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Rule 37 Sanctions: Deterrents to Discovery Abuses

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I. INTRODUCTION

On January 1, 1962, the Montana Legislature enacted a system of procedure, patterned after the Federal Rules of Civil Procedure, to govern the preparation and conduct of civil suits tried and settled at the district court level. The Legislature implemented these new rules to allow Montana courts jurisdiction over parties having substantial contacts with the State of Montana and to facilitate a "just, speedy, and inexpensive determination of every action." Although the Legislature initially adopted this new system, the Montana Supreme Court has applied, interpreted, and amended the rules since 1962.

Rule 37 of the Federal Rules of Civil Procedure enumerates the sanctions that a court may impose on parties who fail to comply with court orders directing discovery. This comment examines the purpose and effect of Rule 37 sanctions in relation to the discovery process. It outlines the evolution of these sanctions as evidenced by Montana case law.

II. RULE 26 DISCOVERY—AN OVERVIEW

Proper discovery is crucial to the competent disposition of every case because it enables each party’s attorney to identify the strengths and weaknesses of his client’s case, thereby promoting a

1. The Rules govern all suits of a civil nature except special statutory proceedings excluded by Rule 81.
2. MONT. R. CIV. P. 1.
3. MONT. R. CIV. P. 4B.
4. MONT. R. CIV. P. 1.
5. MONT. R. CIV. P. 86(a) provides a framework for the Montana Supreme Court to amend the Rules of Civil Procedure.
6. See generally Rosenberg, Sanctions to Effectuate Pretrial Discovery, 58 Colo. L. Rev. 480 (1958) (discussing the sanctions and the linguistic difficulties of Rule 37).
7. MONT. R. CIV. P. 26 contains the general provisions governing discovery. With the adoption of the Federal Rules of Civil Procedure, and particularly of Rule 26, Montana acquired “a comprehensive system for obtaining and requiring disclosure of information needed to prepare for and to prevent surprise at trial.” Mason, The Montana Rules of Civil Procedure, 23 Mont. L. Rev. 3, 46 (1961). To facilitate discovery, Rule 26(a) provides for (1) depositions upon oral examination or written questions, (2) written interrogatories, (3) production of documents or things or permission to enter upon land or other property, for inspection and other purposes, (4) physical and mental examination, and (5) requests for admission.
reliable evaluation of settlement possibilities. Even where trial is not avoidable, an attorney can effectively present a client's case only after conducting thorough discovery. Furthermore, pretrial discovery promotes fairness and prevents surprise at trial. Accordingly, the Montana Rules of Civil Procedure governing discovery encourage (1) disclosure of evidence by each side to achieve trial results based on the merits of a dispute, (2) realistic evaluation of settlement possibilities, and (3) avoidance of unequal advantages to either party.

The scope of discovery, under Rule 26, extends to "any matter, not privileged, which is relevant to the subject matter involved in the pending action." Under Rule 26, the existence and contents of insurance agreements are discoverable although this information cannot be introduced as evidence. Materials prepared for trial cannot be discovered under the rule, however, unless the discovering party establishes a "substantial need" and an inability to obtain the material "without undue hardship." Information generally comes within the scope of discovery if it is "reasonably calculated to lead to the discovery of admissible evidence."

Occasionally, attorneys fail to furnish requested information that is legitimately discoverable. In delaying discovery, attorneys often expect either to frustrate the opposition or to acquire additional time to prepare a client's case. Attorneys employing dilatory discovery tactics face the possibility that the court will impose one or more of the sanctions found in Rule 37.

III. Rule 37 Sanctions

A. The Purposes of Rule 37 Sanctions

Because the rules governing discovery are not self-execut-


ing,\(^\text{17}\) the Legislature implemented the sanctions of Rule 37 to enforce the methods of discovery enumerated in Rule 26(a).\(^\text{18}\) Shortly after Rule 37 was adopted, however, its sanctions were rarely imposed. Judges were reluctant to dismiss actions\(^\text{19}\) or to render default judgments\(^\text{20}\) because the primary purpose of discovery was to provide a means by which each side could realistically evaluate its case and effectuate a disposition of the case on its merits.\(^\text{21}\) When a court dismissed a case or rendered a default judgment, the case was not tried on its merits. Judges hesitated to punish recalcitrant parties unless their noncompliance could not be justified.\(^\text{22}\) Faced with no real threat of punishment, parties across the nation abused the rules of discovery, rendering the discovery processes virtually useless.\(^\text{23}\)

The trend of allowing discovery abuses was reversed by the United States Supreme Court in *National Hockey League v. Metropolitan Hockey Clubs, Inc.*\(^\text{24}\) In *National Hockey League*, respondents failed to timely answer written interrogatories\(^\text{25}\) even after the district court admonished them for their conduct, granted them numerous extensions, and ordered them to answer interrogatories. The Court affirmed the district court’s dismissal\(^\text{26}\) of respondents’ antitrust action for two reasons. The Court noted first that

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20. Mont. R. Civ. P. 37(b)(2)(C) authorizes courts to enter default judgments for failure to discover.
22. Id.
25. Mont. R. Civ. P. 33(a) provides that the party, served with interrogatories, must serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory. (Emphasis added).
26. Pursuant to Mont. R. Civ. P. 37(b)(2)(C), dismissal of the case is a suitable punishment for failure to respond to written interrogatories.
the sanctions of Rule 37 must be available to courts to penalize parties exhibiting "flagrant bad faith" and "callous disregard" of their responsibilities, and second, that the sanctions of Rule 37 must be available "to deter those who might be tempted to such conduct in the absence of such a deterrent." 

The Montana Supreme Court, in Owen v. F.A. Buttrey Co., unequivocally adopted the purposes and functions of Rule 37 sanctions as stated in National Hockey League. In Owen, defendants refused to answer interrogatories, so the district court precluded defendants from introducing evidence contrary to the admitted facts, awarded attorney fees, and ordered parts of defendants' answer stricken. In affirming the sanctions imposed, the Montana Supreme Court stated that National Hockey League was "a pivotal case in the development of Rule 37 as a punitive and deterrent mechanism." The court noted further that under the National Hockey League decision deterrence is not merely permissible but perhaps a mandatory objective of Rule 37. The sanctions of Rule 37 must be used to deter discovery abuses and provide for the "just, speedy and inexpensive determination of every action." Finally, the Montana Supreme Court warned that parties resorting to "willful delay, evasive responses, and disregard of court direction as part . . . of their trial strategy" would suffer the consequences of Rule 37 sanctions.

B. District Court Authority Under Rule 37

Rule 37 addresses both the consequences of a litigant's failure to make discovery, and grants district courts authority to issue any order which is "just." Given such broad authority, a district

27. The decision in National Hockey League was based on Rule 37(b), but the court's statement as to the purpose of Rule 37(b) sanctions is equally applicable to all the sanctions of Rule 37.

28. National Hockey League, 427 U.S. at 643. See also Stanton v. Iver Johnson's Arms, Inc., 88 F.R.D. 290, 291 (1980) (here, the court, citing National Hockey League, ordered that certain facts supporting the discovering party's claim be taken as established and that the disobedient party pay reasonable attorney fees incurred by the discovering party in pursuing the claim).

29. _____ Mont. _____, 627 P.2d 1233.
30. See id. at _____, 627 P.2d at 1236.
31. Id.
32. Id.
33. Id. (citing FED. R. CIV. P. 1 and MONT. R. CIV. P. 1). See also supra note 17 and accompanying text.
34. Owen, _____ Mont. at ____, 627 P.2d at 1236.
35. MONT. R. CIV. P. 37(d) provides in relevant part:
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 ap-
court, in its discretion, may determine whether imposition of sanctions is just and which sanctions it should impose. For example, the court in Owen prohibited defendants from introducing evidence contrary to admitted facts, awarded attorney fees, and ordered parts of defendants’ answer stricken, while the court in National Hockey League dismissed the recalcitrant parties’ action. The authority of district courts to make these determinations is so well established that reviewing courts rarely reverse lower court decisions concerning the imposition of sanctions. Accordingly, the Montana Supreme Court stated in Owen, “when it is not possible for this Court to make a ready, confident, and accurate determination of a party’s good faith in the discovery process, we presume the correctness of the District Court’s action under Rule 37.”

C. The Four Categories of Rule 37 Sanctions

Rule 37 provides four types of sanctions which courts may impose on recalcitrant parties. These sanctions include: (1) court

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orders issued at the request of the discovering party compelling the disobedient party or deponent to perform the requested discovery activities, 42 (2) penalties for failure to comply with a court order,43 (3) contempt citations usually issued for the violation of court orders,44 and (4) monetary sanctions.45 A detailed discussion of each type of sanction follows.

1. **Court Orders Compelling Discovery—Rules 37(a) and 37(d)**

a. **Rule 37(a)**

Upon application to the appropriate court, 46 a party conducting discovery may move47 for an order compelling discovery against an opposing party who, with or without stated objections,48

42. Under MONT. R. Civ. P. 37(a), the discovering party may request an order to compel discovery. MONT. R. Civ. P. 37(d) provides that the court in which an action is pending may, upon motion, issue certain motions. For the text of Rule 37(d), see supra note 35. The three situations where Rule 37(d) orders apply are listed in the text accompanying infra notes 73-75.

43. MONT. R. Civ. P. 37(b)(2) provides sanctions that can be imposed for the violation of an order to compel discovery issued pursuant to Rule 37(a). Further, MONT. R. Civ. P. 37(d) provides sanctions that can be imposed where the party from whom discovery is sought displays a total lack of response.

44. Pursuant to MONT. R. Civ. P. 37(b)(1), the court in which a deposition is taken may hold any deponent who fails to be sworn or to answer a question after being directed to do so by that court in contempt. In addition, under MONT. R. Civ. P. 37(b)(2)(D), the court in which the action is pending may treat as contempt of court a party's failure to obey any orders except an order to submit to a physical or mental examination per MONT. R. Civ. P. 35. For a discussion of Rule 35, see infra note 90.

45. MONT. R. Civ. P. 37 provides for four categories of monetary sanctions. See infra notes 142-71 and accompanying text for a discussion of the monetary sanctions available under Rule 37.

46. MONT. R. Civ. P. 37(a)(1) defines the appropriate court for such an application as “the court in which the action is pending, or, on matters relating to a deposition, . . . the court in the district where the deposition is being taken.” The rule requires deponents who are not parties to apply for such an order in “the district where the deposition is being taken.”

47. MONT. R. Civ. P. 37(a)(2) governs when and under what circumstances a party may move for an order compelling discovery. For a thorough discussion of these circumstances, see infra text accompanying notes 49-70. MONT. R. Civ. P. 33(a) and 34(b) provide that the party initiating discovery may move for an order under Rule 37(a) when faced with any objection to or failure to discover. MONT. R. Civ. P. 37(d) authorizes the court in which the action is pending, on motion per Rule 37(a), to make such orders as are just, see supra note 35, including the orders described in MONT. R. Civ. P. 37(b)(2)(A), 37 (b)(2)(B), and 37(b)(2)(C).

48. MONT. R. Civ. P. 33(a) requires that the party responding to the interrogatories either answer “separately and fully in writing under oath” or object to the interrogatory and state reasons for the objection. MONT. R. Civ. P. 34(b) similarly requires that the responding party either state, in writing, “with respect to each item or category, that inspection and related activities will be permitted as requested” or object to the request and include reasons for the objection.
resists discovery. Rule 37(a)(2) describes three situations where a party may move for an order compelling discovery. First, a discovering party may move for an order compelling discovery where a deponent fails to answer a question submitted pursuant to depositions upon either oral examination or written questions. Orders compelling deponents to answer questions are effective against both individuals and corporations.

Secondly, a party may move for an order compelling discovery if a party fails to answer an interrogatory, as required in Rule 33. Under Rule 33(a), a party served with interrogatories may either answer them in writing or object to them. Rule 33(a) suggests that a discovering party may move for orders to compel in the event that the party served with interrogatories either objects to an interrogatory or fails to answer one. Some commentators, however, maintain that the orders of Rule 37(a) may be sought only where there has been a response, such as a formal objection, that does not satisfy the needs or expectations of the discovering party.

In the event of a formal objection, the commentators contend that the proper solution for the discovering party is to move for an order under Rule 37(a) compelling that the interrogatory be answered. If the party against whom discovery is sought neither answers an interrogatory nor objects to it, the commentators recommend that the discovering party move the court to impose

51. Mont. R. Civ. P. 30 governs depositions upon oral examination.
52. Mont. R. Civ. P. 31 governs depositions upon written questions.
53. Under Mont. R. Civ. P. 30(b)(6), which governs oral depositions, any organization, whether a public or private corporation, a partnership, an association or governmental agency, named as the deponent, must designate one or more officers, directors, managing agents, or persons who consent to testify in its behalf and describe the matters on which each person shall testify. If the organization fails to make a designation according to Rule 30(b)(6), the discovering party may move for an order compelling discovery under Rule 37(a). Mont. R. Civ. P. 31(a) governs written depositions and requires organizations named as deponents to make designations “in accordance with the provisions of Rule 30(b)(6).”
54. See supra note 50.
55. Mont. R. Civ. P. 33 governs interrogatories to parties. See Wolfe, 147 Mont. at 40, 409 P.2d at 534 where the court stated, “Rule 37(a) sanctions may be imposed upon a party who fails to comply with the discovery requirements of the rules, and specifically upon a party who fails to properly answer interrogatories . . . .” (Emphasis added).
58. Id.
penalties on the resisting party. No court in Montana has construed the language of Rule 33(a). Consequently, parties seeking answers to interrogatories in Montana do not know whether Montana courts will follow the plain language of Rule 33(a) or the interpretation given to it by leading authorities.

The third situation in which a party may move for an order under Rule 37(a) occurs when a party served with a Rule 34 request for production of documents or entry upon land fails to respond by indicating that inspection will be permitted or else fails to permit inspection. A party may object to a Rule 34 request for production of documents or entry upon land just as a party served with interrogatories under Rule 33 may object to any interrogatory. Rule 34(b) authorizes the party submitting the request for production of documents or entry upon land to move for an order under Rule 37(a) when the other party objects to the requested inspection, fails to respond to the request, or prohibits the inspection as requested.

Rule 37(a) authorizes a party seeking discovery through depositions, interrogatories, or requests for production to move for an order compelling discovery. Where a deponent or a party served with interrogatories fails to answer a question on depositions or an interrogatory, the discovering party may move for an order compelling an answer. If a deponent corporation or other entity fails to designate a person who can testify as to matters known or

59. The penalties which a discovering party may seek to impose for a complete failure to respond to interrogatories are found in MONT. R. CIV. P. 37(b)(2). These penalties include orders (1) requiring that certain matters be taken as established in accordance with the pleadings of the discovering party (MONT. R. CIV. P. 37(b)(2)(A)); (2) prohibiting the disobedient party from supporting or opposing designated claims or defenses or from introducing designated matters into evidence (MONT. R. CIV. P. 37(b)(2)(B)); or (3) striking pleadings, dismissing the action, or rendering a default judgment against the disobedient party (MONT. R. CIV. P. 37(b)(2)(C)). For a more thorough discussion of these penalties, see infra text accompanying notes 88-140.

60. The rule provides that a discovering party “may move for an order under Rule 37(a) with respect to any objections to or failure to answer an interrogatory.” MONT. R. CIV. P. 33(a).

61. MONT. R. CIV. P. 34(b) allows a party to object to a Rule 34 request for production. See supra note 55 and accompanying text discussing objections as an allowable response to Rule 33 interrogatories.

62. See supra note 50.

63. The procedure outlined in MONT. R. CIV. P. 34(b) which authorizes a party seeking inspection to move for an order under Rule 37(a) is very similar to the procedure outlined in MONT. R. CIV. P. 33(a) which authorizes a party seeking answers to interrogatories to seek such orders.

64. MONT. R. CIV. P. 30 and 31 govern the use of depositions.

65. MONT. R. CIV. P. 33 governs the use of interrogatories.

66. MONT. R. CIV. P. 37(a)(2).
reasonably available to the corporation or entity, the party seeking discovery may move for an order compelling a designation. If a party responds unsatisfactorily to a request for production or inspection, the party initiating the discovery may move for an order compelling the inspection as requested. If the court denies the motion, in whole or in part, then it may issue an order under Rule 26(c) protecting the nonmoving party from further "annoyance, embarrassment, oppression, or undue burden or expense."

b. **Rule 37(d)**

Rule 37(d) authorizes the issuance of orders in addition to those permitted under Rule 37(a). The discovery violations to which Rule 37(d) orders apply, however, are much more serious than those to which Rule 37(a) orders apply. As with Rule 37(a) orders compelling discovery, Rule 37(d) orders may be granted in three situations: (1) when a properly notified party fails to appear

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67. Persons whom a corporation or entity can designate to testify include officers, directors, managing agents, or other persons who consent to testify on the corporation or entity's behalf. Mont. R. Civ. P. 30(b)(6) and 31(a).


69. *Id.*

70. Mont. R. Civ. P. 26(c) authorizes courts to grant protective orders which require: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

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 person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(Emphasis added).

71. Mont. R. Civ. P. 37(d) authorizes default judgments and dismissals both of which are more severe than the motions to compel authorized by Rule 37(a). See Calaway, *Mont. at__, 624 P.2d at 992 (the court dismissed the action but noted that "[e]ntering a default judgment or dismissal with prejudice is a drastic sanction to impose . . . for failing to attend a pretrial conference." The court noted further that severe sanctions are appropriate only where the errant party displays "continual delay, abuse and disregard of the court's authority . . . ").

72. The three orders of Rule 37(d) are discussed infra text accompanying notes 73-87. In addition to the three orders mentioned already, a court may order a disobedient party to pay reasonable expenses pursuant to Rule 37(d). For a discussion of Rule 37(d) monetary sanctions see infra notes 167-71 and accompanying text.
at a deposition;\textsuperscript{73} (2) when a party fails to answer or object to properly served interrogatories submitted under Rule 33(a);\textsuperscript{74} and (3) when a properly served party fails to serve a written response to a Rule 34 request for production or inspection.\textsuperscript{75}

To obtain an order under Rule 37(d), the party seeking discovery must make a motion for the order in the court in which the action is pending.\textsuperscript{76} The court may then issue such orders "as are just."\textsuperscript{77} The language of Rule 37(d) provides for only three types of orders, all relatively severe in comparison to the orders of Rule 37(a).\textsuperscript{78}

The three types of orders expressly authorized under Rule 37(d) are set forth in Rule 37(b)(2). Rule 37(d) orders typically apply only to cases where a party flagrantly abuses discovery processes.\textsuperscript{79} First, the court may order various matters or facts established in accordance to the claim obtaining the order.\textsuperscript{80} Secondly, a court may issue an order forbidding the disobedient party to support or oppose designated claims or defenses or to introduce designated matters into evidence.\textsuperscript{81} Thirdly, an order may be issued which strikes pleadings in whole or in part, stays further proceedings until the order is obeyed, dismisses the action in whole or in part, or renders a default judgment against the recalcitrant party.\textsuperscript{82} The orders enumerated within Rule 37(d) do not comprise an all-inclusive list, and the courts have interpreted Rule 37(d) as allowing less severe sanctions.\textsuperscript{83}

Today, Rule 37(d) provides a wider range of sanctions than it

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  \item \textsuperscript{73} MONT. R. CIV. P. 37(d) provides that "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" may be ordered, on motion to discover, to pay reasonable expenses caused by the failure to discover or to both discover and pay expenses.
  \item \textsuperscript{74} MONT. R. CIV. P. 37(d).
  \item \textsuperscript{75} Id.
  \item \textsuperscript{76} Id.
  \item \textsuperscript{77} Id. \textit{See also supra} note 35.
  \item \textsuperscript{78} MONT. R. CIV. P. 37(d) provides in part: "the court . . . may make such orders . . . 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 . . . ." For the text of MONT. R. CIV. P. 37(b)(2)(A), (B) and (C), see \textit{infra} note 88.
  \item \textsuperscript{79} \textit{See Moore's Pamphlet, supra} note 49, ¶ 37.05 (1984).
  \item \textsuperscript{80} Such an order is authorized under both MONT. R. CIV. P. 37(b) and 37(d) but is set forth only in MONT. R. CIV. P. 37(b)(2)(A).
  \item \textsuperscript{81} A court may impose the sanctions found in MONT. R. CIV. P. 37(b)(2)(B) under either MONT. CIV. P. 37(b) or 37(d). These orders are found in MONT. R. CIV. P. 37(b)(2)(B).
  \item \textsuperscript{82} The orders provided in MONT. R. CIV. P. 37(b)(2)(C) are allowed under both MONT. R. CIV. P. 37(b) and 37(d).
  \item \textsuperscript{83} \textit{E.g.}, Gill v. Stolow, 240 F.2d 669 (2d Cir. 1957); Saltzman v. Birrell, 156 F. Supp. 538 (S.D.N.Y. 1957); 2A W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE 554-57 (Wright ed. 1961).
\end{itemize}
did when it was first enacted. The establishment of "willful failure" to respond or to appear, once a prerequisite to obtaining an order under Rule 37(d), is no longer required, although "willfulness" is still a primary consideration in determining which orders to issue. Accordingly, in *Societe Internationale v. Rogers*,84 where plaintiff failed to fully comply with a pretrial production order, the willfulness or good faith of a party against whom discovery was sought was deemed relevant but only to the determination by the court as to what course it should follow if a party failed to comply with discovery.85 Rule 37, as a whole, and Rule 37(d), in particular, are construed as allowing courts flexibility in fashioning orders appropriate to each case.86

Because the sanctions of Rule 37(d) are more severe than those permitted under Rule 37(a),87 they are legitimately applied only in cases of grievous misconduct. No Montana court which has ordered one of these sanctions has cited Rule 37(d) as authority. Instead, courts support the decision to impose severe sanctions by citing Rule 37(b).

2. **Penalties for Failure to Comply with Court Orders Compelling Discovery—Rule 37(b)(2)**

Rule 37(b)(2) lists the penalties which a court may impose for the failure to comply with any "order to provide or permit discovery"88 and includes orders issued under Rules 37(a)89 and 35.90 The

84. 357 U.S. 197 (1958). The holding of *Societe Internationale* is stated in *supra* note 35.

85. 357 U.S. at 208. The decision in *Societe Internationale* was based on Rule 37(b), not on Rule 37(d), but the court's comments regarding "willfulness" apply to all of the subsections of Rule 37.

86. *See id.*

87. Rule 37(a) orders merely direct the disobedient party to respond to various methods of discovery whereas Rule 37(d) orders effectively disadvantage the disobedient party's case.

88. The orders which a court may issue under *Mont. R. Civ. P.* 37(b)(2) include:

(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 him 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) re-
penalties of Rule 37(b)(2) apply to parties; to officers, directors, or managing agents of a party; or to other persons who consent to testify on behalf of a party.\textsuperscript{81} Rule 37(b)(2) penalties are imposed without motion by the discovering party unlike other penalties\textsuperscript{82} which require parties seeking to enforce discovery to move for an order in the appropriate court.

This is not to say that the party in whose favor the sanction is granted does not file a motion at any time before the imposition of a sanction under Rule 37(b)(2). The sanctions of Rule 37(b)(2) are generally imposed for failure to comply with a court order compelling discovery.\textsuperscript{83} To obtain a court order compelling discovery, a party must first move the court.\textsuperscript{84} Consequently, a person who obtains relief under Rule 37(b)(2) does file a motion earlier in the discovery process. If the party against whom discovery is sought fails to comply with the court order compelling discovery, the court in which the action is pending simply issues whatever sanctions are “just”\textsuperscript{85} without any motion by the discovering party.

requiring him 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 he 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 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.

Only Mont. R. Civ. P. 37(b)(2)(A), (B) and (C) are discussed in this section concerning penalties for failure to comply with court orders compelling discovery. Mont. R. Civ. P. 37(b)(2)(D), dealing with contempt orders, is discussed infra text accompanying note 141. The last paragraph of Mont. R. Civ. P. 37(b)(2), dealing with monetary sanctions, is discussed infra text accompanying notes 157-60.

89. For a discussion of the orders which may be issued under Mont. R. Civ. P. 37(a), see supra text accompanying notes 46-70.

90. Under Mont. R. Civ. P. 35(a), Montana courts are authorized to issue orders requiring the mental or physical examination of a person only when the mental or physical condition of a party or other person is in controversy and only on motion for good cause shown and upon notice to the person to be examined and all parties of the time, place, manner, and scope of the examination. Under Mont. R. Civ. P. 35(b), a court may, on motion, order a party to deliver a copy of a detailed written report of the examining physician to the party or examined person who requests such a report when the terms of the request are just.

91. For an explanation of Mont. R. Civ. P. 30(b)(6) and 31(a), see supra note 53.

92. To obtain orders under Mont. R. Civ. P. 37(a) or Mont. R. Civ. P. 37(d), the party seeking to enforce discovery must move for the order in the appropriate court.

93. See supra text accompanying notes 46-70 for the instances in which Rule 37(a) court orders compelling discovery are granted.

94. For example, a party must first move the court to obtain orders compelling discovery under Mont. R. Civ. P. 26(e), 33(a), 34(b), 35(b)(1), 37(a), and 37(d).

95. Mont. R. Civ. P. 37(b)(2) provides in relevant part that “the court in which the action is pending may make such orders in regard to the failure as are just” without any motion by the discovering party.
Courts have imposed the sanctions of Rule 37(b)(2) in a number of cases. The United States Supreme Court first reviewed the imposition of Rule 37(b)(2) sanctions in *Societe Internationale v. Rogers.* In *Societe Internationale*, the district court dismissed a complaint under Rule 37(b)(2) because the plaintiff failed to comply with a production order. The court of appeals affirmed, basing its power to dismiss the complaint on Rule 41(b). The Supreme Court, however, held that dismissal of the complaint without prejudice was not justified and reversed the lower court's decision. In support of its decision, the Court noted that "Rule 37 should not be construed to authorize dismissal of [the] complaint because of petitioner's noncompliance with a pretrial production order when it [had] been established that failure to comply . . . [was] due to inability, and not to willfulness, bad faith, or any fault of petitioner."  

Eighteen years later, in *National Hockey League v. Metropolitan Hockey Club*, the Court again considered the imposition of a Rule 37(b)(2) sanction. This time, the Court found that the district court did not abuse its discretion in dismissing respondents' case pursuant to Rule 37(b)(2). The district court had ample support for its decision given respondents' failure to answer written interrogatories as ordered by the court. Although the Court mentioned *Societe Internationale* and its standards of "willfulness" and "bad faith," it upheld the lower court's decision to dismiss, an extreme sanction, on the grounds that respondents and their counsel had exercised "flagrant bad faith" and "callous disregard" of their responsibilities. 

The Montana Supreme Court first reviewed the imposition of a Rule 37(b)(2) sanction in *Audit Services, Inc. v. Kraus Construction, Inc.* In *Audit Services*, a case concerning the collection of delinquent contributions owed to a union trust fund, the district court entered a default judgment against the defendant who disobeyed a court order compelling him to answer interrogatories.

97. MONT. R. Civ. P. 41(b) deals with involuntary dismissals and provides in part: "For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him."
98. *Societe Internationale*, 357 U.S. at 212.
100. Id. at 643. MONT. R. Civ. P. 37(b)(2)(C) authorizes the court to dismiss a case for failure to comply with a discovery order. See supra note 88 for the text of Rule 37(b)(2)(C).
102. MONT. R. Civ. P. 37(b)(2)(C) provides that a court may enter a default judgment when a party fails to comply with an order compelling discovery. The text of Rule
It should be noted that although the sanction imposed—a default judgment—is set forth in Rule 37(b)(2)(C), Audit Services was actually decided under Rule 37(d) which refers to Rule 37(b)(2)(C) in permitting the entry of a default judgment for the failure to attend a deposition, answer interrogatories, or respond to a request for documents or inspection. Nevertheless, in Audit Services, the court adopted a policy of implementing severe sanctions for serious abuses of the discovery rules.

The following year, in Calaway v. Jones, the court adhered to the strict policy concerning discovery abuses developed in Audit Services. Calaway sued for damages incurred for the loss of a potato crop allegedly caused by Jones' failure to provide an irrigation system. The court, as in Audit Services, affirmed a default judgment entered by the district court because the defendant, Jones, failed to attend a pretrial conference. Jones had also failed to respond to interrogatories within the statutory time limit, failed to appear at depositions, and failed to seek substitute counsel for more than eight months after his first counsel withdrew. The court found that Jones' conduct represented an "attitude of unresponsiveness" and that the district court acted "within the permissible range of discretion in imposing the sanction of default and dismissal."

The Montana Supreme Court reaffirmed the policy set forth in Audit Services and Calaway, to impose sanctions for discovery abuses, in the landmark products liability case of Owen v. F.A. Buttrey Co. In Owen, defendant Charles Revson, Inc. repeatedly

37(b)(2)(C) is printed at supra note 88.

In affirming the district court's decision, the court contrasted the general judicial disfavor of "first appearance" default judgments, Audit Services, Mont. at __, 615 P.2d at 187 (citing Kootenai Corp. v. Dayton, Mont. __, 601 P.2d 47 (1979)); Little Horn State Bank v. Real Bird, 183 Mont. 208, 598 P.2d 1109 (1979); Shields v. Prikle Refrigerated Freightlines, Inc., Mont. __, 591 P.2d 1120 (1979), to the judicial acceptance of default judgments entered on non-compliance with the discovery rules. Mont. at __, 615 P.2d at 187.

104. See supra notes 80-82 and accompanying text for a discussion of the orders authorized under Rule 37(d) and Rule 37(b)(2), but set forth only in Rule 37(b)(2).
106. See supra note 103.
107. Calaway, Mont. at __, 624 P.2d at 992. Defendant had received notice as to the time and place of the pretrial conference.
108. Mont. R. Civ. P. 33(a) requires a response within 30 days after service of the interrogatories except that a defendant may respond within 45 days after service of the summons and complaint.
109. Calaway, Mont. at __, 624 P.2d at 992.
110. Id.
111. Mont. __, 627 P.2d 1233 (1981). For a previous discussion of Owen, see supra notes 29-34 and accompanying text.
failed to comply with court orders compelling answers to written interrogatories and consequently caused an earlier trial date to be continued. Because of Revson’s disobedience, the trial court struck certain paragraphs of its answer\(^\text{112}\) and thereby precluded it from introducing evidence contrary to the admitted facts. In addition, the court ordered Revson to pay plaintiff’s counsel reasonable attorney fees\(^\text{113}\). The court in Owen actually based its decision on Rule 37(d),\(^\text{114}\) but its authority to strike parts of defendant’s answers, while permitted under both Rule 37(b) and Rule 37(d), is set forth in Rule 37(b)(2)(C). The order by the court requiring defendant to pay plaintiff’s attorney fees is likewise permitted under both Rule 37(b)(2)(E) and Rule 37(d). The Owen decision, nonetheless, represents the intention of the court to use Rule 37 sanctions for punishment and deterrence.\(^\text{115}\)

In In re Marriage of Hill,\(^\text{116}\) a divorce proceeding which cites Owen, the court allowed the opponent of a disobedient party additional time to pursue an examination of a disputed piece of property. The disobedient party in Hill had failed to comply with a court order shortening the time to respond to interrogatories.\(^\text{117}\) The court refused to condone any failure to comply with district court orders or any other frustration of discovery and punished the recalcitrant party for frustrating the discovery process by allowing the discovering party additional time to examine the disputed property.\(^\text{118}\)

Beginning with Audit Services and ending with Hill, the Montana Supreme Court has maintained an attitude of intolerance toward litigants who frustrate or delay discovery. In Johnson v. Young Men’s Christian Association,\(^\text{119}\) however, the court departed from its strict position. The plaintiff, in Johnson, claiming negligence for a learning disability his son allegedly suffered after being found submerged in the YMCA pool, moved for a new trial

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112. Under Mont. R. Civ. P. 37(b)(2)(C), a court may strike pleadings.
113. Under Mont. R. Civ. P. 37(b)(2)(E), the court may order a disobedient party to pay reasonable expenses, including attorney fees, caused by the party's failure to comply with a court order compelling discovery. The imposition of Rule 37(b)(2) monetary sanctions is discussed more fully infra text accompanying notes 157-60.
114. The court in Vehrs v. Piquette, --- Mont. ---, 684 P.2d 476 (1984), stated that Rule 37(d), not 37(b), was the basis of its decision in Owen. Id. at ---, 684 P.2d at 480. Also, the court in Owen never mentioned Rule 37(b)(2) but cited to and included the body of Rule 37(d). --- Mont. at ---, 627 P.2d at 1234-35.
115. For previous discussion of Owen, see supra text accompanying notes 29-34.
117. Id. at ---, 643 P.2d at 587.
118. Id. (citing Owen, --- Mont. ---, 627 P.2d 1233).
partly because the defendant, YMCA, failed to supplement its interrogatory answers.\textsuperscript{120} The court affirmed the lower court's refusal to impose sanctions on either party. In arriving at its decision, the court noted that neither counsel displayed actions that were "commendable as both were lax in keeping the other party informed of pretrial developments and in supplementing answers to interrogatories."\textsuperscript{121} YMCA's failure to supplement interrogatories was not held sufficiently abusive, in light of Johnson's own failure to supplement interrogatories, to warrant the imposition of sanctions per Rule 37(b). \textit{Johnson} does not, however, represent a total departure from \textit{Owen}, since it cited \textit{Owen} to support its statement that protecting the integrity of discovery under the rules opens up the facts, encourages settlements, and avoids protracted litigation.\textsuperscript{122}

In the recent negligence case of \textit{Thibaudeau v. Uglum},\textsuperscript{123} a suit for medical costs, pain and suffering, and loss of earnings resulting from a car accident, the Montana Supreme Court departed further from its strict stance regarding discovery abuses. The defendant in \textit{Thibaudeau} failed to accurately answer interrogatories and attempted to impeach the plaintiff by using the omitted information. Noting that reversal and a new trial may be obtained where interrogatories are not properly answered,\textsuperscript{124} the court nonetheless refused the plaintiff's request for reasonable damages allegedly caused by the defendant's failure to comply with discovery rules.\textsuperscript{125} The primary reason for denying the plaintiff's request was that Rule 37(b) relates to a failure to comply with court orders, and the plaintiff had obtained no court order against the defendant.\textsuperscript{126} Technically, the court correctly refused to impose sanctions against the defendant under Rule 37(b), since Rule 37(b) governs only failures to comply with orders, and here plaintiff had obtained no order.

The most recent case dealing with Rule 37 sanctions, \textit{Vehrs v. Piquette},\textsuperscript{127} reiterated the holding of \textit{Owen} that severe district court sanctions should be imposed where parties fail to comply with orders compelling discovery. In \textit{Vehrs}, the plaintiff brought a

\begin{itemize}
\item 120. Plaintiff claimed that defendant was allowed to add four new witnesses the day before trial, including one the whereabouts of whom defendant knew but did not inform plaintiff.
\item 121. \textit{Johnson}, \textit{Mont.} at \textit{Mont.}, 651 P.2d at 1249.
\item 122. \textit{Id. at}, \textit{651 P.2d at 1254}.
\item 123. \textit{Mont. at}, \textit{553 P.2d at 855} (1982).
\item 124. \textit{Id. at}, \textit{553 P.2d at 858} (citing Sanders v. Mt. Haggin Livestock Co., 160 Mont. 73, 500 P.2d 397 (1972)).
\item 125. The plaintiff, Thibaudeau, made his request pursuant to MONT. R. CIV. P. 37(b).
\item 126. \textit{Thibaudeau}, \textit{Mont. at}, \textit{653 P.2d at 858}.
\end{itemize}
malicious prosecution action. The district court granted the defendants' motion for an order limiting the plaintiff's proof to evidence contained in discovery documents and documents readily accessible to both parties because the plaintiff filed late answers to interrogatories, gave unverified answers, and served incomplete responses. Citing Owen and Rule 37(d), the court held that the district court acted "well within the confines of its discretion when it imposed the discovery sanctions at issue."

The court noted that the abuses of this case were less severe than those presented in Owen and National Hockey League, and concluded that the sanction imposed should likewise be less severe. Accordingly, the court found the district court's sanction to be "well-tailored to the discovery abuse present." The court further found that limiting the facts to those disclosed in discovery was equitable since it resulted from the actions of the plaintiff and his attorney.

The Montana Supreme Court has developed a policy, through case law, to impose the sanctions of Rule 37(b)(2) against parties displaying "flagrant bad faith," "callous disregard" of their responsibilities, or "an attitude of unresponsiveness." In such instances, the court is likely to uphold the imposition of "well-tailored," "equitable" sanctions. The court has approved Rule 37 orders that require that designated facts or matters be established in favor of the party obtaining the order; that forbid a disobedient party from supporting or opposing designated claims or defenses or prohibit the party from introducing designated matters into evidence; and that strike pleadings in whole or in part, stay further proceedings until the order is obeyed, dismiss an

128. Mont. R. Civ. P. 37(b)(2) allows the limitation of evidence to the detriment of the disobedient party.
129. Vehrs, Mont. at 684 P.2d at 480.
130. Id.
131. Id.
132. Id.
134. Id.
135. Calaway, Mont. at 624 P.2d at 992.
136. Vehrs, Mont. at 684 P.2d at 480.
137. Id.
138. These types of sanctions are permitted under Mont. R. Civ. P. 37(b)(2)(A). See Stanton, 88 F.R.D. 290 (holding in part that plaintiff was entitled to have certain facts material to his action taken as established).
139. These types of orders are authorized by Mont. R. Civ. P. 37(b)(2)(B). See Vehrs, Mont. 684 P.2d 476 (holding in part that the district court acted within its discretion in limiting plaintiff's proof on certain counts to evidence contained in discovery documents and documents readily accessible to both parties); Owen, Mont. 627 P.2d 1233 (holding in part that the district court was justified in precluding the disobedient defendant from introducing evidence contrary to the admitted facts).
action in whole or in part, or render a judgment by default against the disobedient party.\textsuperscript{140}

3. **Contempt Citations—Rules 37(b)(1) and 37(b)(2)(D)**

a. **Rule 37(b)(1)**

Under Rule 37(b)(1), the district court authorizing a deposition may consider as contempt the failure of a deponent to be sworn or to answer a question. A deponent cannot be held in contempt until (1) the court issues a direction or order requiring the deponent to be sworn or to answer a question and (2) the deponent then disobeys the order or direction of the court. Rule 37(b)(1) permits district courts authorizing depositions to issue contempt citations when deponents disobey court orders compelling answers to deposition questions.

b. **Rule 37(b)(2)(D)**

Rule 37(b)(1) is only one part of Rule 37 which authorizes a district court to treat a party's failure to comply with discovery as contempt. Rule 37(b)(2)(D) also authorizes the district court in which an action is pending to issue a contempt citation against any party who fails to obey orders of the court, except orders to submit to physical or mental examinations.\textsuperscript{141} Rule 37(b)(2) is broader in scope than Rule 37(b)(1) and allows district courts to issue contempt citations for failure to discover beyond the mere failure to answer a question in a deposition.

4. **Monetary Sanctions—Rules 37(a)(4), 37(b)(2), 37(c) and 37(d)**

A district court in which an action is pending can impose not

\textsuperscript{140} These orders are governed by Mont. R. Civ. P. 37(b)(2)(C). See Owen, ___ Mont. ___, 627 P.2d 1233 (holding in part that the district court was justified in striking part of the defendant's answer for its reluctance to facilitate discovery and its failure to justify its dilatory actions); Calaway, ___ Mont. ___, 624 P.2d 991 (holding that the district court was within its discretion to impose the sanctions of default and dismissal for defendant's failure to attend a pretrial conference); Audit Services, ___ Mont. ___, 615 P.2d 183 (holding in part that the trial court acted within its discretion in refusing to set aside a default judgment where defendants failed to answer interrogatories for seven months). The Montana Supreme Court will impose the sanctions of Rule 37(b)(2) where the facts of a case warrant a severe penalty.

\textsuperscript{141} Mont. R. Civ. P. 35(a) authorizes "the court in which [an] action is pending [to] order [a] party to submit to a physical or mental examination by a physician or to produce for examination the person in his custody or legal control." See supra note 90 for a more detailed discussion of Rule 35(a).
only orders compelling discovery, penalties for failing to comply with court orders, and contempt citations, but also monetary sanctions. Rule 37 provides four categories of monetary sanctions.

a. Rule 37(a)(4)

The first category applies to motions to compel discovery under Rule 37(a)(2) and is set forth in Rule 37(a)(4). Under this variety of monetary sanctions, the party losing a Rule 37(a)(2) motion to compel discovery must pay the reasonable expenses incurred in obtaining the order, including attorney fees. The party who necessitates the motion is not the only one who may be required to pay the reasonable costs of obtaining the order; the attorney advising the party's conduct also may be ordered to pay the costs. In some cases, a court may order both the party and the attorney to pay such costs. In the event that a Rule 37(a)(4) motion to compel discovery is granted in part and denied in part, whereby neither party wins, the court may apportion, in a just manner, the reasonable expenses incurred by the parties in raising and opposing the motion.

Rule 37(a)(4) requires the court to award expenses "unless the court finds that the opposition to the motion was substantially justified or that the circumstances make an award of expenses unjust." The party who loses a case posing a real dispute about discovery is substantially justified in pursuing the matter in court. The purpose of Rule 37(a)(4) and its authorization of monetary sanctions is to discourage parties and their attorneys from pursuing frivolous requests for or objections to discovery in court.

In 1981, the Montana Supreme Court decided two cases in which it stated its position regarding the monetary sanctions of Rule 37(a)(4). First, in Jaap v. District Court, the court noted that under Rule 37(a)(4) district courts may require persons who

142. MONT. R. CIV. P. 37(a)(4).
143. Id.
144. Id.
145. Id.
146. Id. Prior to the 1970 amendment to Rule 37(a)(4), expenses were to be awarded only if the court determined that the losing party acted without substantial justification. After the 1970 amendment to Rule 37(a)(4), however, expenses were to be awarded unless the court found that the losing party acted without substantial justification. The purpose for the amendment to Rule 37(a)(4) was "to encourage judges to be more alert to abuses occurring in the discovery process." MOORE'S PAMPHLET, supra note 49, ¶ 37.02(8).
147. See MOORE'S PAMPHLET, supra note 49, ¶ 37.02(8).
148. Id.
necessitate and then lose a discovery dispute to pay all reasonable expenses, including attorney fees, incurred in supporting or opposing the dispute.\textsuperscript{150} The court noted further that an examining party and his attorney should respect objections of privilege having substantial justification and that a deponent and his attorney should not interpose insubstantial or unjustifiable objections of privilege.\textsuperscript{151} Although the holding of the court in \textit{Jaap} did not directly involve Rule 37(a)(4),\textsuperscript{152} the Montana Supreme Court clearly stated that its monetary sanctions are available to district courts in allowing and enforcing the methods of discovery provided in Rule 26(a).\textsuperscript{153}

In the second case involving monetary sanctions, \textit{State ex rel. Guarantee Insurance v. District Court},\textsuperscript{154} the Montana Supreme Court declined jurisdiction of the cause and dismissed the relator's petition for a writ of supervisory control. The relator, Guarantee Insurance Co., had contended that it would incur "great hardship and expense" if forced to answer two interrogatories as ordered by the district court.\textsuperscript{155} The court rejected Guarantee Insurance Co.'s contention, noting, (1) that little hardship would be involved since the interrogatories could be answered easily by retrieving the necessary claims records from a computer, and (2) that the expense involved could be assessed against the losing party at trial or upon appeal pursuant to Rule 37(a)(4).\textsuperscript{156}

b. \textit{Rule 37(b)(2)}

The second category of monetary sanctions is found in Rule 37(b)(2). This type of monetary sanction covers a broader scope of activities than does Rule 37(a)(4).\textsuperscript{157} Like Rule 37(a)(4), however, Rule 37(b)(2) permits awards of reasonable expenses, including attorney fees, incurred by the prevailing party in supporting or opposing a motion to compel discovery.\textsuperscript{158} The sanctions provided in Rule 37(b)(2) are available against parties who exhibit an overall

\textsuperscript{150} Id. at ____, 623 P.2d at 1392.
\textsuperscript{151} Id. See also 4 J. Moore, Moore's Federal Practice ¶ 26.60(5), at 26-216 (1984).
\textsuperscript{152} The court held that the district court was without power to order the private interview of plaintiff's physicians by defendant. In allowing and enforcing discovery, the district court should have used one of the discovery methods provided in Rule 26(a). Since private interviews are not included in the methods of Rule 26(a), the sanctions and protections of Rule 37 are not available to them. \textit{Jaap}, -- Mont. at ____, 623 P.2d at 1392.
\textsuperscript{153} \textit{Jaap}, -- Mont. at ____, 623 P.2d at 1392.
\textsuperscript{154} -- Mont. --, 634 P.2d 648 (1981).
\textsuperscript{155} Id. at --, 634 P.2d at 651.
\textsuperscript{156} Id.
\textsuperscript{157} McCULLOUGH \& UNDERWOOD, supra note 41, at 308.
\textsuperscript{158} MONT. R. CIV. P. 37(b)(2), last paragraph.
failure to comply with the discovery process, including the failure to obey other types of discovery orders. 159 A court may impose the monetary sanctions of Rule 37(b)(2) in lieu of, or in addition to, the other sanctions provided in Rule 37(b)(2). 160 Like Rule 37(a)(4), Rule 37(b)(2) places the burden on the disobedient party to avoid expenses by establishing that his failure is substantially justified or that certain circumstances make an award of expenses unjust.

c.  Rule 37(c)

A third category of monetary sanctions is authorized under Rule 37(c). These monetary sanctions apply where a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and the party requesting the admission later proves that the document is genuine or the matter is true. 161 Rule 36 provides the means by which a party may obtain an admission, a sworn and specific denial, or a sworn statement “setting forth in detail the reasons why he cannot truthfully admit or deny.” 162 The broad scope of Rule 37(c) covers all failures to conform with Rule 36. 163 If a party improperly refuses a request for admission, then the court must require that the disobedient party pay expenses incurred by the other side in presenting the necessary proof at trial “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 he might prevail on the matter, or (4) there was other good reason for the failure to admit.” 164 Montana courts do not award monetary sanctions in every case, and in Luppold v. Lewis 165 the court did not award expenses.

159. McCULLOUGH & UNDERWOOD, supra note 41, at 308.
160. For a list of the sanctions provided in Rule 37(b)(2), see supra note 88.
161. Mont. R. Civ. P. 36(a) provides in relevant part:

A party may serve upon any other party a written request for the admission, for purposes of the pending action, only, of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request.

. . . The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney. . . .
162. Moore’s Pamphlet, supra note 49 ¶ 37.02(2).
163. Id.
164. Mont. R. Civ. P. 37(c).
Respondents, Luppold et al., had included their motion for attorney fees, incurred in providing proof of facts set forth in a request for admission, in a proposed findings of facts and conclusions of law. Lewis received notice of the motion when the district court awarded attorney fees in its findings of fact and conclusions of law. The Montana Supreme Court reversed the award of attorney fees on the grounds that notice of the motion was "insufficient to allow a resisting party 'the opportunity to be present and intelligently to oppose the motion when made.'”¹⁶⁶

d. Rule 37(d)

The final category of available monetary sanctions is found in Rule 37(d). These sanctions may be imposed against parties who fail to attend a deposition, fail to serve answers to interrogatories, or fail to respond to requests for inspection.¹⁶⁷ A court may impose the monetary sanctions of Rule 37(d) in lieu of, or in addition to, the other available orders.¹⁶⁸ The court may order the party resisting discovery or his attorney to pay to the other party all reasonable expenses, including attorney fees, caused by the resistance.¹⁶⁹ To avoid these expenses, the disobedient party must show that his resistance was substantially justified or that other circumstances make an award of expenses unjust.¹⁷⁰ A court may not excuse a party's resistance to discovery on the ground that the discovery sought is objectionable unless the party resisting discovery has applied for a protective order under Rule 26(c).¹⁷¹

IV. Conclusion

The Montana Supreme Court has shown a willingness to impose Rule 37 sanctions as a means of encouraging compliance with and punishing disobedience of discovery orders and requests.¹⁷² At the same time, recent decisions by the court indicate that only severe discovery abuses warrant the imposition of Rule 37 sanctions.¹⁷³ The decision to impose Rule 37 sanctions ultimately de-

¹⁶⁶. Id. at ____, 563 P.2d at 546.
¹⁶⁷. MONT. R. CIV. P. 37(d).
¹⁶⁸. For a discussion of the sanctions available under Rule 37(d), see supra notes 71-87 and accompanying text.
¹⁶⁹. MONT. R. CIV. P. 37(d).
¹⁷⁰. Id.
¹⁷¹. Id. See supra note 70 for a list of the protective orders authorized by Rule 26(c).
¹⁷². See, e.g., Vehrs, ____ Mont. ____ , 684 P.2d 476; In re Marriage of Hill, ____ Mont. ____ , 643 P.2d 582; Owen, ____ Mont. ____ , 627 P.2d 1233; Audit Services, ____ Mont. ____ , 615 P.2d 183.
¹⁷³. See, e.g., Thibaudeau, ____ Mont. ____ , 653 P.2d 855; Johnson, ____ Mont. ____ ,
pends on the nature of the discovery abuse or abuses involved in a particular case. Where the existing discovery abuses delay discovery enough to warrant punishment, however, Montana district courts will cautiously impose court orders compelling discovery, penalties for failure to comply with court orders compelling discovery, contempt citations, and monetary sanctions. Abuses of the discovery process, although once ignored, will no longer be tolerated in Montana.

651 P.2d 1245.
174. MONT. R. CIV. P. 37(a), 37(d).
175. MONT. R. CIV. P. 37(b)(2).
176. MONT. R. CIV. P.37(b)(1), 37(b)(2)(D).
177. MONT. R. CIV. P. 37(a)(4), 37(b)(2), 37(c), 37(d).