

89-R-99001

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

IN RE: AMENDMENT OF M.R.C.P. 37

MOTION TO AMEND M.R.C.P. 37

FILED
SEP 06 2019
OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

Comes now the Supreme Court Advisory Committee on Rules, pursuant to M.R.A.P. 27(f), and moves the Mississippi Supreme Court to amend M.R.C.P. 37 as discussed below. The amendment requires a party moving to compel to certify that the party has conferred or attempted to confer in good faith with the party failing to respond to discovery. The amendment also includes specific sanctions for failing to comply with an order requiring production of another person for examination pursuant to M.R.C.P. 35.

Rule 37. Failure to Make or Cooperate in 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:~~ The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make discovery in an effort to obtain it without court action.

(1) **Appropriate Court.** An application for an order may be made to the court in which the action is pending.

(2) **Motion.** If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rules 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 inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

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(d).

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(3) Evasive or Incomplete Answer. For purposes of this section, 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 or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the movant filed the motion before attempting in good faith to obtain the discovery without court action, 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 ~~of~~ or the attorney advising 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 expense 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 Court. If a deponent fails to be sworn or to answer a question after being directed to do so by the court, the failure may be considered a contempt of court.

(2) Sanctions by Court in Which Action Is Pending.

(A) For Not Obeying a Discovery Order. If a party or an officer, director, or managing agent of a party or a person designated under Rules 30(b)(6) or 31(a) to testify in behalf of a party fails to obey an order to provide or permit discovery, including an order made under subsection (a) of this rule, 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*i*) 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*ii*) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(~~C~~iii) 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~~iv) 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.

(B) For Not Producing a Person for Examination. If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for examination, the court may issue any of the orders listed in Rule 37(b)(2)(A)(i)-(iii), unless the disobedient party shows that it cannot produce the other person.

(C) Payment of Expenses. In lieu of any of the foregoing orders or in addition, thereto, the court shall require the party failing to obey the order or the attorney advising him 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.

(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, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable under 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 he 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 Rules 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of interrogatories, or (3) to serve a written response to a request for 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 subsections ~~(A)~~, ~~(B)~~, and ~~(C)~~ of subsection (b)(2)(A)(i), (ii), or (iii) of this rule. A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him 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.

The failure to act described in this subsection 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 under Rule 26(d).

(e) **Additional Sanctions.** In addition to the application of those sanctions, specified in Rule 26(d) and other provisions of this rule, the court may impose upon any party or counsel such sanctions as may be just, including the payment of reasonable expenses and attorneys' fees, if any party or counsel (i) fails without good cause to cooperate in the framing of an appropriate discovery plan by agreement under Rule 26(c), or (ii) otherwise abuses the discovery process in seeking, making or resisting discovery.

[Amended effective _____.]

Advisory Committee Historical Note

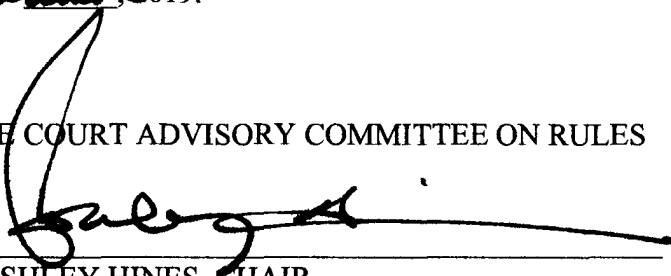
Effective _____, M.R.C.P. 37 was amended so as to require a party to confer in good faith with the opposing party before moving to compel. In addition, the amendment specifies the sanctions for failing to produce a person for examination pursuant to Rule 35.

The Committee believes that the requirement to confer in good faith prior to filing a discovery motion will reduce the need for court involvement in discovery disputes. The Committee believes the amendment specifying sanctions for the failure to comply with an order for a Rule 35 examination addresses an issue that was not addressed when Rule 35 was adopted in 2003. The amendments are consistent with F.R.C.P. 37. The motion to amend M.R.C.P. 37 was unanimously approved by the Committee on December 7, 2018.

The Supreme Court Advisory Committee on Rules therefore moves that the above proposed amendment to M.R.C.P. 37 be considered by the Mississippi Supreme Court.

SO MOVED, this the 6th day of September, 2019.

SUPREME COURT ADVISORY COMMITTEE ON RULES

A large, stylized handwritten signature in black ink, which appears to be "Ashley Hines". The signature is written over a horizontal line that extends across the width of the signature.

JUDGE ASHLEY HINES, CHAIR

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