

## **E-discovery & ESI – Rules to Keep in Mind**

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### **MONTANA RULES OF PROFESSIONAL CONDUCT**

#### **PREAMBLE AND TERMINOLOGY**

(1) A lawyer *shall always pursue the truth*.

(2) A lawyer, as a member of the legal profession, is a representative of clients, *an officer of the legal system* and a public citizen having special responsibility for the quality of justice.

(3) As a representative of clients, a lawyer performs various functions. In performance of any functions a lawyer shall behave consistently with the requirements of honest dealings with others. As advisor, a lawyer endeavors to provide a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements under these Rules of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them.

(9) *A lawyer's responsibilities* as a representative of clients, an officer of the legal system and a public citizen *are harmonious*. . .

(10) . . . Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest. . . Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive *professional and moral judgment guided by the basic principles underlying these Rules*. These principles include *the lawyer's obligation to protect and pursue a client's legitimate interests, within the bounds of the law*, while maintaining a professional, courteous and civil attitude *toward all persons involved* in the legal system.

(14) Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. All lawyers understand that, as officers of the court, they have a duty to be truthful, which engenders trust in both the profession and the rule of law. The Rules of Professional Conduct, when properly applied, serve to define that relationship. *Trust in the integrity of the system and those who operate it is a basic necessity of the rule of law*; accordingly truthfulness must be the hallmark of the legal profession, and the stock-in-trade of all lawyers.

(Emphasis added).

**Terminology:**

- (a) “Belief” or “believes” denotes that the person involved actually supposed the fact in question to be true. A person’s belief may be inferred from circumstances.
- (b) “Bona fide” denotes in or with good faith; honestly, openly, and sincerely; without deceit or fraud.
- (l) “Reasonably should know” when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

**RULE 1.1 COMPETENCE**

A lawyers shall provide *competent representation to a client*. Competent representation requires *the legal knowledge, skill, thoroughness and preparation reasonably necessary* for the representation.

(Emphasis added).

**RULE 1.2 SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER**

- (a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client’s decision whether to settle a matter...
- (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

**RULE 2.1 ADVISOR**

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.

### **RULE 3.1 MERITORIOUS CLAIMS AND CONTENTIONS**

(a) A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein:

- (1) without having first determined through diligent investigation that there is a bona fide basis in law and fact for the position to be advocated;
- (2) for the purpose of harassment, delay, advancement of a nonmeritorious claim or solely to gain leverage; or
- (3) to extend, modify or reverse existing law unless a bona fide basis in law and fact exists for advocating doing so.

(b) A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

### **RULE 3.3 CANDOR TOWARD THE TRIBUNAL**

(a) A lawyer shall not knowingly:

- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
- (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
- (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

### **RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL**

A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence, *unlawfully alter, destroy or conceal a document or other material having potential evidentiary value, or counsel or assist another person* to do any such act;
- (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
- (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;
- (d) in pretrial procedure, make a frivolous discovery request *or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party*;
- (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or ...

(Emphasis added).

### **RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS**

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

### **RULE 5.1 RESPONSIBILITIES OF PARTNERS, MANAGERS AND SUPERVISORY LAWYERS**

- (a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, *shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm* conform to the Rules of Professional Conduct.
- (b) *A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure* that the other lawyer conforms to the Rules of Professional Conduct.
- (c) A lawyer within a firm shall be responsible for another lawyer in the firm's violation of the Rules of Professional Conduct if:
  - (1) the lawyer orders or, with knowledge of the specific conduct, ratifies or ignores the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

(Emphasis added).

## **RULE 5.2 RESPONSIBILITIES OF A SUBORDINATE LAWYER**

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if the lawyer acts in accordance with the supervisory lawyer's reasonable resolution of an arguable question of professional duty.

## **RULE 5.3 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS**

*With respect to a nonlawyer employed or retained by or associated with a lawyer:*

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, *shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance* that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer *shall make reasonable efforts to ensure that the person's conduct is compatible* with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies or ignores the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

(Emphasis added).

## **RULE 8.4 MISCONDUCT**

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable code of judicial conduct or other law.

## **2008 Montana Code of Judicial Conduct**

### **Rule 2.16(B):**

(B) A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate authority.

### **Terminology**

“Knowledge” means “actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.”

## **Montana Rules of Civil Procedure**

**M. R. Civ. P. 11 (b) Representations to the Court.** By presenting to the court a pleading, written motion, or other paper--whether by signing, filing, submitting, or later advocating it--an attorney or unrepresented party certifies to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

- (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

- (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
- (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or lack of information.

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**(c) Sanctions.** (1) *In General.* If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

(2) *Motion for Sanctions.* A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney fees, incurred for the motion.

(3) *On the Court's Initiative.* On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).

(4) *Nature of a Sanction.* A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney fees and other expenses directly resulting from the violation.

(5) *Limitations on Monetary Sanctions.* The court must not impose a monetary sanction:

(A) against a represented party for violating Rule 11(b)(2); or

(B) on its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(6) *Requirements for an Order.* An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

**(d) Inapplicability to Discovery.** This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.<sup>1</sup>

### **M.R.Civ.P. 16(f) Sanctions**

(1) *In General.* On motion or on its own, the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)-(vii), if a party or its attorney:

(A) fails to appear at a scheduling or other pretrial conference;

(B) is substantially unprepared to participate--or does not participate in good faith--in the conference; or

(C) fails to obey a scheduling or other pretrial order.

(2) *Imposing Fees and Costs.* Instead of or in addition to any other sanction, the court must order the party, its attorney, or both to pay the reasonable expenses--including attorney fees--incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust.

### **M. R. Civ. P. 26(b)(2)(B)-(C)<sup>2</sup>**

(B) *Specific Limitations on Electronically-Stored Information.* A party need not provide discovery of electronically-stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. ***On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost.*** If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

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<sup>1</sup> Although Rule 11 does not apply to discovery motions under Rules 26 through 37, an attorney who fails to understand the IT infrastructure of his or her client may not satisfy the "reasonable inquiry" requirement of Rule 11.

<sup>2</sup> Emphasis added. Note that the opportunity to be proactive through use of a motion to compel or protective order. However, both the motion for a protective order and the motion to compel require certification in good faith that the party conferred or attempted to confer with other affected parties. See Rule 26(c)(1); Rule 37(a)(1). Further, failure to appear for a deposition or respond to interrogatories/request to inspect is not excused on the ground that the discovery was objectionable unless there is a pending motion for a protective order under Rule 26(c). See Rule 37(d)(2), Mont. R. Civ. P. Note that basic ediscovery resources/books provide guidance on what types of Electronically Stored Information (ESI) are reasonably accessible.

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

### **M. R. Civ. P. 26(e) Supplementing Responses**

(e) Supplementing Responses.

(1) In General. A party who has responded to an interrogatory, request for production, or request for admission *must supplement or correct its response*:

(A) *in a timely manner if the party learns that in some material respect the response is incomplete or incorrect*, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(B) as ordered by the court.

(2) Expert Witness. For an expert whose opinion is produced in response to an interrogatory served under Rule 26(b)(4), the party's duty to supplement extends both to information included in the response and to information given during the expert's deposition. Any additions or changes to this information *must be disclosed* by the time of the preparation and submission of the pretrial order to the court.<sup>3</sup>

(Emphasis added).

### **M. R. Civ. P. 26(b)(6) [Requirement of a Privilege Log and “Clawback”]<sup>4</sup>**

(6) Claiming Privilege or Protecting Trial-Preparation Materials.

(A) Information Withheld. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and

(ii) describe the nature of the documents, communications, or things not produced or disclosed -- and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) Information Produced. If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making

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<sup>3</sup> Rule 26(e)(2)'s expert witness provision was amended in Sup. Ct. Ord. No. AF 07-0157, Dec. 16, 2014, eff. Dec. 16, 2014, eliminating all but one use of the word “disclosed.”

<sup>4</sup> The Committee Notes to the amendments effective October 1, 2011 state:

Rule 26(b)(6) is a verbatim adoption of Federal Rule 26(b)(5) and imposes a procedure for handling of information withheld under claimed privilege, requiring the creation of a privilege log and providing a procedure for handling inadvertent disclosure of privileged materials.

the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

### **M.R. Civ. P. 26(c)**

#### **(c) Protective Orders.**

(1) In General. A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending -- or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. ***The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties*** in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the discovery;

(B) specifying terms, including time and place, for the discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

(2) Ordering Discovery. If a motion for protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.

(3) Awarding Expenses. Rule 37(a)(5) applies to the award of expenses.

(Emphasis added)

**M. R. Civ. P. 26 (g) Signing Disclosures and Discovery Requests, Responses, and Objections.**

(g) Signing Discovery Requests, Responses, and Objections.<sup>5</sup>

(1) ***Signature Required; Effect of Signature.*** Every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name -- or by the party personally, if unrepresented -- and must state the signer's address. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry, it is:

(A) consistent with these rules and warranted by existing law or by a good faith argument for extending, modifying, or reversing existing law;

(B) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(C) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(2) ***Failure to Sign.*** Other parties have no duty to act on an unsigned request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

(3) ***Sanction for Improper Certification.*** If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney fees, caused by the violation.

**M.R. Civ. P. 26(f) Discovery Conference**

(f) Discovery Conference. At any time after commencement of an action, the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so ***upon motion by the attorney for any party if the motion includes:***

- (1) a statement of the issues as they then appear;
- (2) a proposed plan and schedule of discovery;
- (3) any limitations proposed to be placed on discovery;
- (4) any issues relating to discovery of electronically-stored information, including the form or forms in which it should be produced;
- (5) any other proposed orders with respect to discovery; and

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<sup>5</sup> Note Rule 26(g) was amended in Sup. Ct. Ord. No. AF 07-0157, Dec. 16, 2014, eff. Dec. 16, 2014, eliminating references to "disclosure."

(6) *a statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys in the matters set forth in the motion. Each party and each party's attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party.*<sup>6</sup> Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than 14 days after service of the motion.

Following the discovery conference, *the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan* and schedule for discovery, including resolution of issues relating to the discovery of electronically-stored information, including the form or forms in which it should be produced, setting limitations on discovery, if any; and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.

**M. R. Civ. P. 34. Producing Documents, Electronically-Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes.**

(a) In General. A party may serve on any other party a request within the scope of Rule 26(b):

(1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control:

(A) *any designated documents or electronically-stored information -- including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations -- stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form;* or

(B) any designated tangible things; or

(2) to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

(b) Procedure.

(1) Contents of the Request. The request:

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<sup>6</sup> Note the possibility of sanctions under Rule 37(f):

Failure to Participate in the Framing of a Discovery Plan. If a party or its attorney fails to participate in good faith in the framing of a discovery plan by agreement as is required by Rule 26(f), the court may, after opportunity for hearing, require that party or attorney to pay to any other party the reasonable expenses, including attorney fees, caused by the failure.

(A) must describe with reasonable particularity each item or category of items to be inspected;

(B) must specify a reasonable time, place, and manner for the inspection and for performing the related acts; and

(C) may specify the form or forms in which electronically-stored information is to be produced.

(2) Responses and Objections.

(A) Time to Respond. The party to whom the request is directed must respond in writing within 30 days after being served, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(B) Responding to Each Item. For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons.

(C) Objections. An objection to part of a request must specify the part and permit inspection of the rest.

***(D) Responding to a Request for Production of Electronically-Stored Information. The response may state an objection to a requested form for producing electronically- stored information. If the responding party objects to a requested form -- or if no form was specified in the request -- the party must state the form or forms it intends to use.***

(E) Producing the Documents or Electronically Stored Information. Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically-stored information:

(i) ***A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;***

(ii) ***if a request does not specify a form for producing electronically-stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms;*** and

(iii) a party need not produce the same electronically-stored information in more than one form.

(c) Nonparties. As provided in Rule 45, a nonparty may be compelled to produce documents and tangible things or to permit an inspection.

(Emphasis added).

## **M. R. Civ. P. 37(a) Motion for an Order Compelling Discovery.**

### **(a) Motion for an Order Compelling Discovery.**

(1) In General. On notice to other parties and all affected persons, *a party may move for an order compelling discovery. 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.*

(2) Appropriate Court. A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty must be made in the court where the discovery is or will be taken.

### **(3) Specific Motions.**

(A) To Compel a Discovery Response. A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:

- (i) a deponent fails to answer a question asked under Rule 30 or 31;
- (ii) a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a)(4);
- (iii) a party fails to answer an interrogatory submitted under Rule 33; or
- (iv) a party fails to respond that inspection will be permitted -- or fails to permit inspection -- as requested under Rule 34.

(B) Related to a Deposition. When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order.

(4) Evasive or Incomplete Answer or Response. *For purposes of this subdivision (a), an evasive or incomplete answer or response must be treated as a failure to answer or respond.*

### **(5) Payment of Expenses; Protective Orders.**

(A) If the Motion is Granted or Disclosure or Discovery is Provided After Filing. If the motion is granted -- or if the requested discovery is provided after the motion was filed -- the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney fees. But the court must not order this payment if:

- (i) the movant filed the motion before attempting in good faith to obtain the discovery without court action;
- (ii) the opposing party's response or objection was substantially justified; or
- (iii) other circumstances make an award of expenses unjust.

(B) If the Motion is Denied. If the motion is denied, the court may issue any protective order authorized under Rule 26(c) and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the

party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.

(C) If the Motion is Granted in Part and Denied in Part. If the motion is granted in part and denied in part, the court may issue any protective order authorized under Rule 26(c) and may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion.

(Emphasis added).

### **M. R. Civ. P. 37(b) Failure to Comply With a Court Order.**

#### *(2) Sanctions by the Court Where the Action is Pending.*

(A) For not Obeying a Discovery Order. If a party or a party's officer, director, or managing agent--or a witness designated under Rule 30(b)(6) or 31(a)(4)--fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

- (i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;
- (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
- (iii) striking pleadings in whole or in part;
- (iv) staying further proceedings until the order is obeyed;
- (v) dismissing the action or proceeding in whole or in part;
- (vi) rendering a default judgment against the disobedient party; or
- (vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

...

(C) Payment of Expenses. Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

### **M. R. Civ. P. 37(d)**

(d) Party's Failure to Attend Its Own Deposition, Serve Answers to Interrogatories, or Respond to a Request for Inspection.

(1) In General.

(A) Motion; Grounds for Sanctions. The court where the action is pending may, on motion, order sanctions if:

(i) a party or a party's officer, director, or managing agent -- a person designated under Rule 30(b)(6) or 31(a)(4) -- fails, after being served with proper notice, to appear for that person's deposition; or

(ii) a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response.

(B) Certification. *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.*

(2) Unacceptable Excuse for Failing to Act. *A failure described in Rule 37(d)(1)(A) is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c).*

(3) Types of Sanctions. Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)-(vi). Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless that failure was substantially justified or other circumstances make an award of expenses unjust.

(Emphasis added).

**M. R. Civ. P. 37(c) [New Automatic Sanction Provision – Do not need previous order/hearing for the sanction of not using the information or witness]<sup>7</sup>**

(c) Failure to Disclose, to Supplement an Earlier Response, or to Admit.

(1) Failure to Disclose or Supplement. If a party fails to provide information requested in accordance with these rules or fails to disclose information regarding opinions of a witness as required by Rule 26(b)(4), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

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<sup>7</sup> The Committee Notes to the amendments effective October 1, 2011 state:

Rule 37(c) of the Federal Rule is adopted except for changes necessary to remove reference to disclosures required by Rule 26 nota adopted by Rule 26. New language in Rule 37(c)(1) makes clear the power of the court to impose the sanctions specified in Rule 37(c)(1)(A),(B), or (C) where information properly requested under these rules is not supplied as required or where there is not a proper disclosure of expert opinions under Rule 26(b)(4).

(A) may order the payment of the reasonable expenses, including attorney fees, caused by the failure;

(B) may inform the jury of the party's failure; and

(C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

(2) Failure to Admit. If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney fees, incurred in making that proof. The court must so order unless:

(A) the request was held objectionable under Rule 36(a);

(B) the admission sought was of no substantial importance;

(C) the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or

(D) there was other good reason for the failure to admit.

**M. R. Civ. P. 37(e)**

(e) Failure to Provide 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.