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) *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 if 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 use of the information in the litigation, may:

(A) presume that the lost information was unfavorable to the party responsible for its loss;

(B) instruct the jury that it may or must presume the information was unfavorable to the party responsible for its loss; or

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

(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; Amended eff. 12-21-2018.]

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."

Committee Comments to Amendment to Rule 37(g)
Effective December 21, 2018

A. Introduction

See section 1 of the Committee Comments to Amendment to Rule 26 Effective February 1, 2010, and the Committee Comments to Adoption of Rule 37(g) Effective February 1, 2010, for general information concerning the changes to Rules 26 and 37 governing discovery of electronically stored information.

Rule 37(g), as adopted in 2010 to be consistent with the 2006 changes to the Federal Rules of Civil Procedure related to discovery of electronically stored information, provided: "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." Since the adoption of Rule 37(g), there has been a large increase in the volume of electronically stored information, and discovery related to electronically stored information has likewise increased. Certainly, discovery should not prevent continued routine operation of computer systems necessary for business or other endeavors in this world increasingly connected by computer systems. But it is important for a party aware of the existence of relevant electronically stored information to take reasonable steps to preserve

such information. Uncertainties under former Rule 37(g) concerning discovery of electronically stored information and sanctions for failure to preserve electronically stored information had the potential to result in litigants expending significant time and money on preservation efforts in order to avoid the risk of sanctions if a court were to find they did not do enough to preserve electronically stored information.

B. Section (g)

Rule 37(g), as amended, focuses upon the reasonableness of the steps taken to preserve electronically stored information, as well as whether the information can be replaced or restored. Under former Rule 37(g), sanctions could not be imposed if the information was lost as a result of the "routine, good-faith operation" of a party's computer system and "exceptional circumstances" were not presented. Moreover, the rule did not speak to the curative measures a court could employ when punitive sanctions were to be imposed. Rule 37(g), as amended, specifies measures a court may employ if information that should have been preserved is lost and specifies the findings necessary to justify those measures. It therefore forecloses reliance on the inherent authority of the court to determine when certain measures should be used.

Although former Rule 37(g) indicated that spoliation of electronically stored information should be reviewed using a standard that turns on "good faith," Rule 37(g), as amended, focuses more upon the reasonableness of the steps taken to preserve the information. Too, Rule 37(g), as amended, addresses more specifically the sanctions that may be imposed and recognizes the difference between sanctions intended to cure prejudice to a party, including the assessment of the cost of replacing or restoring the lost information, and punitive sanctions when there has been a deliberate manipulation of computer systems to prevent discovery of relevant and important information.

Under Rule 37(g), as amended, before the court considers measures necessary to cure prejudice to a party, it must find not only that reasonable steps were not taken to preserve relevant information, but also that the information cannot be restored or replaced. To this end the court may, for example, order additional discovery from sources that were previously designated as not reasonably accessible because of burden or cost under Rule 26(b)(2)(A). Further, pursuant to a simultaneous change to Rule 26(c), express authorization is provided to the court to assess the associated costs, including the cost of replacing or restoring the information and attorney fees, to the party who lost the information.

However, it should be remembered that efforts to restore or replace lost information should be proportional to the importance of the lost information.

C. Subsection (g)(1)

The rule does not specify which party bears the burden of proving prejudice once it has been determined that electronically stored information has been lost because of a failure to take reasonable steps to preserve the information. This is left to the discretion of the trial court. As the Advisory Committee's Notes on the 2015 Amendment to Rule 37, Federal Rules of Civil Procedure, state:

> "Determining the content of lost information may be a difficult task in some cases, and placing the burden of proving prejudice on the party that did not lose the information may be unfair. In other situations, however, the content of the lost information may be fairly evident, the information may appear to be unimportant, or the abundance of preserved information may appear sufficient to meet the needs of all parties. Requiring the party seeking curative measures to prove prejudice may be reasonable in such situations. The rule leaves judges with discretion to determine how best to assess prejudice in particular cases."

If the trial court finds that electronically stored information should have been preserved, has been lost because a party failed to take reasonable steps to preserve it, and cannot be replaced or restored and that another party has been prejudiced, it may order appropriate measures to cure the prejudice, but nothing more. Such measures, as noted in the Federal Advisory Committee's Notes, may include prohibiting the party that lost the information from putting in certain evidence. For example, the court may "exclude a specific item of evidence to offset prejudice caused by failure to preserve other evidence that might contradict the excluded item of evidence." Advisory Committee's Notes to the 2015 Amendment of Rule 37, Federal Rules of Civil Procedure. However, the objective must be only to cure the prejudice, and, as the Federal Advisory Committee notes: "Care must be taken ... to ensure that curative measures under subdivision (e)(1)[Rule 37(g)(1), Ala. R. Civ. P., as amended,] do not have the effect of measures that are permitted under subdivision (e)(2) [Rule 37(g)(2), Ala. R. Civ. P., as amended,] only on a finding of intent to deprive another party of the lost information's use in the litigation."

The amendment to our Rule 37(g) requires that the court, not the jury, determine not only whether the lost information should have been preserved, whether the loss resulted from a failure to take reasonable steps to preserve it, and whether it can be replaced or restored, but also whether another party has been prejudiced by the loss and what measures should be taken to cure that prejudice, being mindful that the rule calls for measures no greater than necessary to cure the prejudice. It was the opinion of the Committee recommending this amendment that the court was in a much better position to make such determinations and that to allow the parties to put in evidence of the

loss and to allow the jury to determine the appropriate cure had too much potential to distract the jury. It should be noted that this may be a departure from the Federal Rules of Civil Procedure. Although the corresponding federal rule is not clear as to whether the court or the jury should make such determinations, the Advisory Committee's Notes to the federal rule appear to indicate that the federal rule allows the court to permit the parties to put in evidence of the loss and allow the jury to determine the appropriate cure.

D. Subsection (g)(2)

Rule 37(g)(2), as amended, applies to those rare cases when a party deliberately fails to preserve electronically stored information with intent to prevent another party's use of that information. In other words, the intent required to invoke subsection (g)(2) is the specific intent to deprive another party of electronically stored information and anything short of such specific intent would not involve this subsection. It is noted that the corresponding federal rule addresses the negligent and the intentional loss of electronically stored information, but nothing is directly said in the Advisory Committee's Notes to the federal rule about wanton conduct, although the Federal Advisory Committee's Notes do make clear that "grossly negligent" conduct is to be treated in the same manner as a negligent loss of information. Moreover, if the trial judge believes the loss of information was occasioned by conduct that is more egregious than negligence, but is not intentional, under the Alabama rule the judge is provided discretion under subsection (g)(1) to take appropriate measures to cure the prejudice. This approach also simplifies matters for the trial court, which will have to fit the facts into only one of two, not three, categories (i.e., intentional conduct and nonintentional conduct).

Subsection (g)(2)(A) authorizes the court to presume that the lost information was unfavorable to the party responsible for its loss. This could have application when the court is presiding at a bench trial or ruling on a pretrial motion.

Subsection (g)(2)(B) has application in a jury trial and provides that the court may instruct the jury that it may or must presume the information lost was unfavorable to the party that lost it. The Alabama rule requires that the court make the finding whether the relevant information was lost intentionally (that is, with the intent to deprive another party of the use of the information in the litigation) and, if so, the sanction to impose, which may include an adverse-inference charge. If the court determines that such loss was intentional, it may give the "must presume" adverse-inference charge as the sanction. The court having found that the party intentionally lost the information, it may be inferred that the information lost was both unfavorable to the party that lost it and favorable to the opposing party's case.

Here again, the Alabama Rules of Civil Procedure deviate from the Federal Rules of Civil Procedure, which allow the court to permit the jury to determine the issue of intent and, if the jury finds intent, gives the jury the option of presuming that the information was unfavorable to the party that lost it. This, of course, would require that the parties put in evidence of the loss. Although this is not entirely clear from the federal rule itself, it is clearly expressed in the Advisory Committee's Notes to the federal rule.

This amendment to Rule 37(g) does not change existing Alabama substantive law regarding spoliation of evidence or when a duty to preserve evidence arises. Further, this amendment addresses only electronically stored information and leaves unchanged Alabama law as to sanctions for the failure to preserve other types of evidence or information.

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 20 So. 3d.

Note from the reporter of decisions: The order amending Rule 26(b)(1), Rule 26(b)(2), Rule 26(c), and Rule 37(g) and adopting the Committee Comments to the amendments to Rule 26(b)(1) and Rule 26(b)(2), Rule 26(c), and Rule 37(g) Effective December 21, 2018, is published in that volume of *Alabama Reporter* that contains Alabama cases from ___ So. 3d.