failure to make discovery: Sanctions.

(a) *Motion for order compelling discovery.* A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) APPROPRIATE COURT. An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition being taken within the state in a circuit other than the circuit in which the action is pending, to the court in the circuit where the deposition is being taken. An application for an order to a party on matters relating to a deposition being taken outside the state may also be made to any court having general civil jurisdiction in the place where the deposition is being taken. An application for an order to a nonparty on matters relating to a subpoena for production or inspection of materials within this state shall be made to the court in the circuit where the discovery is being sought or the court in the circuit where the action is pending. An application for an order to a deponent who is not a party and whose deposition is being taken within the state, may be made to the court in the circuit where the deposition is being taken or in which the action is pending. An application for an order to a deponent who is not a party on matters relating to a deposition being taken outside the state, shall be made to any court having general civil jurisdiction in the place where the deposition is being taken.

(2) MOTION. If a deponent fails to answer a question propounded or submitted under Rule 30 or Rule 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for production or inspection submitted under Rule 30(b)(5), or if a party in a response to a request for production or inspection submitted under Rule 34, fails to respond that production or inspection will be permitted as requested or fails to produce or permit inspection as requested, or if a person objects to or fails to comply, in whole or in part, with a subpoena under Rule 45(a)(3), the discovering party may move for an order compelling an answer, or designation, or an order compelling production or inspection in accordance with the subpoena. If a person or a party objects to the notice of a proposed subpoena under Rule 45(a)(3), the discovering party may move for an order compelling issuance of the subpoena. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

A motion relating to discovery issues shall be accompanied by a statement of the attorney for the moving party stating that the attorney, before filing the motion, has endeavored to resolve the subject of the discovery motion through correspondence or discussions with opposing counsel or, if the opposing party is not represented by counsel, with the opposing party.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

(3) EVASIVE OR INCOMPLETE ANSWER. For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) AWARD OF EXPENSES OF MOTION. If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party 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.

If the motion is granted in part and denied in part, the court may 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 A CIRCUIT JUDGE OR COURT IN PLACE WHERE DEPOSITION IS TAKEN OR PRODUCTION SOUGHT. If a deponent fails to be sworn or to answer a question after being directed to do so by a circuit judge or, when the deposition is being taken outside the state, by the court in the place in which the deposition is being taken; or, if a person, not a party, fails to permit production of documents or entry upon land under Rule 45(a)(3) after being directed to do so by a circuit

judge or, when production or entry is sought outside the state, by the court in the place where the documents, things, or land are located, the failure may be considered a contempt of court.

(2) SANCTIONS BY COURT IN WHICH ACTION IS PENDING. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, 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:

(A) 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;

(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 Rule 35(a) requiring that party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, 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 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.

(c) *Expenses on failure to admit.* If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 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 fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), 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.

(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 Rule 30(b)(6) or 31(a) 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 to comply with a properly served request for production under Rule 30(b)(5), without having made an objection thereto, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for production or inspection submitted under 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, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act 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.

The failure to act described in this subdivision 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(c).

(e), (f) [Omitted.]

(g) *Electronically stored information.* 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.

(dc) *District court rule.* Rule 37 applies in the district courts in those instances in which discovery has been permitted pursuant to Rule 26(dc).

[Amended 1-4-82, eff. 3-1-82; Amended eff. 8-1-92; amended eff. 10-1-95; Amended 11-4-2009, eff. 2-1-2010.]

Committee Comments on 1973 Adoption

Rule 37(a) provides recourse for compulsion of discovery and applies to all discovery devices. Generally comparable provisions existed in Tit. 7, § 474(17), Code of Ala.

Rule 37(a)(1) states which court is the appropriate court for determination of problems arising in discovery. Note that it makes available the possibility of an application to the Judge of the Circuit in the State of Alabama when the deposition is being taken inside the state but in a circuit other than the circuit wherein the action is pending. Note further that it provides for application to a court outside the state of Alabama when the deposition is being taken outside the state of Alabama and a problem arises during the taking of a deposition. Problems arising with respect to parties may be brought to the attention of the court where the deposition is being taken or in the Court where the action is pending. Problems arising with the deposition of persons not parties must be taken up with the court in the circuit or state or place where the deposition is being taken.

Rule 37(a)(2) establishes a motion as the vehicle for relief under the various discovery devices. Further, the party successfully opposing a Rule 37 motion compelling discovery can obtain a protective order as an adjunct to the order denying the Rule 37 motion just as if he had moved for such relief under Rule 26(c). This provision applies to non-parties against whom documentary discovery is sought under Rule 34. Relief against non-parties for failure to produce documents in compliance with the deposition subpoena duces tecum served pursuant to Rule 45 is available within the terms of Rule 45.

Rule 37(a)(3) specifically treats evasive or incomplete answers as failures to answer.

Rule 37(a)(4) requires award of expenses including attorney's fees to the successful party under a Rule 37 motion unless the court finds that the position taken by the loser was with substantial justification or other circumstances found

to make such award unjust. Partial successes and failures can result in apportioned expenses where appropriate.

Rule 37(b) provides sanctions such as contempt, admissions, exclusion of claims, defenses or evidence, stays, and default judgments. Contempt is not available for refusals to submit to physical or mental examinations.

Rule 37(c) affords a right to expenses attendant to proof of matters after an unsuccessful effort to procure admissions under Rule 36. Expenses are available only when the request for admission is unobjectionable, of substantial import, without reasonable expectation of prevailing on the matter or no other good reason for failure to admit exists.

Rule 37(d) provides remedies for complete failures to respond or object to discovery for which compliance is expected without court order unless objected to. Previous sanctions available in instances where refusals based upon objections have been the basis of orders compelling discovery are available. That the discovery reaches objectionable matter is only available as an excuse when motion for a protective order under Rule 26(c) has been made.

Rules 37(e) and 37(f) are omitted as they are inapplicable to state practice.

Committee Comments to Amendment Effective March 1, 1982

Rule 37(a)(2) referred to the practice under Rule 34 and with the amendment of Rule 34, it is necessary to make certain changes in Rule 37. While the procedure is set forth under Rule 37(a)(2) for the filing of a motion which would lead to a court order requiring production from a non-party and thereby justify a citation of contempt of court for non-compliance, the disregard of the subpoena itself could form the basis for the issuance of an order to show cause why a contempt citation ought not to issue. The use of the motion practice might be preferable in instances where non-compliance is most likely attributable to confusion on the part of the non-party and the invocation of the contempt power of the court would appear to be beyond the necessities of the case.

Committee Comments to August 1, 1992, Amendment to Rule 37(a)(2)

The portion of the first paragraph requiring a statement of the attorney for the moving party was added to require all attorneys to consult with opposing counsel before filing a motion for discovery. The committee hopes that most discovery disputes will be resolved between counsel without resort to provisions regarding motions for discovery.

**Committee Comments to October 1, 1995,
Amendment to Rule 37**

The amendment is technical. No substantive change is intended.

**Committee Comments to Adoption of
Rule 37(g) Effective February 1, 2010**

See the Committee Comments to Amendment to Rule 26 Effective February 1, 2010, for general information concerning the comprehensive changes to Rules 16, 26, 33(c), 34, 37, and 45, which govern discovery of electronically stored information ("ESI").

The change to Rule 37 recognizes that ESI is routinely and automatically altered and deleted in the normal course of business for reasons entirely unrelated to litigation. Accordingly, ESI may be lost or destroyed without culpability, fault, or ill motive. The addition of subdivision (g) to Rule 37 recognizes this and provides that, absent exceptional circumstances, sanctions are inappropriate if ESI is lost as a result of the routine operation of a computer system, provided that the party responsible for the lost ESI was acting (or failed to act) in good faith.

Good faith may require a party to take steps to alter the routine operation of the computer system or otherwise preserve appropriate ESI if a duty to preserve exists. This rule is procedural and does not address the issue whether and when such a duty exists. However, when it does exist, the party must act appropriately, which may include issuing a "litigation hold."

Good faith requires that a party not exploit the routine operation of its computer system. For example, a party may not adopt a short record-retention period with no legitimate business purpose in order to thwart discovery of harmful information by having its computer system overwrite the information.

A decision whether a party has acted in good faith regarding ESI that is within sources that are not reasonably accessible should be made on a case-by-case basis. As the Federal Rules of Civil Procedure Advisory Committee Notes to Fed. R. Civ. P. 37 provide: "One factor [to be considered] is whether the party

reasonably believes that the information on such sources is likely to be discoverable and not available from reasonably accessible sources."

Note from the reporter of decisions: The order amending, effective February 1, 2010, Rule 16, Rule 26, Rule 33(c), Rule 34, Rule 45, and Form 51A, and adopting effective February 1, 2010, Rule 37(g) and the Committee Comments to Amendment to Rule 16 Effective February 1, 2010, the Committee Comments to Amendment to Rule 26 Effective February 1, 2010, the Committee Comments to Amendment to Rule 33(c) Effective February 1, 2010, the Committee Comments to Amendment to Rule 34 Effective February 1, 2010, the Committee Comments to Adoption of Rule 37(g) Effective February 1, 2010, and the Committee Comments to Amendment to Rule 45 Effective February 1, 2010, is published in that volume of *Alabama Reporter* that contains Alabama cases from ___ So. 3d.