

Tex. R. Civ. P. 215 <u>(with redline suggestions)</u>	Fed. R. Civ. P. 37	Issues
RULE 215. ABUSE OF DISCOVERY; SANCTIONS	RULE 37. FAILURE TO MAKE DISCLOSURES OR TO COOPERATE IN DISCOVERY; SANCTIONS	
<p><b>215.1 Motion for Sanctions or Order Compelling Discovery.</b>  A party, upon reasonable notice to other parties and all other persons affected thereby, may apply for sanctions or an order compelling discovery as follows:</p>	<p><b>(a) Motion for an Order Compelling Disclosure or Discovery.</b>  <b>(1) <i>In General.</i></b> On notice to other parties and all affected persons, a party may move for an order compelling disclosure or 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 disclosure or discovery in an effort to obtain it without court action.</p>	
<p>a) <b>Appropriate court.</b> <u>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 may be made in any district court where the discovery is or will be taken if different from the district where the action is pending. On matters relating to a deposition, an application for an order to a party may be made to the court in which the action is pending, or to any</u></p>	<p><b>(2) <i>Appropriate Court.</i></b> 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 <del>must</del> <u>may</u> be made in <del>the</del> <u>any district</u> court where the discovery is or will be taken <u>if different from the district where the action is pending.</u></p>	<p><b>I prefer the Federal rule as redlined— parties must go to the court where case is pending; nonparties to the district where discovery taken if different from where action pending. NOTE: This allows nonparties who have to produce documents only to go to local court.</b></p>

<p><del>district court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken. As to all other discovery matters, an application for an order will be made to the court in which the action is pending.</del></p>		
<p><b>(b) Motion.</b></p> <p><u>(1) To Compel Disclosure. If a party fails to make a disclosure required by Rule 194, any other party may move to compel disclosure and for the imposition of any sanction authorized by Rule 215.2(b) without the necessity of first having obtained a court order compelling such disclosure.</u></p> <p><u>(2) To Compel a Discovery Response. A party seeking discovery may move for an order compelling an answer, response, designation, production, or inspection. This motion may be made if:</u></p> <p><u>(i) If a party or other deponent which is a corporation or other</u></p>	<p><b>(3) Specific Motions.</b></p> <p><b>(A) To Compel Disclosure.</b> If a party fails to make a disclosure required by Rule <del>194-26(a)</del><sup>xx</sup>, any other party may move to compel disclosure and for appropriate sanctions.</p> <p><b>(B) To Compel a Discovery Response.</b> A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:</p> <p><b>(i)</b> a deponent fails to answer a question asked under Rule 30 or 31;</p> <p><b>(ii)</b> a corporation or other entity fails to</p>	<p><b>We need to change this rule now that we are adopting initial disclosures. I have used the federal rule's division between failure to make a disclosure and failure to respond to a request. This changes this rule substantively to allow for sanctions (other than fees) without a previous order compelling discovery ONLY when the party fails to make initial disclosures.</b></p> <p><b>The highlighted portion of (b)(1) has been moved from elsewhere in the current rule.</b></p>

entity fails to make a designation under Rules 199.2(b)(1) or 200.1(b); or ~~(ii)~~ if a party, or other deponent, or a person designated to testify on behalf of a party or other deponent fails:

(A) to appear before the officer who is to take his deposition, after being served with a proper notice; or

(B) to answer a question propounded or submitted upon oral examination or upon written questions; or

~~(iii)~~ if a party fails:

(A) to serve answers or objections to interrogatories submitted under Rule 197, after proper service of the interrogatories; or

(B) to answer an interrogatory submitted under Rule 197; or

(C) to serve a written response to a request for inspection submitted under Rule 196, after

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 produce documents or fails to respond that inspection will be permitted—or fails to permit inspection—as requested under Rule 34.

<p>proper service of the request; or (D) to respond that discovery will be permitted as requested or fails to permit discovery as requested in response to a request for inspection submitted under Rule 196.;</p> <p><del>the discovering party may move for an order compelling a designation, an appearance, an answer or answers, or inspection or production in accordance with the request, or apply to the court in which the action is pending for the imposition of any sanction authorized by Rule 215.2(b) without the necessity of first having obtained a court order compelling such discovery.</del></p>		
<p>When taking a deposition on oral examination, the proponent of the question may complete or</p>	<p><b>(C) Related to a Deposition.</b> When taking an oral deposition, the party asking a question may complete or</p>	

<p>adjourn the examination before he applies for an order.</p>	<p>adjourn the examination before moving for an order.</p>	
<p>If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion pursuant to Rule 192.6.</p>		
<p>c) <b>Evasive or incomplete answer.</b> For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.</p>	<p><b>(4) Evasive or Incomplete Disclosure, Answer, or Response.</b> For purposes of this subdivision (a), an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.</p>	
<p>(d) <b>Disposition of motion to compel: award of expenses.</b> If the motion is granted, the court <del>must</del><u>shall</u>, after opportunity for hearing, require a party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay, at such time as ordered by the court, the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other</p>	<p><b>(5) Payment of Expenses; Protective Orders.</b>  <b>(A) If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing).</b> If the motion is granted—or if the disclosure or 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</p>	

<p>circumstances make an award of expenses unjust. Such an order shall be subject to review on appeal from the final judgment.</p>	<p>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's fees. But the court must not order this payment if:</p> <ul style="list-style-type: none"> <li>(i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;</li> <li>(ii) the opposing party's nondisclosure, response, or objection was substantially justified; or</li> <li>(iii) other circumstances make an award of expenses unjust.</li> </ul>	
<p>If the motion is denied, the court may, after opportunity for hearing, require the</p>	<p><b>(B) <i>If the Motion Is Denied.</i></b> If the motion is denied, the court may issue any protective</p>	<p><b>TX uses "may" for award of sanctions after denial of motion. Feds say "must"</b></p>

<p>moving party or attorney advising such motion to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.</p>	<p>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's fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.</p>	
<p>If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.</p> <p>In determining the amount of reasonable expenses, including attorney fees, to be awarded in connection with a motion, the trial court shall award expenses which are reasonable in relation to the amount of work reasonably expended in obtaining an order compelling compliance or in opposing a motion which is denied.</p>	<p><b>(C) <i>If the Motion Is Granted in Part and Denied in Part.</i></b> 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.</p>	
<p><b>(e) Providing person's own statement.</b> If a party fails to comply with any person's written request for the person's own statement as provided in Rule 192.3(h),</p>	<p><i>(No directly related provision)</i></p>	

<p>the person who made the request may move for an order compelling compliance. If the motion is granted, the movant may recover the expenses incurred in obtaining the order, including attorney fees, which are reasonable in relation to the amount of work reasonably expended in obtaining the order.</p>		
<p><b>215.2 Failure to Comply with Order or with Discovery Request.</b>  <b>(a) Sanctions by court in district where deposition is taken.</b> If a deponent fails to appear or to be sworn or to answer a question after being directed to do so by a district court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.</p>	<p><b>(b) Failure to Comply with a Court Order.</b>  <b>(1) Sanctions Sought in the District Where the Deposition Is Taken.</b> If the court where the discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court. If a deposition-related motion is transferred to the court where the action is pending, and that court orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of either the court where the discovery is taken or the court where the action is pending.</p>	
<p><b>(b) Sanctions by Court in Which Action is Pending.</b> If a party or an officer, director,</p>	<p><b>(b) . . .</b></p>	

<p>or managing agent of a party or a person designated under <a href="#">Rules 199.2(b)(1)</a> or <a href="#">200.1(b)</a> to testify on behalf of a party fails to comply with proper discovery requests or to obey an order to provide or permit discovery, including an order made under Rules 204<sup>1</sup> or 215.1, the court in which the action is pending may, after notice and hearing, make such orders in regard to the failure as are just, and among others the following:</p> <p>(1) an order disallowing any further discovery of any kind or of a particular kind by the disobedient party;</p> <p>(2) an order charging all or any portion of the expenses of discovery or taxable court costs or both against the disobedient party or the attorney advising him;</p> <p>(3) 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;</p>	<p><b>(2) Sanctions Sought in the District Where the Action Is Pending.</b></p> <p><b>(A) For Not Obeying a Discovery Order.</b> If a party or a party's officer, director, or managing agent--or a witness designated under <a href="#">Rule 30(b)(6)</a> or <a href="#">31(a)(4)</a>--fails to obey an order to provide or permit discovery, including an order under <a href="#">Rule 26(f)</a>, <a href="#">35</a>, or 37(a), the court where the action is pending may issue further just orders. They may include the following:</p> <p>(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;</p> <p>(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;</p> <p>(iii) striking pleadings in whole or in part;</p> <p>(iv) staying further proceedings until the order is obeyed;</p> <p>(v) dismissing the action or proceeding in whole or in part;</p>	
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<p>(4) 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;</p> <p>(5) an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing with or without prejudice the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party;</p> <p>(6) 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;</p> <p>(7) when a party has failed to comply with an order under Rule 204 requiring him to appear or produce another for examination, such orders as are listed in paragraphs (1), (2), (3), (4) or (5) of this subdivision, unless the person failing to comply shows that he is unable to appear or to produce such person for examination.</p>	<p>(vi) rendering a default judgment against the disobedient party; or</p> <p>(vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.</p> <p><b>(B) For Not Producing a Person for Examination.</b> If a party fails to comply with an order under <a href="#">Rule 35(a)</a> requiring it to produce another person for examination, the court may issue any of the orders listed in Rule 37(b)(2)(A)(i)-(vi), unless the disobedient party shows that it cannot produce the other person.</p> <p><b>(C) Payment of Expenses.</b> 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's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.</p>	
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<p>(8) 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, at such time as ordered by the court, the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. Such an order shall be subject to review on appeal from the final judgment.</p>		
	<p><b>(c) Failure to Disclose, to Supplement an Earlier Response, or to Admit.</b>  <b>(1) Failure to Disclose or Supplement.</b> If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), 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:  <b>(A)</b> may order payment of the reasonable expenses,</p>	<p>Exclusion sanction is in Texas Rule 193.6.</p>

	<p>including attorney’s fees, caused by the failure; <b>(B)</b> may inform the jury of the party’s failure; and <b>(C)</b> may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)—(vi).</p>	
<p><b>c) Sanction against nonparty for violation of Rules 196.7 or 205.3.</b> If a nonparty fails to comply with an order under Rules 196.7 or 205.3, the court which made the order may treat the failure to obey as contempt of court.</p>	<p><i>(No directly related provision)</i></p>	
<p><b>215.3 Abuse of Discovery Process in Seeking, Making, or Resisting Discovery.</b> If the court finds a party is abusing the discovery process in seeking, making or resisting discovery or if the court finds that any interrogatory or request for inspection or production is unreasonably frivolous, oppressive, or harassing, or that a response or answer is unreasonably frivolous or made for purposes of delay, then the court in which the action is pending may, after notice and hearing, impose any appropriate sanction authorized by</p>	<p><i>(No directly related provision)</i></p>	

<p>paragraphs (1), (2), (3), (4), (5), and (8) of Rule 215.2(b). Such order of sanction shall be subject to review on appeal from the final judgment.</p>		
<p><b>215.4 Failure to Comply with Rule 198</b>  <b>(a) Motion.</b> A party who has requested an admission under Rule 198 may move to determine the sufficiency of the answer or objection. For purposes of this subdivision an evasive or incomplete answer may be treated as a failure to answer. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of Rule 198, it may order either that the matter is admitted or that an amended answer be served. The provisions of Rule 215.1(d) apply to the award of expenses incurred in relation to the motion.  <b>(b) Expenses on failure to admit.</b> If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 198 and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the</p>	<p><b>(2) Failure to Admit.</b> 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's fees, incurred in making</p>	<p><b>215.4 could be included in Rule 198</b></p>

<p>reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 193, or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had a reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.</p>	<p>that proof. The court must so order unless:</p> <ul style="list-style-type: none"> <li>(A) the request was held objectionable under Rule 36(a);</li> <li>(B) the admission sought was of no substantial importance;</li> <li>(C) the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or</li> <li>(D) there was other good reason for the failure to admit.</li> </ul>	
<p><b>215.5 Failure of Party or Witness to Attend to or Serve Subpoena; Expenses.</b></p> <p><b>(a) Failure of party giving notice to attend.</b> If the party giving the notice of the taking of an oral deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney fees.</p> <p><b>(b) Failure of witness to attend.</b> If a party gives notice of the taking of an oral</p>	<p><b>(d) Party's Failure to Attend Its Own Deposition, Serve Answers to Interrogatories, or Respond to a Request for Inspection.</b></p> <p><b>(1) In General.</b></p> <p><b>(A) Motion; Grounds for Sanctions.</b> The court where the action is pending may, on motion, order sanctions if:</p> <ul style="list-style-type: none"> <li>(i) a party or a party's officer, director, or managing agent—or a person designated</li> </ul>	

deposition of a witness and the witness does not attend because of the fault of the party giving the notice, if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney fees.

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

	<p>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).</p> <p><b>(3) Types of Sanctions.</b> 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’s fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.</p>	
<p><b>215.6 Exhibits to Motions and Responses.</b> Motions or responses made under this rule may have exhibits attached including affidavits, discovery pleadings, or any other documents.</p>	<i>(No directly related provision)</i>	
<u><b>215.7</b></u>	(e) Failure to Preserve Electronically Stored Information. [addressed separately]	
<i>(No directly related provision)</i>	<b>(f) Failure to Participate in Framing a Discovery Plan.</b> If a party or its attorney fails to participate in good faith in	<b>Texas needs this.</b>

**215.8. Failure to Participate in Framing a Discovery Plan.** If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

developing and submitting a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

<p><i>(No directly related provision)</i></p>	<p><b>(f) Failure to Participate in Framing a Discovery Plan.</b> If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.</p>	
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