**Mary R. Russell***
**Paul V. Herbers****
**Louis A. Cohn*****

# Rule 61

# ENFORCEMENT OF DISCOVERY: SANCTIONS



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The annotative material to Rule 61 was written by Honorable Mary R. Russell, Paul V. Herbers, and Louis A. Cohn. The material includes material prepared by C. Patrick McLarney and Kevin R. Sweeney for previous editions.

*Judge Russell received her B.A. and B.S., 1980, from Northeast Missouri State University and J.D., 1983, from the University of Missouri-Columbia School of Law. Judge Russell is a Judge of the Supreme Court of Missouri. Assistance in preparing this chapter was provided by Mary Hoemann Newell, B.A., 2000, and J.D., 2003, from the University of Missouri-Columbia. Ms. Newell is a law clerk for Judge Russell at the Supreme Court of Missouri.

**Mr. Herbers received his B.S., with honors, 1973, from Georgetown University and M.B.A., with honors, and J.D., 1977, from the University of Missouri-Columbia. He is a member and director of the firm of Cooling & Herbers, P.C.

***Mr. Cohn received his B.S. and B.A., with honors, 1987, from Northeast Missouri State University and J.D., 1991, from the University of Kansas. He is an associate with the Overland Park, Kansas, firm of Caldwell & Moll, L.C. Mr. Cohn is a member of The Missouri Bar and the Kansas Bar Association.

## Chapter Outline

# I. Rule 61.01 Failure to Make Discovery: Sanctions

## A. Text of Rule

**(a) Failure to Act—Evasive or Incomplete Answers.** Any failure to act described in this Rule may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has filed timely objections to the discovery request or has applied for a protective order as provided by Rule 56.01(c).

For the purpose of this Rule, an evasive or incomplete answer is to be treated as a failure to answer.

**(b) Failure to Answer Interrogatories.** If a party fails to answer interrogatories or file objections thereto within the time provided by law, or if objections are filed thereto which are thereafter overruled and the interrogatories are not timely answered, the court may, upon motion and reasonable notice to other parties, make such orders in regard to the failure as are just and among others the following:

(1) An order striking pleadings or parts thereof, or dismissing the action or proceeding or any part thereof, or render a judgment by default against the disobedient party.

(2) Upon the showing of reasonable excuse, the court may grant the party failing to answer the interrogatories additional time to file answers but such order shall provide that if the party fails to answer the interrogatories within the additional time allowed, the pleadings of such party shall be stricken or the action be dismissed or that a default judgment shall be rendered against the disobedient party.

**(c) Failure to Answer Request for Admissions.** If a party, after being served with a request to admit the genuineness of any relevant documents or the truth of any relevant and material matters of fact, fails to file answers or objections thereto, as required by Rule 59.01, the genuineness of any relevant documents or the truth of any relevant and material matters of fact contained in the request for admissions shall be taken as admitted. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 59.01, 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 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 59.01, (2) the admission sought was of no substantial importance, (3) the party failing to admit had reasonable grounds to believe that such party might prevail on the matter, or (4) there was other good reason for the failure to admit.

**(d) Failure to Produce Documents, and Things or to Permit Inspection.** If a party fails to respond that inspection will be permitted as requested, fails to permit inspection, or fails to produce documents and tangible things as requested under Rule 58.01, or timely files objections thereto that are thereafter overruled and the documents and things are not timely produced or inspection thereafter is not timely permitted, the court may, upon motion and reasonable notice to other

parties, make such orders in regard to the failure as are just and among others the following:

(1) An order refusing to allow the disobedient party to support or oppose designated claims or defenses or prohibit the disobedient party from introducing designated matters in evidence.

(2) An order striking 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.

(3) An order treating as a contempt of court the failure to obey.

(4) An order requiring the party failing to obey the order or the attorney advising the 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.

**(e) Failure to Appear for Physical Examination.** If a party fails to obey an order directing a physical or mental or blood examination under Rule 60.01, the court may, upon motion and reasonable notice to the other parties and all persons affected thereby, make such orders in regard to the failure as are just, and among others, it may take any action authorized under Rules 61.01(d)(1), (2), and (4). Where a party has failed to comply with an order requiring the production of another for examination, the court may enter such orders as are authorized by this Rule 61.01, unless the party failing to comply shows an inability to produce such person for examination.

**(f) Failure to Attend Own Deposition.** If a party or an officer, director or managing agent of a party or a person designated under Rules 57.03(b)(4) and 57.04(a), to testify on behalf of a party, fails to appear before the officer who is to take his deposition, after being served with notice, the court may, upon motion and reasonable notice to the other parties and all persons affected thereby, make such orders in regard to the failure as are just and among others, it may take any action authorized under paragraphs (1), (2), (3) and (4) of subdivision (d) of this Rule.

**(g) Failure to Answer Questions on Deposition.** If a witness fails or refuses to testify in response to questions propounded on deposition, the proponent of the question may move for an order compelling an answer. The proponent of the question may complete or adjourn the deposition examination before applying for an order. In ruling upon the motion, the court may make such protective order as it would have been empowered to make on a motion pursuant to Rule 56.01(c).

If the motion is granted, the court, after opportunity for hearing, shall 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, after opportunity for hearing, shall 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.

If the motion is granted and if the persons ordered to respond fail to comply with the court's order, the court, upon motion and reasonable notice to the other parties and all persons affected thereby, may make such orders in regard to the failure as are just, and among others, it may take any action authorized under Rule 61.01(d).

**(h) Objections to Approved Discovery.** If objections to Rule 56.01(b)(6) approved interrogatories or requests for production are overruled, the court may assess against such objecting party, attorney, or attorney's law firm, or all of them, the attorney's fees reasonably incurred in having such objection overruled. If such fees are not paid within sixty days, the court may enter such other appropriate orders against the disobedient party, including an order striking pleadings, dismissing the action, or entering a judgment by default.

## B. Historical Note

Rule 61.01, which became effective January 1, 1994, repealed the prior Rule 61.01, which was effective January 1, 1975, to January 1, 1994. *Cf.* FED. R. CIV. P. 37.

## C. Amendments

### 1. 1993 Amendments

Two amendments were adopted in 1993 to the prior Rule 61.01 as follows:

1. The amendment to Rule 61.01(d) deleted the former requirement that a motion to compel be filed before seeking sanctions. This change made the Missouri request for production enforcement procedure similar to the Missouri interrogatory enforcement procedures, as set out in Rule 61.01(b).

2. Rule 61.01(h) was added to reduce discovery abuse and expense by providing assurance that approved discovery may be used without incurring objections. A party may still object to the use of approved interrogatories or requests for production but does so at some risk because unsuccessful objections may result in sanctions being imposed.

The language of the Rule was also changed in 1993 to be gender neutral.

### 2. 2000 Amendment

"Rule 56.01(b)(6)" was substituted for "Rule 56.01(b)(5)" in subdivision (h).

## D. Cross-References

The statutory predecessor of Rule 61.01 is § 510.060, RSMo 2000. Rule 61.01, which was promulgated by the Supreme Court of Missouri under the authority of Article V, § 5, of the Missouri Constitution, supersedes § 510.060 when they are inconsistent. *State ex rel. Peabody Coal Co. v. Powell*, 574 S.W.2d 423, 426 (Mo. banc 1978). *See* Rule 41.02.

Rule 61.01 is based on Federal Rule of Civil Procedure 37. Although structured differently, Federal Rule of Civil Procedure 37 authorizes essentially the same orders and sanctions as Rule 61.01. Counsel should note that both Rules permit a trial court to order an attorney who advises a client to improperly oppose discovery requests to personally pay the opposition's costs. These provisions are likely to facilitate discovery because attorneys will be hesitant to advise clients to oppose discovery requests.

## E. Time Constraints

Rule 61.01 does not impose express time constraints on the imposition of sanctions for failure to respond to discovery requests.

## F. Comment

### 1. Generally

#### a. Purpose

The purpose of all civil discovery is to help the court and the litigants determine the facts in issue before trial, *Bethell v. Porter*, 595 S.W.2d 369, 377 (Mo. App. W.D. 1980), and to minimize concealment and surprise in litigation, *Hilmer v. Hezel*, 492 S.W.2d 395, 396 (Mo. App. E.D. 1973).

A discovery order does not need to be denominated "judgment" to be enforceable. *Crimmins v. Crimmins*, 121 S.W.3d 559, 560 (Mo. App. E.D. 2003). A monetary sanction entered under Rule 61.01 becomes a final judgment and is

enforceable even if the underlying action is voluntarily dismissed. *P.R. v. R.S.*, 950 S.W.2d 255, 257 (Mo. App. E.D. 1997).

In deciding whether to impose sanctions for failure to comply with discovery rules, the trial court must:

> not ignore the spirit of the rule; i.e. that the rules of discovery were designed to eliminate, as far as possible, concealment and surprise in the trial of law suits to the end that judgment therein be rested upon the real merits of the causes and not upon the skill and maneuvering of counsel.

*Crompton v. Curtis-Toledo, Inc.*, 661 S.W.2d 645, 650 (Mo. App. E.D. 1983).

"The type of Rule 61.01 sanction should depend on the nature of the information sought in relation to the proceeding, what orders will best assist the party seeking the information, and the benefits and disadvantages to the parties and the court resulting from the sanction chosen." *Cosby v. Cosby*, 202 S.W.3d 717, 721 (Mo. App. E.D. 2006). A sanction has been deemed to be unnecessarily excessive when it was "counterproductive in that it precluded rather than furthered the objective of producing necessary information for the trial court to determine the main issue at trial . . . ." *Id.* at 722.

When a party fails to seek enforcement of discovery under Rule 61.01, it may be appropriate to deny that party's motion for a continuance to obtain further discovery. *See Bydalek v. Brines*, 29 S.W.3d 848, 856 (Mo. App. S.D. 2000) (affirming trial court's denial of motion for continuance when the movant failed to comply with Rule 65.03, and in dicta stating that denial was also proper because movant could not show good cause for continuance under Rule 65.01 because of failure to seek enforcement of discovery under Rule 61.01).

While Rule 61.01 is sufficient to provide relief to parties who endure discovery abuses before settlement, an independent action will lie when the discovery abuse is discovered after the settlement and dismissal of the lawsuit. *Roth v. La Societe Anonyme Turbomeca Fr.*, 120 S.W.3d 764, 776 (Mo. App. W.D. 2003).

Missouri does not recognize a tort for intentional spoliation of evidence, as articulated in *Pikey v. Bryant*, 203 S.W.3d 817 (Mo. App. S.D. 2006). In *Pikey*, the Southern District noted that Rule 61.01 and other remedies currently provide redress for destruction and alteration of potential evidence, but reasoned that, if Missouri were to recognize the tort of intentional spoliation of evidence, plaintiffs, at a minimum, would be required to show a causal relationship between spoliation of evidence and impairment of the ability to prosecute the underlying suit. *Id.* at 825.

There are two cases not decided expressly under Rule 61 that relate directly to the purpose of the rule:

1. In *Bailey v. Norfolk & Western Railway Co.*, 942 S.W.2d 404 (Mo. App. E.D. 1997), the defendant's expert testified at trial in a Federal Employers' Liability Act, 45 U.S.C. §§ 51–60, case that the plaintiff's work conditions could be ruled out as a cause, even as an insignificant cause, of the plaintiff's physical complaints. The trial court instructed the jury to disregard the testimony on the basis of surprise. The testimony contradicted the attorney's opening statement and the witness's earlier deposition testimony. The appellate court found this instruction, used as a sanction, to be within the trial court's discretion to maintain the position of the parties during discovery and protect the integrity of the discovery process.

2. In *Hill v. St. Louis University*, 123 F.3d 1114 (8th Cir. 1997), the trial court entered a sanctions order against counsel for improper *ex parte* contact with the opposing party's employee, a department chairman with managerial duties. That contact violated Rule 4-4.2 of the Missouri Rules of Professional Conduct, and the imposition of sanctions for violation of the ethical rule was within the court's proper exercise of discretion.

### b. Discretionary Standard

The trial court has broad discretion under Rule 61.01 to choose the type of sanctions to be imposed for failure to

comply with discovery procedures. *Simpkins v. Ryder Freight Sys., Inc.*, 855 S.W.2d 416 (Mo. App. W.D. 1993); *Ballesteros v. Johnson*, 812 S.W.2d 217 (Mo. App. E.D. 1991). Sanctions should be limited to what is necessary to accomplish the purpose of discovery, and a party seeking sanctions must show that discovery noncompliance resulted in prejudice. *Anderson v. Arrow Trucking Co.*, 181 S.W.3d 185, 189 (Mo. App. W.D. 2005).

The trial court's ruling should be reversed in such matters only when the court abuses its discretion, i.e., when its ruling is clearly against the logic of circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate lack of careful consideration. *Connelly v. Schafer*, 837 S.W.2d 344 (Mo. App. W.D. 1992). On appeal, the appellate court determines only whether the trial court could have reasonably concluded as it did and not whether the appellate court would have imposed the same sanctions under the circumstances. *Luster v. Gastineau*, 916 S.W.2d 842, 844 (Mo. App. S.D. 1996) (dismissal as a sanction for failing to provide responsive interrogatory answers, medical authorizations, or tax return authorizations).

### c. Burden of Proof

Motions for sanctions regarding failure to cooperate in discovery do not prove themselves, and the burden is on the moving party to prove their allegations. *Ballesteros v. Johnson*, 812 S.W.2d 217 (Mo. App. E.D. 1991). A movant does not need to use the word "prejudice" in the motion for sanctions provided that the facts pleaded demonstrate prejudice. *Norber v. Marcotte*, 134 S.W.3d 651 (Mo. App. E.D. 2004).

Because the sanctions that the trial court can impose under Rule 61 are so drastic, Missouri courts require "strict compliance" with the requirements of Rule 61.01 to justify the imposition of sanctions. *N.W. Elec. Power Coop., Inc. v. Buckstead*, 578 S.W.2d 314, 316 (Mo. App. W.D. 1979). Thus, a party seeking sanctions must carefully conform to the requirements of Rule 61.01.

In the past, decisions have limited the potentially harsh effect of these sanctions by requiring evidence that the failure to respond to the discovery request was willful before imposing

default judgment, even though willfulness is not expressly required by the Rule. *See Peoples-Home Life Ins. Co. v. Haake*, 604 S.W.2d 1, 4-5 (Mo. App. W.D. 1980); *In re Marriage of Dickey*, 553 S.W.2d 538, 541 (Mo. App. W.D. 1977); *Zurheide-Hermann, Inc. v. London Square Dev. Corp.*, 504 S.W.2d 161, 165-66 (Mo. 1973); *City of Columbia ex rel. Sterling Excavation & Erection, Inc. v. Bil-Nor Constr. Co.*, 411 S.W.2d 856, 859 (Mo. App. W.D. 1967).

Absent evidentiary support for a sanction, the sanction award will be reversed on appeal. *Fid. Nat'l Ins. Co. v. Snow*, 26 S.W.3d 473, 474 (Mo. App. S.D. 2000). In *Dorsch v. Family Medicine, Inc.*, 159 S.W.3d 424, 437–39 (Mo. App. W.D. 2005), the court reversed the trial court's order of sanctions when it found the record void of essential information to permit review of discovery sanctions because there was insufficient evidence to show that the trial court properly exercised its discretion in awarding sanctions.

**d. Limits on Court's Discretion**

When the conduct of a party manifests contumacious and deliberate disregard for the trial court's authority and is calculated to result in delay, courts have imposed sanctions. *McManemin v. McMillin*, 157 S.W.3d 304, 308 (Mo. App. S.D. 2005) (sanctions upheld when party's continual failure to produce documents was found to be contumacious and with deliberate disregard for the trial court's authority); *Koonce v. Union Elec. Co.*, 831 S.W.2d 702, 704 (Mo. App. E.D. 1992); *Smithey v. Davis*, 752 S.W.2d 486, 488 (Mo. App. S.D. 1988).

When a discovery sanction would destroy one party's case, it is an abuse of discretion for the trial court to impose such a harsh sanction without finding that the errant party has shown contumacious and deliberate disregard for the authority of the trial court. *S.R. v. K.M.*, 115 S.W.3d 862, 865 (Mo. App. E.D. 2003).

Production of volumes of evasive, incomplete, and nonresponsive documents is sufficient to demonstrate the contumacious disregard necessary to support sanctions. *Norber v. Marcotte*, 134 S.W.3d 651 (Mo. App. E.D. 2004).

Courts have imposed sanctions when the party's conduct showed disregard for the court's authority and was intended to cause delay. *Wilkerson v. Prelutsky*, 943 S.W.2d 643, 648–49 (Mo. banc 1997) (exclusion of expert witnesses affirmed after failure to identify expert in interrogatories); *Fredco Realty, Inc. v. Jones*, 906 S.W.2d 818, 821 (Mo. App. E.D. 1995).

Sanctions have been upheld when a defendant company was evasive and not forthcoming during discovery after its discovery objections were overruled, which obligated it to respond under Rule 61.01. *Anderson v. Arrow Trucking Co.*, 181 S.W.3d 185 (Mo. App. W.D. 2005).

Dismissal of an action for failure to comply with a discovery order is a harsh sanction that the court should order only in extreme situations showing a clear record of delay or contumacious conduct. *Spacewalker, Inc. v. Am. Family Mut. Ins. Co.*, 954 S.W.2d 420, 423–24 (Mo. App. E.D. 1997); *Foster v. Kohm*, 661 S.W.2d 628, 632 (Mo. App. E.D. 1983).

There is some authority to support the proposition that, before imposing sanctions for failure to comply with discovery rules, the trial court must first determine whether the party seeking discovery was prejudiced by the opponent's failure to so comply. *Crompton v. Curtis-Toledo, Inc.*, 661 S.W.2d 645, 650 (Mo. App. E.D. 1983) (relating to failure to supplement interrogatories). In *Mitchell v. Schnucks Markets, Inc.*, 100 S.W.3d 109, 112 (Mo. App. E.D. 2002), a witness's testimony was permissibly admitted when the plaintiffs had requested the witness's statement in interrogatories but the defendants' response to those interrogatories was incomplete because the plaintiffs were allowed to interview the witness and did not describe how they were prejudiced. But, in *Binder v. Thorne-Binder*, 186 S.W.3d 864, 867 (Mo. App. W.D. 2006), sanctions were upheld when the trial court did not make specific findings that the party's actions were contemptuous or prejudicial before imposing sanctions, because the Western District reasoned that such specific findings were not required under the Rule.

Before imposing sanctions, the court should also consider the noncompliant party's excuse for disobedience. *See*:

- *Moore v. Weeks*, 85 S.W.3d 709, 722 (Mo. App. W.D. 2002) (although content of witness's testimony could be found in public record, defendants were nevertheless obligated to disclose her)

- *Sonderman v. Maret*, 694 S.W.2d 864, 867 (Mo. App. E.D. 1985) (conclusory letter from physician recommending that defendant was "unable to 'be involved in any legal proceedings'" was not reasonable excuse for noncompliance)

- *Jackson v. Jackson*, 655 S.W.2d 786, 787 (Mo. App. E.D. 1983) (fact that defendant "lived far away and could not afford to appear" was not reasonable excuse for failure to appear for deposition and failure to answer interrogatories)

The imposition of sanctions under Rule 61.01 requires a separate motion for sanctions and notice to all parties affected. *Hammons v. Hammons*, 680 S.W.2d 409, 411 (Mo. App. E.D. 1984). Sanctions under Rule 61.01 cannot be imposed *ex parte* or by the court *sua sponte*, and a court order stating the manner in which discovery is to be accomplished does not provide a foundation for sanctions if it is vague. *Id.*

In *Lambert v. Holbert*, 172 S.W.3d 894, 897–99 (Mo. App. S.D. 2005), the court was found to have appropriately set aside the judgment when the discovery sanctions imposed on the defendant resulted from a proceeding about which he had no notice.

In *Harrington v. Harrington*, 153 S.W.3d 315, 318–20 (Mo. App. W.D. 2005), the trial court was found to have abused its discretion when it granted an oral motion for sanctions first raised at trial and struck an incarcerated party's pleadings because there was inadequate notice.

The trial court may not issue a Rule 61.01 sanction that is in excess of what is necessary to accomplish the purposes of discovery when a lesser sanction would be sufficient. *Houchins v. Houchins*, 727 S.W.2d 181, 184 (Mo. App. W.D. 1987) (order striking answer unjust when party not in violation of any discovery order and lesser sanction was available to obtain complete interrogatories; sanction found to

be counterproductive to objective of producing needed facts); *J.B.C. v. S.H.C.*, 719 S.W.2d 866, 871 (Mo. App. E.D. 1986) (order striking pleadings and refusing to allow party to participate during trial was excessive when violation was a failure to answer 2 of 42 interrogatories); *but see Moore*, 85 S.W.3d at 722 (exclusion of witness testimony available sanction when defendant fails to identify witness in responses to discovery requests).

In *Fairbanks v. Weitzman*, 13 S.W.3d 313 (Mo. App. E.D. 2000), the appellate court affirmed the trial court's sanction of the defendant, requiring him to pay for the plaintiff's deposition of an untimely disclosed expert witness. An additional sanction of $18,371.65 was vacated and reversed as an abuse of the trial court's discretion and not in accordance with the purposes of discovery when the plaintiff had been granted a continuance and allowed the opportunity to conduct further discovery to develop her positions before trial. *Id.* at 328.

The trial court in *Flynn v. Flynn*, 34 S.W.3d 209, 211 (Mo. App. E.D. 2000), denied the parents' motion for continuance in a guardianship hearing, struck their pleadings for failure to comply with Rule 61.01, and entered a default judgment against them, appointing the child's grandparents as guardians. The appellate court reversed the guardianship award, holding that failure to comply with discovery requests did not constitute the requisite evidence to prove that the parents were unwilling, unable, or unfit caretakers of the child so as to deprive them of their child-rearing rights. *Flynn*, 34 S.W.3d at 212.

In *In re Marriage of Lindeman*, 140 S.W.3d 266, 271–72 (Mo. App. S.D. 2004), the trial court did not abuse its discretion in striking a party's pleading and denying him the right to present witnesses when the court had earlier issued four orders to compel discovery, two of which awarded attorney fees, and warned that further failure to comply with discovery would result in pleadings being struck.

Rule 61.01 does not allow the trial court to sanction a party for failing to produce for deposition a nonresident, nonretained expert who is domiciled outside of Missouri, has not consented to the jurisdiction of Missouri courts, and conducts no business in Missouri. *See State ex rel. Common v. Darnold*, 120 S.W.3d 788, 791 (Mo. App. S.D. 2003).

Although the court has the discretion to provide a remedy when evidence was fraudulently concealed during discovery, a party must timely object to such evidence, and a party cannot later file a separate action for fraud during the course of discovery in the prior lawsuit. *Klein v. Gen. Elec. Co.*, 728 S.W.2d 670, 671 (Mo. App. E.D. 1987).

### e. Definition of "Failure" to Answer or Respond

Under Rule 61.01, sanctions are imposed only for a "failure" to answer or respond to discovery requests. Sanctions may be imposed for untruthful or evasive answers, in addition to a complete failure to respond. *Hilmer v. Hezel*, 492 S.W.2d 395, 397 (Mo. App. E.D. 1973); *but see City of Salisbury v. Nagel*, 420 S.W.2d 37, 41–42 (Mo. App. W.D. 1967) (answer of "unknown" if information is not available to respondent is not "refusal"). In Rule 61.01(a), the Supreme Court of Missouri has codified this broad interpretation of the term "failure" by providing that "an evasive or incomplete answer is to be treated as a failure to answer." *Accord* FED. R. CIV. P. 37(a)(3).

Before adopting the current Rule, the Supreme Court of Missouri held that a refusal to respond to an improper discovery request was not a failure to respond to discovery requiring imposition of sanctions. *State ex rel. Gamble Constr. Co. v. Carroll*, 408 S.W.2d 34, 36-37 (Mo. banc 1966). Rule 61.01(a) reverses this holding by implication; a party who does not properly object to a discovery request or apply for a protective order under Rule 56.01(c) risks imposition of sanctions under Rule 61.01 for the failure to respond. The trial court, however, still has wide discretion to refuse to impose sanctions for a failure to respond if the discovery request is clearly improper. *State ex rel. State Highway Comm'n v. Pfitzinger*, 569 S.W.2d 335, 336 (Mo. App. E.D. 1978).

## 2. Failure to Answer Interrogatories

Rule 61.01, authorizing sanctions for failure to file objections and answers to interrogatories, does not require that there first be a motion to compel answers before such sanctions can be imposed. *Russo v. Webb*, 674 S.W.2d 695, 697 (Mo. App. S.D. 1984).

Even when a continuing duty to supplement answers to interrogatories has been established, before imposing sanctions on the errant party the trial court will first determine whether in a particular situation the opposing party has been prejudiced. *Crompton v. Curtis-Toledo, Inc.*, 661 S.W.2d 645 (Mo. App. E.D. 1983).

If a party fails to properly answer interrogatory questions propounded under Rule 57.01, Rule 61.01(b) authorizes the trial court, upon motion and reasonable notice to other parties, to impose such sanctions as are just on the nonresponding party. Rule 61.01(b)(1) expressly authorizes three such types of sanctions. Rule 61.01(b)(2) authorizes the court to extend the time to answer but requires mandatory sanctions if the party subsequently fails to reply.

Because these drastic sanctions may result in a loss of claim, action, or defense, they should only be imposed for a "contumacious and deliberate" refusal. *See In re Marriage of Dickey*, 553 S.W.2d 538, 541 (Mo. App. W.D. 1977); *see also* Comment 1.d, Generally—Limits on Court's Discretion, *supra*.

**a. Order to Strike**

The trial court may enter an order striking the pleadings of a disobedient party without a prior order compelling that party to answer interrogatories within a specified time. *Russo v. Webb*, 674 S.W.2d 695, 697 (Mo. App. S.D. 1984).

In *Daugherty v. Bruce Realty & Development, Inc.*, 840 S.W.2d 271 (Mo. App. E.D. 1992), a trial court order striking the plaintiff's pleadings on the defendant's oral motion for sanctions for failure to comply with discovery orders was an attempt by the court to compel the parties to proceed responsibly with discovery and not an entry of judgment from which appeal could be taken.

Illustrations of proper exercise by a trial court of its authority to strike pleadings because of failure to answer interrogatories are found in the following cases:

- *Scott v. LeClercq*, 136 S.W.3d 183, 190 (Mo. App. W.D. 2004)
- *Bell v. Bell*, 987 S.W.2d 395, 401 (Mo. App. E.D. 1999)

- *Jackson v. Jackson*, 655 S.W.2d 786, 787 (Mo. App. E.D. 1983)
- *In re Marriage of Simmons*, 636 S.W.2d 351, 353 (Mo. App. E.D. 1982)

But compare *Cosby v. Cosby*, 202 S.W.3d 717, 722 (Mo. App. E.D. 2006), in which sanctions were found to be an abuse of discretion when the party's interrogatory answers were late and incomplete, but he had "at least substantially complied with the trial court's orders."

Although an individual defendant generally may avoid having any responsive pleadings struck for a failure to answer interrogatories by claiming the Fifth Amendment privilege against self-incrimination, that privilege will not protect:

- a corporate defendant;

- an individual defendant as to corporate records (even if those records may incriminate the defendant personally); or

- an individual defendant as to records in relation to which the individual defendant acted in a fiduciary capacity to the plaintiff.

*State ex rel. Jay Bee Stores, Inc. v. Edwards*, 636 S.W.2d 61, 63-64 (Mo. banc 1982).

The claim by an individual defendant of the Fifth Amendment privilege as a basis for refusing to respond to discovery is presumptively valid. In determining whether sanctions should be imposed for the failure to respond to the discovery request, however, the trial court has a "duty to inquire as to whether a [Fifth Amendment] claim is overbroad." *State ex rel. Collins v. Edwards*, 652 S.W.2d 98, 101 (Mo. banc 1983); *see also State ex rel. Harry Shapiro, Jr., Realty & Inv. Co. v. Cloyd*, 615 S.W.2d 41, 45-46 (Mo. banc 1981). The burden in such an inquiry, which is on the party seeking answers to the interrogatories, may be met by any competent evidence, including the conduct and admissions of the nonresponding party, and the court is not limited to testimony on that issue presented in court. *Edwards*, 652 S.W.2d at 101. In such an inquiry, the trial court has a "duty to 'do something,'" and the

court's upholding of a Fifth Amendment claim without taking action to determine if the claim is valid (such as conferring with the witness and counsel on whether the claim is made in good faith) may be improper. *Id.* at 102.

A party seeking a response to a discovery request may be able to employ the extraordinary writs of prohibition or mandamus to require the trial judge to make the inquiry mandated by *Edwards* in response to the claim of the Fifth Amendment privilege, although it is not clear which writ the Missouri courts view as correct in these circumstances. *See id.* at 101–02; *see also Shannon v. Shannon*, 680 S.W.2d 367 (Mo. App. S.D. 1984) (trial court has the authority under Rule 61 to require a party to waive the constitutional privilege against self-incrimination as a condition to allowing the party to testify).

When a party requesting affirmative relief invokes the privilege against self-incrimination, the court may impose sanctions precluding the party from seeking the affirmative relief relevant to the privilege, but such a defendant is entitled to utilize discovery and to assert affirmative defenses to defend against a claim. *State ex rel. Lieberman v. Goldman*, 781 S.W.2d 802, 806–07 (Mo. App. E.D. 1989).

In a driver's license revocation proceeding, a trial court's order striking pleadings and reinstating a motorist's license as a result of the Department of Revenue's failure to answer interrogatories was held to be an abuse of discretion because the information sought was not available to the Department within the meaning of Rule 57.01. *Arth v. Dir. of Revenue*, 722 S.W.2d 606, 607 (Mo. banc 1987) (language is now in Rule 57.01(c)); *see also McDermott v. Dir. of Revenue*, 725 S.W.2d 143 (Mo. App. E.D. 1987); *Wild v. Dir. of Revenue*, 725 S.W.2d 144 (Mo. App. E.D. 1987); *Richardson v. Dir. of Revenue*, 725 S.W.2d 141 (Mo. App. E.D. 1987).

The sanction of striking a party's pleadings is not warranted for a party's failure to sign interrogatories that are otherwise legally sufficient. *Ottinger v. Dir. of Revenue*, 725 S.W.2d 142, 143 (Mo. App. E.D. 1987).

**b. Dismissal**

When a party's failure to answer interrogatories rises to the level of contumacious and deliberate disregard for the trial court's authority, dismissal of an action with prejudice is an appropriate sanction. *Amick v. Horton*, 689 S.W.2d 369, 377 (Mo. App. S.D. 1985). In such a case, it is not necessary to determine to what extent the party's opponent was prejudiced by the party's failure to answer interrogatories before dismissing the cause of action. *Id.*

An order making clear that the plaintiffs had 20 days in which to comply with court-ordered discovery or their claims would be dismissed, and the intervening time period before the sanction took effect, constituted sufficient notice and opportunity to be heard to warrant involuntary dismissal of the action with prejudice. *Burris v. Terminal R.R. Ass'n*, 835 S.W.2d 535 (Mo. App. E.D. 1992).

Cases that illustrate the trial court's ability to dismiss a claim with prejudice when the claimant refuses to answer interrogatories include *Luster v. Gastineau,* 916 S.W.2d 842, 845 (Mo. App. S.D. 1996), *Jones v. Eagan*, 715 S.W.2d 596, 597 (Mo. App. E.D. 1986), and *McVeigh v. Faith Hosp. Ass'n*, 647 S.W.2d 615, 616 (Mo. App. E.D. 1983).

Dismissal of a prior action for failure to answer interrogatories is a dismissal on the merits and bars a subsequent suit under Rule 67.03, not by application of *res judicata. State ex rel. Willens v. Gray*, 757 S.W.2d 656, 658 (Mo. App. W.D. 1988).

In *Atteberry v. Hannibal Regional Hospital*, 926 S.W.2d 58 (Mo. App. E.D. 1996), the trial court dismissed an action with prejudice for failure to produce documents and answer interrogatories, but the court of appeals reversed the order on the basis that an application for a change of judge had already been filed, so the order was without jurisdiction.

**c. Default Judgment**

The entry of a default judgment as a sanction for failure to answer interrogatories is a drastic punishment and should be invoked only when the party has shown contumacious and deliberate disregard for the authority of the court. *Russo v.*

*Webb*, 674 S.W.2d 695, 697 (Mo. App. S.D. 1984); *see also* Comment 1.d, Generally—Limits on Court's Discretion, *supra*. A default judgment entered as a sanction for failure to file objections and answers to interrogatories will not be set aside on appeal "unless [a] reasonable excuse and a meritorious defense are so apparent that failure to set aside the judgment is arbitrary." *Russo*, 674 S.W.2d at 697.

Imposing a default judgment as a sanction under the rules of discovery is based on the presumption that no merit exists in an asserted defense in light of the failure to produce information necessary to the disposition of the cause. *Simpkins v. Ryder Freight Sys., Inc.*, 855 S.W.2d 416 (Mo. App. W.D. 1993).

In *Spacewalker, Inc. v. American Family Mutual Insurance Co.*, 954 S.W.2d 420, 424 (Mo. App. E.D. 1997), the imposition of a default judgment as a sanction for failure to answer burdensome interrogatories was held to be an abuse of discretion when the court permitted only a very short period of time to gather an "extremely burdensome" amount of information and the need for that discovery before trial was questionable.

In a proceeding for dissolution of marriage, when a party's conduct hinders, delays, and complicates the proceeding, the trial court may strike that party's pleadings and render a default judgment. *Giesler v. Giesler*, 731 S.W.2d 33, 35 (Mo. App. E.D. 1987).

Default judgment was upheld as a sanction in *Karolat v. Karolat*, 151 S.W.3d 852 (Mo. App. W.D. 2004), when a mother in a child custody matter:

- failed to answer interrogatories even after confirming in a hearing that she would do so;
- ordered her doctor not to release a report of her mental evaluation despite a court order;
- refused access to the guardian ad litem for the children; and
- delayed the proceedings for over six months.

Entering default judgment in a civil action as a sanction for a fitness vendor operator's refusal to answer interrogatories was reversible error in a civil action based on alleged unlawful merchandising practices when answers to interrogatories were protected by the Fifth Amendment privilege against self-incrimination. *State ex rel. Webster v. Ames*, 791 S.W.2d 916 (Mo. App. S.D. 1990).

Rule 74.05, which governs default judgments, is not applicable to a judgment resulting from the imposition of sanctions. *See Treetop Vill. Prop. Owners Ass'n v. Miller*, 139 S.W.3d 595, 600 (Mo. App. S.D. 2004); *State ex rel. Eddy v. Rolf*, 145 S.W.3d 429, 433 (Mo. App. W.D. 2004); *see also Burleson v. Fleming*, 58 S.W.3d 599, 604 (Mo. App. W.D. 2001). In *Portell v. Portell*, 643 S.W.2d 18 (Mo. App. E.D. 1982), the appellate court reaffirmed the trial court's discretion to enter a default judgment when answers to interrogatories are late and incomplete when filed. A default judgment entered as a sanction is not a default judgment in the ordinary sense, but is treated as a judgment upon trial by the court. *Portell*, 643 S.W.2d at 20. But because entry of default judgment for failure to respond to an interrogatory is not a judgment on the merits, it provides no basis for collateral estoppel. *Peoples-Home Life Ins. Co. v. Haake*, 604 S.W.2d 1, 8-10 (Mo. App. W.D. 1980).

Additional per curiam decisions approving the sanction of judgment by default include *City of St. Charles v. Murphy*, 93 S.W.3d 859 (Mo. App. E.D. 2003), and *Tatarczuk v. Cohen Esrey Real Estate Services*, 85 S.W.3d 653 (Mo. App. W.D. 2002).

A party against whom an interlocutory default judgment is entered as a discovery sanction may not argue on appeal that discovery violations had not occurred, because that issue is barred by the doctrine of *res judicata*. *Penney v. Ozark Mountain Country Mall, Inc.*, 738 S.W.2d 137, 139 (Mo. App. S.D. 1987).

**d. Extension of Time: Mandatory Sanctions**

Reasonable excuse is a prerequisite for the applicability of Rule 61.01(b)(2), authorizing a court to grant a party additional time to file answers to interrogatories. *Russo v. Webb*, 674 S.W.2d 695, 697 (Mo. App. S.D. 1984).

A trial court may properly deny a motion for sanctions when a prior motion to compel answers to interrogatories was sustained by consent of the parties and when a second motion to compel was withdrawn because answers had been filed. *Viehweg v. Vic Tanny Int'l of Mo., Inc.*, 732 S.W.2d 212, 214 (Mo. App. E.D. 1987).

**e. Other "Just" Sanctions**

Although the trial court is granted the authority to impose other sanctions that may be "just" under the circumstances for a failure to answer interrogatories (Rule 61.01(b)), a court has no authority to impose monetary sanctions for failure of attorneys to answer interrogatories. *Roth v. Roberts*, 672 S.W.2d 709 (Mo. App. E.D. 1984).

Exclusion of evidence is one of the proper remedies available to a trial court for the appellant's failure to meet the duty of answering interrogatories. *Garrison v. Garrison*, 640 S.W.2d 179 (Mo. App. E.D. 1982) (testimony of non-expert witnesses not named in answer to interrogatory requesting names of persons with knowledge of specific facts properly excluded as witness as to those facts); *cf. Sch. Dist. of Springfield R-12 ex rel. Midland Paving Co. v. Transamerica Ins. Co.*, 633 S.W.2d 238, 248 (Mo. App. S.D. 1982) (proper to allow testimony to facts not disclosed in interrogatories when information was otherwise available to opposing party).

The trial court properly may refuse to allow the nonresponding party to testify, to present evidence, or otherwise to participate in the trial. *Portell v. Portell*, 643 S.W.2d 18, 20 (Mo. App. E.D. 1982). But absent bad faith, willfulness, or contumacious conduct, the imposition of a sanction striking admissible and necessary evidence is an abuse of discretion and is not authorized when the sanction results in the denial of a meaningful hearing. *State ex rel. Ark. Power & Light Co. v. Mo. Pub. Serv. Comm'n*, 736 S.W.2d 457, 460 (Mo. App. W.D. 1987); *see also* Comment 1.d, Generally—Limits on Court's Discretion, *supra*.

A court had the power under Rule 61.01 to direct certain factual findings against an asbestos defendant who had intentionally withheld discoverable information and had falsely responded to an interrogatory. *Goede v. Aerojet Gen. Corp.*, 143 S.W.3d 14 (Mo. App. E.D. 2004).

In *Binder v. Thorne-Binder*, 186 S.W.3d 864, 867 (Mo. App. W.D. 2006), in which a party repeatedly failed to answer interrogatories, sanctions included ordering the party's pleadings stricken, not permitting the party to present evidence or conduct cross-examination, and permitting the party's opponent to proceed by default.

While the trial court has "broad discretion" to exclude a non-expert witness whose name is not disclosed in response to written interrogatories or deposition questions, the critical factor to be considered by the court is whether the party seeking discovery was prejudiced by the failure to disclose. *Crompton v. Curtis-Toledo, Inc.*, 661 S.W.2d 645, 649-50 (Mo. App. E.D. 1983).

When an interrogatory is overly broad and the party seeking discovery does not seek a more responsive answer, a nondisclosed witness may be allowed to testify. *DeLisle v. Cape Mut. Ins. Co.*, 675 S.W.2d 97, 104 (Mo. App. S.D. 1984); *see also Roach v. Consol. Forwarding Co.*, 665 S.W.2d 675, 682 (Mo. App. E.D. 1984) (trial court properly refused to strike non-expert witness not disclosed in response to interrogatories when party seeking discovery had actual notice of identity of witness before trial).

The court in *Calvin v. Jewish Hospital of St. Louis*, 746 S.W.2d 602 (Mo. App. E.D. 1988), held that a trial court improperly prohibited a hospital from utilizing an expert witness in a medical malpractice action when the name of the expert witness was disclosed by the hospital 17 days before trial, notwithstanding a prior scheduling order prohibiting the naming of the expert witness within 60 days of the trial; the trial court had previously permitted the patient to name 2 experts 13 days before the previous trial date and permitted the doctor to name 1 expert 10 days before the previous trial date.

The court in *Koonce v. Union Electric Co.*, 831 S.W.2d 702 (Mo. App. E.D. 1992), held that the trial court properly struck several of the plaintiffs' expert witnesses and refused to bar one of the defendant's experts when the plaintiffs unjustifiably failed to comply with two pretrial orders directing production of stricken experts. The plaintiffs' failures, combined with the fact that the case had been tried

five years earlier, appealed, remanded, dismissed, and refiled, manifested contumacious and deliberate disregard for the trial court's authority. *Id.*; *see also Wilkerson v. Prelutsky*, 943 S.W.2d 643, 648–49 (Mo. banc 1997) (judgment entered in favor of defendant after plaintiff's expert was excluded).

The failure to seasonably identify an expert witness may require either exclusion of the expert's testimony or a recess from trial to permit adequate discovery. *Ellis v. Union Elec. Co.*, 729 S.W.2d 71, 75 (Mo. App. E.D. 1987).

An expert witness identified during trial does not need to be excluded when the opposing party does not establish any prejudice resulting from the expert's testimony. *Hurlock v. Park Lane Med. Ctr., Inc.*, 709 S.W.2d 872 (Mo. App. W.D. 1985). *But cf. State ex rel. Mo. Highway & Transp. Comm'n v. Pully*, 737 S.W.2d 241 (Mo. App. W.D. 1987) (striking testimony of expert witness as sanction for failing to seasonably supplement interrogatories was not too harsh when opposing party would have been prejudiced by such testimony).

In *American Property Maintenance v. Monia*, 59 S.W.3d 640, 646–47 (Mo. App. E.D. 2001), the trial court excluded from trial certain defense witnesses who were not disclosed before trial under the plaintiff's discovery requests. The defendants did not dispute their failure to disclose the witnesses and their evidence, but they alleged that the sanction was excessive because some of the requested information was provided during a deposition and to the defendants' prior attorney. *Id.* at 646. The appellate court found that it was not an abuse of discretion to exclude the witnesses because the defendants provided no reasonable explanation for their failure to provide the requested information and the violation resulted in surprise and prejudice to the plaintiff. *Id.* at 647.

In *Giddens v. Kansas City Southern Railway Co.*, 29 S.W.3d 813, 819–20 (Mo. banc 2000), the trial court imposed discovery sanctions when it found that videotapes that supplemented earlier answers to interrogatories were not revealed timely. The Supreme Court found that the trial court abused its discretion in finding that the videotapes were not seasonably disclosed and that the sanction for the alleged discovery violation was in error, but it reasoned that the

sanction imposed did not prejudice the other party because the court permitted the videotapes to be shown to the jury. *Id.* at 820.

As illustrated above, Missouri appellate courts in the past have granted to the trial courts broad discretion to order sanctions that are "just" in the given circumstances of a case under Rule 61.01(b), even though the sanctions ordered were not expressly listed in Rule 61.01(b)(1). Under a decision by the Court of Appeals for the Western District of Missouri, however, the trial court's ability under Rule 61.01(b) to impose any sanction, other than those enumerated in Rule 61.01(b)(1), may be challenged. In *Fuller v. Padley*, 628 S.W.2d 719, 722 (Mo. App. W.D. 1982), the trial court ordered the nonresponding party to pay the discovering party's attorney fees relating to the failure to answer interrogatories. The Court of Appeals for the Western District set aside that order, however, holding that, because an order to pay fees was not a sanction listed in Rule 61.01(b)(1), such an order by the trial court was improper. The court expressed the following logic at page 722:

> If the Supreme Court had intended that the payment of expenses and attorneys fees be authorized with respect to interrogatories, it would seem that it would have been stated specifically as it was with respect to the failure to answer questions on depositions. There seems no good reason to write into Rule 61.01(b)(1) a sanction not specified.

In so holding, the court did not address the language of Rule 61.01(b) that authorizes the trial court to "make such orders . . . as are just and among others the following" and then lists specifically authorized sanctions. The issue of whether the listed sanctions are exclusive has not been directly addressed by the Supreme Court of Missouri or any other Missouri appellate court. Under the authority of the *Fuller* decision, however, the ability of a trial court to order any sanction under Rule 61.01(b) or 61.01(d)–(g), other than those expressly listed in those subdivisions, may be in question. *See, e.g., Simpson ex rel. Simpson v. Revco Drug Ctrs. of Mo., Inc.*, 702 S.W.2d 482, 490 (Mo. App. W.D. 1985) (citing *Fuller* for the proposition that, "Courts are not at liberty to improvise discovery sanctions and write into the rules measures which the Supreme Court has not adopted.").

Counsel should also be aware of a case discussing the inherent power of the court to award sanctions: *Rea v. Moore*, 74 S.W.3d 795 (Mo. App. S.D. 2002). Although the case did not involve a discovery dispute and was considered under the language of Rule 55.03 (similar to Federal Rule of Civil Procedure 11), the opinion indicates that the inherent power of the court to enter sanctions may be of significant value in a discovery matter, particularly when one party can be shown to have made false pleadings, false affidavits, or perjured testimony. This inherent power is not limited by the Rule but rather is described as the court's "inherent power, right and duty to take that action which is necessary to protect the integrity of the judicial process." *Rea*, 74 S.W.3d at 799–800.

### f. Procedure to Compel Answers to Interrogatories

A question exists as to whether the Missouri Rules of Civil Procedure provide a mechanism to compel answers to interrogatories over objections. Unlike Federal Rule of Civil Procedure 37(a), there is no provision generally authorizing a motion for an order compelling discovery in the Missouri Rules of Civil Procedure. Instead, Rule 57.01(e), which deals with discovery by interrogatories, authorizes a party seeking answers to interrogatories to "move for an order under Rule 61.01(b) with respect to any objection to or other failure to answer an interrogatory." Rule 61.01(b), however, does not authorize an order to compel answers to interrogatories over objection, but merely allows for imposition of sanctions "upon motion and reasonable notice." *Cf.* Rule 61.01(d) (authorizes motion for order to compel compliance with requests to produce); Rule 61.01(g) (authorizes motion for order to compel answer to deposition questions). Rule 61.01(b) seems to lack the mechanism to compel answers to interrogatories over objections that are anticipated under Rule 57.01(e).

It appears, therefore, that a party seeking discovery is only authorized to move that sanctions be imposed for the improper objection to interrogatories. Although, in the past, the party seeking discovery may have been able to move for an order compelling answers to the interrogatories over objection, arguing that such an order was "just" and therefore implicitly authorized under Rule 61.01(b), the viability of such an argument is now questionable under the holding in *Fuller v. Padley*, 628 S.W.2d 719, 722 (Mo. App. W.D. 1982) (*see*

Comment 2.e, Other "Just" Sanctions, *supra*). Moreover, the court in *Russo v. Webb*, 674 S.W.2d 695, 697 (Mo. App. S.D. 1984), held that Rule 61.01(b) does not require a motion or order compelling answers to interrogatories before the imposition of sanctions for failure to answer interrogatories.

### 3. Failure to Answer Request for Admissions

#### a. Matter Taken as Admitted

If a party fails to respond to a request for admission of the genuineness of any relevant document or the truth of any relevant or material matter made under Rule 59.01, Rule 61.01(c) requires that the genuineness of that document or the truth of that matter be taken as admitted. *Cf.* Rule 61.01(c) and Rule 59.01(a) *with* § 510.060.3, RSMo 2000 (only order imposing costs allowed).

If the matters that are deemed admitted constitute the ultimate issue in the litigation or establish the requesting party's entire case, the court may enter a directed verdict or default judgment against the nonresponding party. *See Linde v. Kilbourne*, 543 S.W.2d 543, 545-47 (Mo. App. W.D. 1976); *Scott v. Twin City State Bank*, 537 S.W.2d 641, 642-43 (Mo. App. W.D. 1976). *But cf. Pickens v. Equitable Life Assurance Soc'y of United States*, 413 F.2d 1390, 1393–94 (5th Cir. 1969) (central facts cannot be established by failure to respond under prior Federal Rule of Civil Procedure 36(a)) *with* Federal Rule of Civil Procedure 36(a)); *City of Rome v. United States*, 450 F. Supp. 378, 383 (D.D.C. 1978), *aff'd*, 446 U.S. 156 (1980) (answer admitting or denying any "genuine issue for trial" required).

Although not expressly provided for in Rule 61.01(c), Missouri appellate courts have held that the trial court may permit a late answer to the requests for admissions absent bad faith or prejudice and thus avoid ruling that the relevant matters are admitted. *Coates v. United States Fid. & Guar. Co.*, 525 S.W.2d 654, 655 (Mo. App. E.D. 1975).

#### b. Imposition of Costs

The trial court can order the offending party to pay reasonable expenses, including attorney fees, to the prevailing

party for discovery disputes under Rule 61.01(d)(4), but the court cannot award attorney fees or sanctions for actions over which it did not preside. *Norber v. Marcotte*, 134 S.W.3d 651, 663–64 (Mo. App. E.D. 2004).

### 4. Failure to Produce Documents and Things, or to Permit Inspection

#### a. Order to Compel

Under Rule 61.01(d), the requesting party may move for an order to compel compliance with the request to produce. If the motion is granted after hearing, the court shall require the nonresponding party to pay the expenses of obtaining that order. Counsel should note that this recovery-of-costs provision is more stringent than the provisions for costs under Rule 61.01(c); this order may be imposed against the party, the attorney who advises such conduct, or both. In addition, the nonresponding party or that party's attorney may escape imposition of costs only if the opposition to the motion was "substantially justified" or the award of expenses is otherwise unjustified. Rule 61.01(d)(4).

#### b. Enumerated Sanctions

Numerous cases illustrate the trial court's authority to enter default judgment against a defendant for failure to comply with an order to produce documents. *See, e.g., Zerjav v. Schneider*, 998 S.W.2d 44 (Mo. App. E.D. 1999) (failure to produce documents to which no objection had been made); *Sagehorn v. Phillips Petroleum Co.*, 648 S.W.2d 647 (Mo. App. E.D. 1983); *McKay v. Am. Family Mut. Ins. Co.*, 633 S.W.2d 298 (Mo. App. E.D. 1982).

The trial court may dismiss a plaintiff's suit as a sanction for the plaintiff's failure to comply with a prior sanction imposing costs as a result of the plaintiff's failure to answer interrogatories or to produce documents. *Jacobs v. Corley*, 793 S.W.2d 512 (Mo. App. E.D. 1990); *Jones v. Eagan*, 715 S.W.2d 596 (Mo. App. E.D. 1986).

The exclusion of documents is a proper sanction for a party's failure to produce such documents in response to a request for production of documents. *Honey v. Barnes Hosp.*, 708 S.W.2d

686, 698 (Mo. App. E.D. 1986); *see also Simpson ex rel. Simpson v. Revco Drug Ctrs. of Mo., Inc.*, 702 S.W.2d 482, 488 (Mo. App. W.D. 1985) (sanctions for failure to produce documents in response to a request for production include allowing the party seeking discovery to advise the jury of such lack of cooperation in closing argument and striking affirmative defenses).

When the trial court strikes the defendants' answer as a discovery sanction under Rule 61.01(d)(2) and subsequently enters judgment against them, the defendants cannot invoke Rule 74.05 to set aside that judgment because it is not an ordinary default. *DuPont v. Bluestein*, 994 S.W.2d 96, 97 (Mo. App. S.D. 1999). The judgment entered on a Rule 61.01(d)(2) sanction striking the defendants' answer constitutes a judgment upon trial by the court and not a default judgment because an answer was filed. *Id.* at 97.

When the plaintiff in a wrongful death case has knowledge of fraud in discovery compliance but settles the suit, the plaintiff cannot later bring a separate cause of action for damages for the discovery violation. *Phipps v. Union Elec. Co.*, 25 S.W.3d 679, 681 (Mo. App. E.D. 2000). Rule 61.01(d)(4) affords recovery for parties damaged by another's failure to produce documents, and it allows for complete relief when the fraud is discovered while the case is pending. *Phipps,* 25 S.W.3d at 682. It is unclear whether it offers exclusive protection for fraud in the discovery process that is not discovered or reasonably discoverable during litigation. *Id.*; *but see Roth v. La Societe Anonyme Turbomeca Fr.*, 120 S.W.3d 764, 775–76 (Mo. App. W.D. 2003).

The *Black v. Adrian*, 80 S.W.3d 909 (Mo. App. S.D. 2002), court held that the trial court was within its discretion to deny a request for sanctions for the defendants' failure to produce in discovery certain documents that had been recorded in Barry County and were available to the plaintiffs as public records.

In *Vasseghi v. McNutt*, 811 S.W.2d 453 (Mo. App. W.D. 1991), the plaintiff automobile driver waived an objection to admission of a diagram of the accident scene drawn by the defendant automobile driver, even though the diagram and notes regarding the diagram were not disclosed during pretrial discovery.

In *Jacobs*, 793 S.W.2d 512, the court held that the trial court properly struck the plaintiff's pleadings and dismissed his petition for failure to produce tax returns when:

- the plaintiff did not produce tax returns by the date that the case was set for trial;
- the plaintiff failed to comply with a court order to produce returns;
- the plaintiff filed a certificate in court stating that he had fully complied with the order to produce tax returns when he had not produced returns; and
- the evidence supported a conclusion that the plaintiff was "lying to the Court."

*Jacobs*, 793 S.W.2d at 515.

A judge properly struck the defendant's pleadings for failure to produce documents, even though the defendant filed an affidavit claiming that certain documents were not in existence, when failure to produce requested documents was not an isolated incident but was only part of a continuous effort to evade all discovery. *Restorative Servs., Inc. v. Prof'l Care Ctrs., Inc.*, 793 S.W.2d 141 (Mo. App. E.D. 1990).

The award of attorney fees for opposition to production of documents during discovery is a matter within the trial court's discretion and will be upheld absent a showing of abuse of discretion. *Kenny's Tile & Floor Covering, Inc. v. Curry*, 681 S.W.2d 461, 466 (Mo. App. W.D. 1984). A request to "produce," however, does not require that the respondent turn over or give up the items requested; a party properly responds to such a request and avoids sanctions by bringing forward or offering the items for inspection. *State ex rel. State Farm Mut. Auto. Ins. Co. v. Rickhoff*, 509 S.W.2d 485, 487 (Mo. App. E.D. 1974); *State ex rel. Crawford v. Moody*, 477 S.W.2d 438, 439–40 (Mo. App. S.D. 1972).

In *Crimmins v. Crimmins*, 121 S.W.3d 559, 560–61 (Mo. App. E.D. 2003), the appellate court found that the trial court did not abuse its discretion by:

- striking the husband's pleadings;
- not allowing him to present evidence or cross-examine witnesses; and
- entering a default judgment against the husband

when he had repeatedly failed to produce documents, was jailed in contempt, and had destroyed documents that the wife sought to discover.

In *Stidham v. Stidham*, 136 S.W.3d 74, 82–84 (Mo. App. W.D. 2004), the trial court did not abuse its discretion in granting a discovery sanction of $1,500 for attorney fees for the defendant husband's failure to produce requested documents until the day of trial, and the court did not err in refusing to allow more fees because the award adequately remedied the actual expenses caused by the discovery abuse.

In *Zimmer v. Fisher*, 171 S.W.3d 76, 77–80 (Mo. App. E.D. 2005), a sanction of default judgment entered at trial was upheld when the court found that the noncompliant defendants were on notice of the possibility of sanctions, even though an earlier default judgment entered before trial was vacated.

*See also McManemin v. McMillin*, 157 S.W.3d 304 (Mo. App. S.D. 2005) (sanctions upheld for repeated failure to produce documents in discovery); *Scott v. LeClercq*, 136 S.W.3d 183 (Mo. App. W.D. 2004) (striking defendant's answer not an abuse of discretion because of defendant's continued refusal to provide discovery, including failure to produce documents); *cf. Cosby v. Cosby*, 202 S.W.3d 717, 722 (Mo. App. E.D. 2006) (court abused its discretion in granting sanctions when document production was late and incomplete, but party had "at least substantially complied with the trial court's orders").

### 5. Failure to Appear for Physical Examination

Dismissal of a personal injury cause of action with prejudice is an appropriate sanction when the plaintiff fails to obey a court order requiring the plaintiff to submit to a physical examination without the presence of an attorney and the order warns the plaintiff that failure to comply with the order will result in

dismissal of the case with prejudice. *Jensen v. Wallace*, 671 S.W.2d 331, 333 (Mo. App. W.D. 1984).

### 6. Failure to Attend Own Deposition

Sanctions for failure to attend one's own deposition, such as an order striking pleadings or entering a default judgment, could be made under Rule 61.01(b)(1) even though a necessary party-plaintiff was misdescribed and the correction was not made until after the sanction was imposed and default entered. *Sher v. Chand*, 889 S.W.2d 79, 81–82 (Mo. App. E.D. 1994); *Sonderman v. Maret*, 694 S.W.2d 864, 866 (Mo. App. E.D. 1985). Expenses supporting an award of $2,500 as a sanction for failure to produce the defendant and witness for depositions were not proven in *Ballesteros v. Johnson*, 812 S.W.2d 217 (Mo. App. E.D. 1991).

Although default judgment is a drastic sanction and should be invoked sparingly, it is authorized when a party repeatedly refuses to appear for the party's deposition. *Kingsley v. Kingsley*, 716 S.W.2d 257, 260 (Mo. banc 1986) (default judgment in such circumstances is not a denial of due process). It is the deponent's burden to secure a stay, continuance, or excuse from attendance of the deponent's deposition or run the risk of being sanctioned, and a motion to quash by itself will not result in a continuance or a stay. *Id.*

A default judgment is a harsh sanction and should not be invoked except when a party's actions show contumacious and deliberate disregard for the authority of the court. The trial court's discretion in entering a default judgment against a party for failure to comply with the discovery order will not be disturbed absent evidence of abuse of discretion. *Kohn ex rel. Curtis v. Kohn*, 672 S.W.2d 174, 176 (Mo. App. E.D. 1984); *see also* Comment 1.d, Generally—Limits on Court's Discretion, *supra*. The trial court's refusal to allow a party to explain the party's absence for a scheduled deposition is unjust and warrants remand for determination of whether the party had good and sufficient reason for failure to appear at the deposition. *Kohn*, 672 S.W.2d at 176. In lieu of the entry of default, the trial court may also deny the right to cross-examine witnesses or to present a defense when a party fails to attend its own deposition. *Id.*

Dismissal of a limited partnership's cause of action for failure of the general partner to appear for his deposition was affirmed in

*Great Western Trading Co. v. Mercantile Trust Co. National Ass'n*, 661 S.W.2d 40, 43-44 (Mo. App. E.D. 1983) (refusal to comply showed disregard for the trial court's authority; notice of deposition to general partner constituted notice to the entire limited partnership and, therefore, nonparty limited partners could not claim that they had failed to be properly notified under Rule 61.01(f)).

Entry of a default judgment against a nonresident defendant may constitute an abuse of discretion by the trial court if the defendant lives so far away that travel to attend the deposition would constitute an undue physical or financial hardship to the nonresident defendant, especially if the nonresident defendant does not plan to attend the trial. *State ex rel. Charterbank Springfield, N.A. v. Donegan*, 658 S.W.2d 919, 923 (Mo. App. S.D. 1983); *State ex rel. Von Pein v. Clark*, 526 S.W.2d 383, 387 (Mo. App. W.D. 1975). If a defendant is planning to attend the trial, however, it is proper to require the defendant to attend his or her deposition a short time before trial or risk entry of a default judgment under Rule 61.01(f). *Donegan*, 658 S.W.2d at 923–24; *Clark*, 526 S.W.2d at 387. If the defendant is asserting a counterclaim, however, it is more likely that entry of judgment against the defendant on the counterclaim for failure to attend his or her own deposition is proper. *Donegan*, 658 S.W.2d at 923.

When a party offered no evidence of excuse or justification, the sanction of striking that party's answer was an appropriate remedy for failing to appear for the party's own deposition. *Union State Bank of Clinton v. Dolan*, 718 S.W.2d 522, 528 (Mo. App. W.D. 1986). The trial court may issue a sanction prohibiting a party from presenting any evidence at trial when the party disobeys a court order directing his or her attendance at the party's deposition. *Buck, Bohm & Stein, P.C. v. Duff*, 738 S.W.2d 874, 877 (Mo. App. W.D. 1987).

In *Dobbs v. Dobbs Tire & Auto Centers, Inc.*, 969 S.W.2d 894 (Mo. App. E.D. 1998), the Eastern District Court of Appeals affirmed the dismissal of the defendant corporation's counterclaim because it failed to attend a deposition ordered by the trial court. The court found no abuse of discretion when there was a pattern of disregard for the rules of discovery. *Dobbs*, 969 S.W.2d at 899. The defendant argued that it was unable to provide a corporate representative to attend the deposition because all of the representatives had asserted their Fifth

Amendment privilege against self-incrimination. *Id.* at 898. Nevertheless, a court may dismiss a counterclaim when a party invokes the privilege against self-incrimination. *Id.* at 899.

The court upheld sanctions against a father in a child support modification case for failing to produce requested records and to appear at his own deposition; the sanctions included striking the father's pleadings and prohibiting him from introducing evidence or objecting to the mother's evidence regarding the motion for modification. *Eidson ex rel. Webster v. Eidson*, 7 S.W.3d 495, 499–500 (Mo. App. W.D. 1999).

In *Fredco Realty, Inc. v. Jones*, 906 S.W.2d 818, 820–21 (Mo. App. E.D. 1995), the court upheld a default judgment for the defendant's repeated failures to appear for scheduled court appearances and depositions or to show good cause for the defendant's conduct. The progress of the case had been impaired by:

- the defendant's numerous extensions;
- the defendant's filing of a bankruptcy petition that the defendant later dismissed;
- the defendant's incarceration in a federal penitentiary; and
- a death in the defendant's attorney's family.

*Jones*, 906 S.W.2d at 820–21. But ultimately the defendant's failure to appear and cooperate with a deposition or to produce documents in connection with that deposition supported the appellate court's decision that the exercise of discretion to impose sanctions was not unjust. *Id.*

In *P.R. v. R.S.*, 950 S.W.2d 255, 257 (Mo. App. E.D. 1997), the trial court dismissed an action with prejudice as a sanction for the plaintiff's failure to comply with a prior court order regarding a deposition. That order was held on appeal to be a nullity because the plaintiff had already voluntarily dismissed her case, but the plaintiff remained liable to pay $5,000 in costs under a prior court order. *P.R.*, 950 S.W.2d at 256–57.

In *Brewer v. Republic Drywall*, 145 S.W.3d 506 (Mo. App. S.D. 2004), on appeal from a workers' compensation administrative

hearing, the court held that the workers' compensation carrier's failure to appear for a deposition following the administrative law judge's order justified striking the carrier's affirmative defense.

Rule 61.01 does not allow the trial court to sanction a party for failing to produce for deposition a nonresident, nonretained expert who is domiciled outside of Missouri, has not consented to the jurisdiction of Missouri courts, and conducts no business in Missouri. *State ex rel. Common v. Darnold*, 120 S.W.3d 788 (Mo. App. S.D. 2003) (court's order exceeded its jurisdiction).

### 7. Failure to Answer Questions at Deposition

#### a. Order to Compel

A court may order a deponent to answer under Rule 61.01(g), but further sanctions can only be imposed upon motion and reasonable notice. *State ex rel. Mo. Highway & Transp. Comm'n v. Anderson*, 759 S.W.2d 102, 107 (Mo. App. S.D. 1988).

#### b. Payment of Costs

The trial court may deny the plaintiff's motion for payment of expenses of proving the reasonableness of bills at issue. *Chong Kee Min v. Wun Sik Hong*, 802 S.W.2d 171 (Mo. App. S.D. 1991).

The trial court may also deny a motion for expenses in compelling answers to a deposition when the motion for expenses contains no competent evidence as to the expenses incurred. *Johnson v. St. Mary's Health Ctr.*, 738 S.W.2d 534, 536 (Mo. App. E.D. 1987).

The trial court can properly award a former wife attorney fees as a sanction for her former husband's failure to respond to discovery requests in an action to modify child support. *Leahy v. Leahy*, 858 S.W.2d 221 (Mo. banc 1993).

#### c. Sanctions for Failure to Comply With Order

A discovery order that elaborates on the conduct required for compliance with such order but speaks of the consequences of noncompliance with the order in vague terms is unenforceable. *Hammons v. Hammons*, 680 S.W.2d 409, 411 (Mo. App. E.D. 1984).

Failure to appear for a second scheduled deposition, without explanation or excuse, amounts to contumacious conduct warranting a default judgment as a sanction. *Smithey v. Davis*, 752 S.W.2d 486, 488 (Mo. App. S.D. 1988).

In *Scott v. LeClercq*, 136 S.W.3d 183 (Mo. App. W.D. 2004), sanctions were upheld when the defendant's continued refusal to provide discovery included failure to give answers in a deposition and leaving his deposition early, even after several warnings and the setting aside of the trial court's first order striking pleadings.

### d. Duty to Supplement Depositions

The duty to supplement depositions does not apply to a change in an expert's opinion during trial. *Matthews v. City of Farmington*, 828 S.W.2d 693 (Mo. App. E.D. 1992).

Exclusion of certain expert testimony as a discovery sanction is error when the question is not clearly asked during deposition and the court found the testimony not to be a surprise. *Sherar v. Zipper*, 98 S.W.3d 628 (Mo. App. W.D. 2003).