

AMENDMENTS

TO ORCP 46

promulgated by

COUNCIL ON COURT PROCEDURES

1980 to 2024

2014-2015 BIENNIUM STAFF COMMENT TO RULE 46

Note: This staff comment is provided as a convenience to those who read the Oregon Rules of Civil Procedure and have a general question as to the impetus for a particular amendment during the 2014-2015 biennium. Language in this comment was circulated to members of the Council on Court Procedures, but was not voted on or approved by the Council. This comment is neither legislative history for purposes of construction, as in statutory construction, to determine the intent of the Council in making any amendment, nor does it establish the meaning of any rule that has been amended. For the purpose of construing the Oregon Rules of Civil Procedure, the only authoritative legislative history is found in the Council's minutes of its deliberations. The Council's minutes can be found at www.counciloncourtprocedures.org. If the Legislative Assembly amended a rule, the legislative history for the Legislature's amendment can be found at www.oregonlegislature.gov.

Rule 46 was amended to improve clarity. In section A, use of “apply” and “application” are changed to the correct terminology, “motion.” Likewise, “submitted” is changed to “served.” Language describing the court is changed to “circuit court.” Discovery methods are more accurately described. An extraneous comma is deleted and three commas are added. References to rules 39 and 40 are separately stated for consistency. One archaic “such...as” is replaced. The article “an” is added twice and the phrase “attorney’s fee” is altered to avoid a possessive. The listed amendments are made for the purpose of improved clarity and consistency and are made without the intention to effect a change in the section’s meaning or operation.

Subsection A(2) now requires that the items a party seeks to discover be “identified,” rather than “set out,” at the beginning of the motion.

In section B, lead lines are added. Three internal references to the rules are consistently and separately stated. Four archaic uses of the word “such” have been modernized. A preposition is corrected in subsection B(1). Paragraph B(2)(a) is rewritten for clarity. Punctuation between the paragraphs in section B(2) is corrected. Paragraph B(2)(d) and subsection B(3) are rewritten for clarity. “Attorney’s fee” in subsection B(3) is amended to not require a possessive form. The listed amendments are made for the purpose of improved clarity and consistency and are made without the intention to effect a change in the section’s meaning or operation.

Section C is amended to make the words “admissions” and “grounds” singular rather than plural, and “attorney’s fee” is amended to not require a possessive. The existing sub-listing by number within the section is inconsistent with the rules’ format and is eliminated, and proper punctuation for a series is added. One archaic use of “such” is eliminated. The listed amendments are made for the purpose of improved clarity and consistency and are made without the intention to effect a change in the section’s meaning or operation.

Section D’s lead line is amended to read more clearly and to remove a reference to language previously moved to Rule 36. The existing sub-listing by number within the section is inconsistent with the rules’ format and is eliminated. “To,” “or,” and “where” are added to or

substituted for existing language. Two archaic uses of “such” are modernized. An internal reference to the rule is amended to be consistent with other rules. Two commas are added and “attorney’s fees” is made non-possessive. The listed amendments are made for the purpose of improved clarity and consistency and are made without the intention to effect a change in the section’s meaning or operation.

RULE 46

FAILURE TO MAKE DISCOVERY; SANCTIONS

A. Motion for order compelling discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

A.(1) Appropriate court. An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deponent's failure to answer questions at a deposition, to a judge of a circuit or district court in the county where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to a judge of a circuit or district court in the county where the deposition is being taken.

A.(2) Motion. If a party fails to furnish a written statement under Rule 36 B.(4), or if a party fails to furnish a report under Rule 44 B. or C., or if a deponent fails to answer a question propounded or submitted under Rules 39 or 40, or if a corporation or other entity fails to make a designation under Rule 39 C.(6) or Rule 40 A., or if a party fails to respond to a request for a copy of an insurance agreement or policy under Rule 36 B.(2), or if a party in response to a request for inspection submitted under Rule 43 fails to permit inspection as requested, the discovering party may move for an order compelling discovery in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 36 C.

A.(3) Evasive or Incomplete answer. For purposes of this section, an evasive or incomplete answer is to be treated as a failure to answer.

A.(4) Award of expenses of motion. If the motion is granted, the court may, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court may, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

B. Failure to comply with order.

B.(1) Sanctions by court in the county where deposition is taken. If a deponent fails to be sworn or to answer a question after being directed to do so by a circuit or district court judge in the county in which the deposition is being taken, the failure may be considered a contempt of court.

B.(2) Sanctions by court in which action is pending.

If a party or an officer, director, or managing agent or a person designated under Rule 39 C.(6) or 40 A. to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under section A. of this rule or Rule 44, the court in which the action is pending may make such orders in regard to the failure as are just, including among others, the following:

B.(2)(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.(2)(b) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the disobedient party from introducing designated matters in evidence;

B.(2)(c) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or

dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party;

B.(2)(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 order except an order to submit to a physical or mental examination.

B.(2)(e) Such orders as are listed in paragraphs (a), (b), and (c) of this subsection, where a party has failed to comply with an order under Rule 44 A. requiring the party to produce another for examination, unless the party failing to comply shows inability to produce such person for examination.

B.(3) Payment of expenses. In lieu of any order listed in subsection (2) of this section or in addition thereto, the court shall require the party failing to obey the order or the attorney advising such party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

C. Expenses on failure to admit. If a party fails to admit the genuineness of any document or the truth of any matter, as requested under Rule 45, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the party requesting the admissions may apply to the court for an order requiring the other party to pay the party requesting the admissions the reasonable expenses

incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 45 B. or C., or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that such party might prevail on the matter, or (4) there was other good reason for the failure to admit.

D. Failure of party to attend at own deposition or respond to request for inspection or to inform of question regarding the existence of coverage of liability insurance policy. If a party or an officer, director, or managing agent of a party or a person designated under Rule 39 C.(6) or 40 A. to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition of that party or person, after being served with a proper notice, or (2) to comply with or serve objections to a request for production and inspection submitted under Rule 43, after proper service of the request, or (3) to inform a party seeking discovery of the existence and limits of any liability insurance policy under Rule 36 B. that there is a question regarding the existence of coverage, the court in which the action is pending on motion may make such orders in regard to the failure as are just, including among others it may take any action authorized under paragraphs (a), (b), and (c) of subsection B.(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising

such party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this section may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 36 C.

COMMENT

For failure to identify expert witnesses when requested, see ORCP 36 B.(4). For failure of a person taking deposition or witness to appear at deposition, see ORCP 39 H. For failure to furnish medical reports when requested, see ORCP 44 D.

This rule is based upon Federal Rule 37 and incorporates most sanctions for failure to engage in discovery into one rule. The existing sanction provisions in Oregon are scattered throughout ORS Chapters 41 and 45 as part of the ORS sections relating to specific discovery devices and do not provide a clear procedure to be followed when a party or witness fails to comply with discovery requirements. The federal language was modified slightly to fit existing ORS sections and these rules. In subsection A.(2) a reference to failure to respond to a request for insurance policy under ORCP 36 B.(2), failure to furnish a statement under ORCP 36 B.(4), and failure to furnish a report under ORCP 44 B. or C., were included. In subsection A.(4) the court "may" award expenses, and in subsection B.(3) and D. the court "shall" award expenses which conforms to ORS 41.617(2), 41.631(3), 41.626(5), and 41.617(4). Failure to advise a party seeking discovery under ORCP 36 B.(2) of the existence of a coverage question was added to section 46 D.

RULE 46

FAILURE TO MAKE DISCOVERY; SANCTIONS

A.(2) Motion. If a party [fails to furnish a written statement under Rule 36 B.(4), or if a party] fails to furnish a report under Rule 44 B. or C., or if a deponent fails to answer a question propounded or submitted under Rules 39 or 40, or if a corporation or other entity fails to make a designation under Rule 39 C.(6) or Rule 40 A., or if a party fails to respond to a request for a copy of an insurance agreement or policy under Rule 36 B.(2), or if a party in response to a request for inspection submitted under Rule 43 fails to permit inspection as requested, the discovering party may move for an order compelling discovery in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 36 C.

D. Failure of party to attend at own deposition or respond to request for inspection or to inform of question regarding the existence of coverage of liability insurance policy. If a party or an officer, director, or managing agent of a party or a person designated under Rule 39 C.(6) or 40 A. to testify on behalf of a party fails (1) to appear before the

officer who is to take the deposition of that party or person, after being served with a proper notice, or (2) to comply with or serve objections to a request for production and inspection submitted under Rule 43, after proper service of the request, [or (3) to inform a party seeking discovery of the existence and limits of any liability insurance policy under Rule 36 B. that there is a question regarding the existence of coverage,] the court in which the action is pending on motion may make such orders in regard to the failure as are just, including among others it may take any action authorized under paragraphs (a), (b), and (c) of subsection B.(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising such party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this section may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 36 C.

COMMENT

The cross reference in subsection 46 A.(2) to 36 B.(4) should have been removed when the 1979 Legislature deleted 36 B.(4).

The language removed from section 46 D. became superfluous when the 1979 Legislature revised 36 B.(2).

FAILURE TO MAKE DISCOVERY; SANCTIONS
RULE 46

A. Motion for order compelling discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

A.(1) Appropriate court.

A.(1)(a) Parties. An application for an order to a party may be made to the court in which the action is pending, ~~or and,~~ on matters relating to a deponent's failure to answer questions at a deposition, ~~to a judge of a circuit or district court in the county where the deposition is located~~ such an application may also be made to a court of competent jurisdiction in the political subdivision where the deponent is located.

A.(1)(b) Non-parties. An application for an order to a deponent who is not a party shall be made to a ~~judge of a circuit or district court in the county where the deposition is being taken~~ court of competent jurisdiction in the political subdivision where the non-party deponent is located.

* * * * *

B. Failure to comply with order.

B.(1) Sanctions by court in the county where deposition is taken the deponent is located. If a deponent fails to be sworn or to answer a question after being directed to do so by a circuit or district court judge in the county in which the ~~deposition is being taken~~ deponent is located, the failure may be

considered a contempt of court.

* * * * *

COMMENT

46 A.(1). This subsection is reorganized into two distinct subsections. Subsection 46 A.(1)(a) deals with orders against parties who fail to make discovery in accordance with these rules. Such orders are usually sought from the court before which the action is pending. But in the case of party deponents, the alternative of seeking discovery orders from a court where the deponent is physically located is provided. Although not so limited, this alternative is most likely to be effective with respect to deponents who are outside Oregon. Reference to "a court of competent jurisdiction in the political subdivision where the deponent is located" is substituted for the prior language to avoid possible confusion when another jurisdiction might not have counties or where courts are styled differently from those of Oregon. Subsection A.(1)(b) makes clear that, in the case of non-party deponents, discovery orders can be effectively sought only from a competent court of the political subdivision where the deponent is located, which might or might not be the court where the action is pending.

46 B.(1). The phrase "the deponent is located" is substituted for the prior language to make the wording consistent with new subsections 46 A.(1)(a) and (b). This provision is applicable only to the contempt sanction as imposed by an Oregon court for disobedience of its discovery order. When a recalcitrant non-party deponent disobeys a discovery order of a court of another jurisdiction, the availability of a contempt sanction is of course determined by the law of that jurisdiction. When a recalcitrant deponent is a party who disobeys a discovery order of the court wherein the action is pending, contempt of that court is among the sanctions for such disobedience provided by subsection 46 B.(2).

~~SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS~~

~~RULE 9~~

~~* * * * *~~

~~F **Service by telephonic facsimile communication device.** Whenever under these rules service is required or permitted to be made upon a party, and that party is represented by an attorney, the service may be made upon the attorney by means of a telephonic facsimile communication device if the attorney maintains such a device at the attorney's office and the device is operating at the time service is made. Service in this manner shall be equivalent to service by mail for purposes of Rule 10 C.~~

FAILURE TO MAKE DISCOVERY; SANCTIONS

RULE 46

A Motion for order compelling discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

* * *

(A)(2) **Motion.** If a party fails to furnish a report under Rule 44 B or C, or if a deponent fails to answer a question propounded or submitted under Rules 39 or 40, or if a corporation or other entity fails to make a designation under Rule 39 C(6) or Rule 40 A, or if a party fails to respond to a request for a copy of an insurance agreement or policy under Rule 36 B(2), or if a party in response to a request for inspection submitted under Rule 43 fails to permit inspection as requested, the discovering party may move for an order compelling discovery in accordance with the request. Any motion made under this subsection shall set out at the beginning of the motion the items that the moving party seeks to discover. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before

applying for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 36 C.

* * * * *

~~**DISMISSAL OF ACTIONS;**~~

~~**COMPROMISE**~~

~~**RULE 54**~~

~~* * * * *~~

~~**E Compromise; effect of acceptance or rejection.**~~

~~**E(1)** Except as provided in ORS 17.065 through 17.085, the party against whom a claim is asserted may, at any time up to 10 days prior to trial, serve upon the party asserting the claim an offer to allow judgment to be given against the party making the offer for the sum, or the property, or to the effect therein specified.~~

~~**E(2)** If the party asserting the claim accepts the offer, the party asserting the claim or such party's attorney shall endorse such acceptance thereon, and file the same with the clerk before trial, and within three days from the time it was served upon such party asserting the claim; and thereupon judgment shall be given accordingly, as a stipulated judgment. [*Unless agreed upon otherwise by the parties, costs, disbursements, and attorney fees shall be entered in addition as part of such judgment as provided in Rule 68.*] **If the offer does not state that it includes costs and disbursements or attorney fees, the party asserting the claim shall submit any claim for costs and disbursements or attorney fees to the court as provided in Rule 68.**~~

~~**E(3)** If the offer is not accepted and filed within the time prescribed, it shall be deemed withdrawn, and shall not be given in evidence on the trial; and if the party asserting the claim~~

1 **FAILURE TO MAKE DISCOVERY; SANCTIONS**

2 **RULE 46**

3 **A Motion for order compelling discovery.** A party, upon reasonable notice to other
4 parties and all persons affected thereby, may [*apply*] **move** for an order compelling discovery as
5 follows:

6 A(1) **Appropriate court.**

7 A(1)(a) **Parties.** [*An application*] **A motion** for an order [*to*] **directed against** a party
8 may be made to the court in which the action is pending[,] and, on matters relating to a deponent's
9 failure to answer questions at a deposition, [*such an application*] **a motion** may also be made to [*a*
10 *court of competent jurisdiction in the political subdivision*] **the circuit court for the county** where
11 the deponent is located.

12 A(1)(b) **Non-parties.** [*An application*] **A motion** for an order [*to*] **directed against** a
13 deponent who is not a party shall be made to [*a court of competent jurisdiction in the political*
14 *subdivision*] **the circuit court for the county** where the non-party deponent is located.

15 A(2) **Motion.** If a party fails to furnish a report under Rule 44 B or C, or if a deponent fails
16 to answer a question propounded or [*submitted*] **served** under [*Rules*] **Rule 39** or **Rule 40**, or if a
17 corporation or other entity fails to make a designation under Rule 39 C(6) or Rule 40 A, or if a party
18 fails to respond to a request for a copy of an insurance agreement or policy under Rule 36 B(2), or if
19 a party in response to a request for **production or** inspection submitted under Rule 43 fails to
20 **produce or to** permit inspection as requested, the discovering party may move for an order
21 compelling discovery in accordance with the request. Any motion made under this subsection shall
22 [*set out*] **identify** at the beginning of the motion the items that the moving party seeks to discover.
23 When taking a deposition on oral examination, the proponent of the question may complete or
24 adjourn the examination before applying for an order. If the court denies the motion in whole or in
25 part, it may make [*such*] **any** protective order [*as*] it would have been empowered to make on a
26 motion made pursuant to Rule 36 C.

1 A(3) **Evasive or incomplete answer.** For purposes of this section, an evasive or
2 incomplete answer is to be treated as a failure to answer.

3 A(4) **Award of expenses of motion.** If the motion is granted, the court may, after an
4 opportunity for hearing, require the party or deponent whose conduct necessitated the motion or
5 the party or attorney advising such conduct, or both of them, to pay to the moving party the
6 reasonable expenses incurred in obtaining the order, including [*attorney's*] **attorney** fees, unless
7 the court finds that the opposition to the motion was substantially justified or that other
8 circumstances make an award of expenses unjust. If the motion is denied, the court may, after an
9 opportunity for hearing, require the moving party or the attorney advising the motion, or both of
10 them, to pay to the party or deponent who opposed the motion the reasonable expenses incurred
11 in opposing the motion, including [*attorney's*] **attorney** fees, unless the court finds that the making
12 of the motion was substantially justified or that other circumstances make an award of expenses
13 unjust. If the motion is granted in part and denied in part, the court may apportion the reasonable
14 expenses incurred in relation to the motion among the parties and persons in a just manner.

15 B **Failure to comply with order.**

16 B(1) **Sanctions by court in the county where the deponent is located.** If a deponent fails
17 to be sworn or to answer a question after being directed to do so by a circuit court judge [*in*] of the
18 county in which the deponent is located, the failure may be considered a contempt of court.

19 B(2) **Sanctions by court in which action is pending.** If a party or an officer, director, or
20 managing agent or a person designated under Rule 39 C(6) or **Rule** 40 A to testify on behalf of a
21 party fails to obey an order to provide or permit discovery, including an order made under section
22 A of this rule or Rule 44, the court in which the action is pending may make [*such orders*] any order
23 in regard to the failure as [*are*] is just[,] including, [*among others*] **but not limited to**, the following:

24 B(2)(a) **Establishment of facts.** An order that the matters [*regarding which the order was*
25 *made*] that caused the motion for the sanction or any other designated facts shall be taken to be
26 established for the purposes of the action in accordance with the claim of the party obtaining the

1 order[;].

2 B(2)(b) **Designated matters.** An order refusing to allow the disobedient party to
3 support or oppose designated claims or defenses, or prohibiting the disobedient party from
4 introducing designated matters in evidence[;].

5 B(2)(c) **Strike, stay, or dismissal.** An order striking out pleadings or parts thereof, or staying
6 further proceedings until the order is obeyed, or dismissing the action or any part thereof, or
7 rendering a judgment by default against the disobedient party[;].

8 B(2)(d) **Contempt of court.** In lieu of or in addition to any of the [*foregoing orders or*
9 *in addition thereto*] **orders listed in paragraph B(2)(a), B(2)(b), or B(2)(c) of this rule**, an order
10 treating as a contempt of court the failure to obey any order except an order to submit to a
11 physical or mental examination.

12 B(2)(e) **Inability to produce person.** [*Such orders*] **Any of the orders** [*as are*] listed in
13 [*paragraphs (a), (b), and (c) of this subsection*] **paragraph B(2)(a), B(2)(b), or B(2)(c) of this rule**,
14 [*where*] **when** a party has failed to comply with an order under Rule 44 A requiring the party to
15 produce another **person** for examination, unless the party failing to comply shows inability to
16 produce [*such*] **the** person for examination.

17 B(3) **Payment of expenses.** In lieu of or in addition to any order listed in subsection [(2)
18 *of this section*] **B(2) of this rule**, [*or in addition thereto,*] the court shall require the party failing to
19 obey the order or the attorney advising [*such*] **that** party, or both, to pay the reasonable expenses,
20 including [*attorney's*] **attorney** fees, caused by the failure, unless the court finds that the failure
21 was substantially justified or that other circumstances make an award of expenses unjust.

22 **C Expenses on failure to admit.** If a party fails to admit the genuineness of any
23 document or the truth of any matter, as requested under Rule 45, and if the party requesting the
24 [*admissions*] **admission** thereafter proves the genuineness of the document or the truth of the
25 matter, the party requesting the [*admissions*] **admission** may apply to the court for an order
26 requiring the other party to pay the party requesting the [*admissions*] **admission** the reasonable

1 | expenses incurred in making that proof, including reasonable [attorney's] **attorney** fees. The court
2 | shall make the order unless it finds that: [(1)] the request was held objectionable pursuant to Rule
3 | 45 B or C[, or (2)]; the admission sought was of no substantial importance[, or (3)]; the party failing
4 | to admit had reasonable [ground] **grounds** to believe that [such party] **it** might prevail on the
5 | matter[, or (4)]; **or** there was other good reason for the failure to admit.

6 | **D Failure of party to attend [at] own deposition or to respond to request for**
7 | **production or inspection [or to inform of question regarding the existence of coverage of liability**
8 | **insurance policy].** If a party or an officer, director, or managing agent of a party or a person
9 | designated under Rule 39 C(6) or **Rule** 40 A to testify on behalf of a party fails [(1)] to appear before
10 | the officer who is to take the deposition of that party or person, after being served with a proper
11 | notice, or [(2)] to comply with or **to** serve objections to a request for production [and] **or** inspection
12 | submitted under Rule 43, after proper service of the request, the court [in which] **where** the action
13 | is pending on motion may make [such orders] **any order** in regard to the failure as [are] **is** just[,
14 | including among others it may take] **including, but not limited to,** any action authorized under
15 | [subsection B(2)(a), (b), and (c)] **paragraphs B(2)(a), B(2)(b), and B(2)(c)** of this rule. In lieu of any
16 | order or in addition thereto, the court shall require the party failing to act or the attorney advising
17 | [such] **that** party, or both, to pay the reasonable expenses, including [attorney's] **attorney** fees,
18 | caused by the failure, unless the court finds that the failure was substantially justified or that other
19 | circumstances make an award of expenses unjust. The failure to act described in this section may
20 | not be excused on the ground that the discovery sought is objectionable unless the party failing to
21 | act has applied for a protective order as provided by Rule 36 C.