

Provisions of Federal and Local District of Utah Rules Regarding Motions to Compel

Meet and Confer Requirement

The motion [to **compel disclosure**] must include a certification that the **movant has in good faith conferred or attempted to confer** with the party not making the disclosure in an effort to secure the disclosure without court action. Fed. R. Civ. P. 37(a)(2)(A).

The motion [to **compel answer to deposition question, designate 30(b)(6) witness, to compel answer to an interrogatory, after failure to respond that inspection will be permitted or failure to permit the inspection**] 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. Fed. R. Civ. P. 37(a)(2)(B).

Informal Conference to Settle Discovery Disputes. Unless otherwise ordered, the court will not entertain any discovery motion, except those motions brought by a person appearing pro se and those brought under Fed. R. Civ. P. 26(c) by a person who is not a party, unless counsel for the moving party files with the court, at the time of filing the motion, a statement showing that the **attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys** on the matters set forth in the motion. Such statement must recite, in addition, the **date, time, and place of such consultation and the names of all participating parties or attorneys.** DUCivR 37-1 (a).

Appendix for Motion to Compel

Motions to Compel Discovery. Motions to compel discovery under Fed. R. Civ. P. 37(a) must be accompanied by a **copy** of the discovery request, the **response** to the request to which objection is made, and a succinct **statement**, separately for each objection, summarizing why the response received was inadequate. DUCivR 37-1(b).

Waiver of Defenses to Motion to Compel and of Objections to Discovery

The failure to act [failure to appear for deposition, answer interrogatories, or respond to a request for inspection] may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has a pending motion for a protective order as provided by Rule 26(c). Fed. R. Civ. P. 37(d).

Sanctions - *if no order in place*

Failure to disclose or supplement discovery - evidence barred

(1) A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. Fed. R. Civ. P. 37(c)(1).

Failure to admit - expenses of proof

[T]he court [may enter] an order requiring the other party to pay the reasonable expenses incurred in making that proof [required by a party's wrongful failure to admit], including reasonable attorney's fees. The court shall make the order unless it finds that (A) the request was held objectionable pursuant to Rule 36(a), or (B) the admission sought was of no substantial importance, or (C) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or (D) there was other good reason for the failure to admit. Fed. R. Civ. P. 37(c)(2).

Failure to appear for deposition, answer interrogatories, or respond to a request for inspection

If a party or [related person fails to appear for deposition, answer interrogatories, or respond to a request for inspection] . . . 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 subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule. Fed. R. Civ. P. 37(d).

Sanctions - disobedience of court order

Failure to be sworn or answer deposition question after court direction.

If a deponent fails to be sworn or to answer a question after being directed to do so by the *court in the district in which the deposition is being taken*, the failure may be considered a contempt of that court. Fed. R. Civ. P. 37(c)(1).

Failure to Obey Other Discovery Order

(2) Sanctions by Court in Which Action Is Pending. If a party or [related person fails to obey an order for discovery], 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.

Unsuccessful attempt for Protective Order

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

Expenses and Attorney's Fees

Motion for order compelling disclosure or discovery

(A) If the motion [for an order compelling disclosure or discovery] is granted or if the disclosure or 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's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or 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.

(B) If the motion is denied, the court may enter any protective order authorized under Rule 26(c) 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's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(C) If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26(c) 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. Fed. R. Civ. P. 37(a)(4).

Unsuccessful attempt for Protective Order

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. Fed. R. Civ. P. 26(c).

Failure to disclose or supplement

In addition to or in lieu of this sanction [for failure to disclose or supplement], the court, on motion and after affording an opportunity to be heard, **may** [require] payment of reasonable expenses, including attorney's fees, caused by the failure. Fed. R. Civ. P. 37(c)(1).

Failure to admit

[T]he court [may enter] an order requiring the other party to pay the reasonable expenses incurred in making that proof [required by a party's wrongful failure to admit], including reasonable attorney's fees. The court **shall** make the order unless it finds that (A) the request was held objectionable pursuant to Rule 36(a), or (B) the admission sought was of no substantial importance, or (C) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or (D) there was other good reason for the failure to admit. Fed. R. Civ. P. 37(c)(2).

Failure to appear for deposition, answer interrogatories, or respond to a request for inspection

If a party or [related person fails to appear for deposition, answer interrogatories, or respond to a request for inspection¹] . . . the court **shall** require the party failing to act or the attorney advising that party or both 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. Fed. R. Civ. P. 37(d).

Failure to obey order

[In the event of failure to obey an order] 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'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. Fed. R. Civ. P. 37(b)(2).

Non Parties

Prior Statements

Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded. Fed. R. Civ. P. 26(b)(3).

Subpoenas

Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued. An adequate cause for failure to obey exists when

¹ Failure to permit inspection not included.

a subpoena purports to require a non-party to attend or produce at a place not within the limits provided by clause (ii) of subparagraph (c)(3)(A). Fed. R. Civ. P. 45(e).

Frequently Cited Case Law in Motions to Compel

What does “substantially justified” mean?

Authoritative commentators suggest a fairly low threshold for showing “substantial” justification. “Making a motion, or opposing a motion, is ‘substantially justified’ if the motion raised an issue about which reasonable people could genuinely differ . . .”² However, the Tenth Circuit has made a somewhat less generous analysis:

We are of the view, therefore, that as between the two commonly used connotations of the word “substantially,” the one most naturally conveyed by the phrase before us here is not “justified to a high degree,” but rather “justified in substance or in the main”— that is, justified to a degree that could satisfy a reasonable person.³

It is not enough to subjectively believe that a position is justified. The sanctions rule calls for an objective analysis, made in the context of the suit.

When will ultimate sanctions be imposed?

Guidelines for imposition of the extreme sanction of dismissal (against a violating plaintiff) or judgment (against a violating defendant) which apply generally to discovery sanctions also apply to spoliation sanctions.

Before choosing dismissal as a just sanction, a court should ordinarily consider a number of factors, including: (1) the degree of actual prejudice to the defendant; (2) the amount of interference with the judicial process; (3) the culpability of the litigant; (4) whether the court warned the party in advance that dismissal of the action would be a likely sanction for noncompliance; and (5) the efficacy of lesser sanctions.⁴

Dismissal and entry of judgment are remedies of last resort because “a court should impose the least onerous sanction that will remedy the prejudice and, where applicable, punish the past wrongdoing and deter future wrongdoing.”⁵

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² 8A Charles Alan Wright & Arthur R. Miller Federal Practice & Procedure Civ.2d § 2288 (2nd ed. 1994).

³ *Hutchinson v. Pfeil*, No. 98-5043, 1999 WL 1015557, at *3 (10th Cir. Nov. 9, 1999)(unpublished decision). Interestingly, *Hutchinson* and many other cases cite to “[t]he controlling definition of ‘substantially justified’ [] set forth in *Pierce v. Underwood*” [487 U.S. 552, 564-65 (1988)] when *Pierce* considered a different legal issue entirely, only analogizing to what Justice Scalia termed to be the prevalent view under Fed. R. Civ. P. 37(a)(4)(A).

⁴ *Ehrenhaus v Reynolds*, 965 F.2d 916, 921 (10th Cir. 1992)(citations and quotation marks omitted).

⁵ *Jordan F. Miller Corp. v. Mid-Continent Aircraft Serv., Inc.*, No. 97-5089, 1998 WL 68879, at *6 (10th Cir. Feb. 20, 1998)(unpublished decision).