

Working Group 1 Sanctions Drafting Team Report: Categorical Analysis and Recommendation for Structuring of Publication

The Sedona Conference

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WORKING GROUP 1 SANCTIONS DRAFTING TEAM REPORT FOR 2023 ANNUAL MEETING

Categorical Analysis and Recommendation for Structuring of Publication

ANALYSIS: Categories of Discovery Sanctions and Associated Rules / Statutes / Common Law

OBJECTIVES OF DISCOVERY SANCTIONS – BY CATEGORY	ASSOCIATED FEDERAL RULES / STATUTES / COMMON LAW
Enforce Compliance and Punish Non-Compliance with a Court Order	Rule 16(f)(1)(C); Rule 37(b)(2); Rule 45(g); Inherent Authority;
Enforce Compliance with Discovery Rules, including Proper Certification*	Rule 16(f); Rule 26(e); Rule 26(g)(3); Rule 37(c); Rule 37(d); Rule 37(f)
Ensure Parties Engage in Good Faith Discovery and Proper Motion Practice	Rule 37(a)(5)
Punish Egregious Discovery Misconduct and Vexatious Discovery Practices	28 U.S.C. § 1927; Rule 37(a)(5) (<i>secondarily</i>); Inherent Authority
Prevent Over-Preservation of ESI and Prevent, Cure Loss, or Punish Destruction of Relevant ESI	Rule 37(e)
Prevent, Cure Loss, or Punish Destruction of Relevant Non-Electronic Evidence or Fabrication of Evidence	Common Law; Inherent Authority

* Rule 11(d) expressly excludes discovery disclosures, requests, responses, objections, and motions under Rules 26 through 37, and accordingly is omitted from this list.

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GUIDELINES: Drafting Team Recommendation for Top-Level Structure of Publication

Guideline 1: Discovery sanctions are designed to cure prejudice, remediate harm, and provide both specific and general deterrence of discovery misconduct, as appropriate.

- Discuss why the sanctions rules exist.
- Discuss why the sanctions rules were amended.

Guideline 2: The failure to effectively employ discovery sanctions, where appropriate, impedes the operation of Rule 1 (promoting the just, speedy, and inexpensive determination of every action and proceeding), emboldens those who would improperly manipulate the discovery process, and ultimately diminishes the rule of law.

- Discuss challenges to measuring the effectiveness of sanctions, including the lack of quantifiable data.
- Discuss the barriers to the effective use of sanctions to achieve the goals of Rule 1.
- Discuss ways in which sanctions provisions could be used more effectively.
- Discuss reasons why sanctions provisions may not be effectively used in some cases.
 - Wide discretion afforded to judges in applying discovery sanctions rules and the level of severity of sanctions that is appropriate.
 - Inconsistent interpretation of discovery sanctions rules across circuits, among district courts in the same circuit, and among judges in the same district court.
- Discuss consequences of failing to employ sanctions rules effectively (e.g., unfairness in the process, inefficiency of case management, etc.).

Guideline 3: Discovery sanctions should be effectively employed to enforce compliance with the self-executing Federal Rules of Civil Procedure and to resolve any failure of a party to comply.

- Address Rule 16(f); Rule 26(e); Rule 26(g)(3); Rule 37(c); Rule 37(d); Rule 37(f).
- Discuss importance of sanctions as a means of efficient management of the discovery process.
- Discuss examples of conduct subject to sanctions for violation of these provisions.
- Discuss applicable rules and types of sanctions that would be appropriate for these violations.

Guideline 4: Discovery sanctions should be effectively employed to enforce compliance with a court discovery order and to punish any failure of a party to comply.

- Discuss standard under Rule 37(b), including caselaw related to definition of “order.”
- Discuss examples of conduct subject to sanctions for violation of these provisions.
- Discuss types of sanctions that would be appropriate for these violations.

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Guideline 5: Sanctions should be effectively employed to remediate harm arising from and to deter abuse of the discovery process resulting in formal motion practice that lacks substantial justification.

- Discuss substantive provisions of Rule 37(a)(5), including mandatory nature of sanctions where standard is met and no exception applies.
 - Discuss ways in which courts and parties more effectively use Rule 37(a)(5)(C), where a motion is granted in part and denied in part, to advance this guideline.
- Discuss award of expenses under the rule, including inconsistent caselaw on what fees and expenses may be awarded.
- Discuss anecdotal evidence related to the effectiveness of this provision.

Guideline 6: The Federal Rules of Civil Procedure—along with the common law and state law equivalents—should promote the timely preservation of relevant electronically stored information, provide for remediation to cure any prejudice caused by the loss of such information, and sanction any failure to preserve with the intent to deprive another party of the information.

- Discuss Rule 37(e)(1) requirements, including any inconsistency in interpretation by courts, concerns with the rule as written or applied in achieving the goals of the rule, and examples of conduct subject to sanctions.
 - Discuss the standard for establishing prejudice.
 - Discuss which party should bear the burden of proof for prejudice, and whether a burden-shifting approach is appropriate.
 - Discuss the types of sanctions that may be ordered under Rule 37(e)(1).
- Discuss Rule 37(e)(2) requirements, including any inconsistency in interpretation by courts, concerns with the rule as written or applied in achieving the goals of the rule, and examples of conduct subject to sanctions.
 - Discuss the effectiveness of the adverse inference and whether it is an appropriate sanction under both (e)(1) and (e)(2).
 - Discuss the types of sanctions that may be ordered under Rule 37(e)(2).
 - Discuss what is the standard of proof for establishing intent to deprive.
- Discuss how continued reliance on pre-2015 caselaw by some courts and practitioners undermines the goals of the 2015 Amendments to Rule 37(e) and Rule 1.
- Discuss whether evidence of spoliation should be submitted to the jury, including whether the jury should be charged with making a finding of intent to deprive.

Guideline 7: Sanctions should be effectively employed to prevent, cure, and where appropriate, punish vexatious discovery conduct or other bad faith conduct when the Federal Rules of Civil Procedure are not “up to the task.”

- Discuss the court’s inherent authority to sanction where no specific rule is applicable or sufficient, including with respect to the loss, destruction, or fabrication or alteration of evidence.

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- Discuss application of the court's inherent authority and relevant caselaw to address the destruction or loss of non-electronic evidence, which is beyond the scope of Rule 37(e).
- Discuss whether inherent authority is being effectively used by the courts to deter and timely punish vexatious discovery conduct.
- Discuss courts' application of 28 U.S.C. § 1927 for imposition of sanctions, where appropriate.

DISCUSSION

The first two guidelines (#1-2) are generalized statements on the purpose of sanctions and the issues that arise in the absence of effective application of a sanctions regime. There would be commentary below each guideline addressing the issues related to the guideline. We'd have to write these mostly from scratch.

The next five guidelines (#3-7) address the six categories of discovery sanctions laid out at the start of this submission.

Guideline 6 covers Rule 37(e) and is simply more complex than the others. This topic encompassed much of the Brainstorming Group and then the Drafting Team's work and needs to conform with The Sedona Principles, Third Edition, Principle 14.

In standard Sedona WG1 style, there will be detailed Comments under each Guideline. In addition to the bullet points addressed above, the Comments would address the following:

- Current rules / statutes / common law (including Inherent Authority) that apply to that category and how those rules are currently interpreted / used. We can take much of the currently written materials for these Comments.
- Issues we have identified in how the rules are written or applied that may be causing splits amongst the circuits (if not within districts) and unequal or disparate application.
- Any other concerns about the rule / statutes / common law as written or applied.
- Recommendations, if any, on changes to the text of a rule or statute.
- Recommendations, if any, on a common interpretation of existing text that should be applied in the case law across circuits.
- Recommendations on the position of the adverse inference in Rule 37(e)(2).
- The "Incompetent Spoliator" problem.
- Dealing with a spoliating employee (does *respondeat superior* apply) or agent, and application of Rule 37(e) and Inherent Authority to that problem.

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RULES

Rule 16. Pretrial Conferences; Scheduling; Management

(f) **SANCTIONS.**

- (1) In General. On motion or on its own, the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)–(vii), if a party or its attorney:
 - (C) fails to obey a scheduling or other pretrial order.

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

(b) **FAILURE TO COMPLY WITH A COURT ORDER.**

- (2) Sanctions Sought in the District Where the Action Is Pending.
 - (A) For Not Obeying a Discovery Order. If a party or a party's officer, director, or managing agent—or a witness designated under Rule 30(b)(6) or 31(a)(4)—fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:
 - (i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;
 - (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
 - (iii) striking pleadings in whole or in part;
 - (iv) staying further proceedings until the order is obeyed;
 - (v) dismissing the action or proceeding in whole or in part;
 - (vi) rendering a default judgment against the disobedient party; or
 - (vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.
 - (B) For Not Producing a Person for Examination. If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for examination, the court may

issue any of the orders listed in Rule 37(b)(2)(A)(i)–(vi), unless the disobedient party shows that it cannot produce the other person.

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

Rule 45. Subpoena

- (g) CONTEMPT. The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

Rule 16. Pretrial Conferences; Scheduling; Management

- (f) SANCTIONS.
 - (1) In General. On motion or on its own, the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)–(vii), if a party or its attorney:
 - (A) fails to appear at a scheduling or other pretrial conference;
 - (B) is substantially unprepared to participate—or does not participate in good faith—in the conference; or
 - (C) fails to obey a scheduling or other pretrial order.
 - (2) Imposing Fees and Costs. Instead of or in addition to any other sanction, the court must order the party, its attorney, or both to pay the reasonable expenses—including attorney’s fees—incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust.

Rule 26. Duty to Disclose; General Provisions Governing Discovery

- (e) SUPPLEMENTING DISCLOSURES AND RESPONSES.
 - (1) In General. A party who has made a disclosure under Rule 26(a)—or who has responded to an interrogatory, request for production, or request for admission—must supplement or correct its disclosure or response:

- (A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or
 - (B) as ordered by the court.
- (2) **Expert Witness.** For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

Rule 26. Duty to Disclose; General Provisions Governing Discovery

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

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

- (c) **FAILURE TO DISCLOSE, TO SUPPLEMENT AN EARLIER RESPONSE, OR TO ADMIT.**
- (1) **Failure to Disclose or Supplement.** If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:
 - (A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;
 - (B) may inform the jury of the party's failure; and
 - (C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)–(vi).
- (2) **Failure to Admit.** If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the

requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court must so order unless:

- (A) the request was held objectionable under Rule 36(a);
- (B) the admission sought was of no substantial importance;
- (C) the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or
- (D) there was other good reason for the failure to admit.

**Rule 37. Failure to Make Disclosures or to Cooperate in Discovery;
Sanctions**

**(d) PARTY'S FAILURE TO ATTEND ITS OWN DEPOSITION, SERVE ANSWERS
TO INTERROGATORIES, OR RESPOND TO A REQUEST FOR INSPECTION.**

(1) In General.

- (A) Motion; Grounds for Sanctions. The court where the action is pending may, on motion, order sanctions if:
 - (i) a party or a party's officer, director, or managing agent—or a person designated under Rule 30(b)(6) or 31(a)(4)—fails, after being served with proper notice, to appear for that person's deposition; or
 - (ii) a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response.
- (B) Certification. A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action.

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

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

**Rule 37. Failure to Make Disclosures or to Cooperate in Discovery;
Sanctions**

- (f) **FAILURE TO PARTICIPATE IN FRAMING A DISCOVERY PLAN.** If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

**Rule 37. Failure to Make Disclosures or to Cooperate in Discovery;
Sanctions**

- (a) **MOTION FOR AN ORDER COMPELLING DISCLOSURE OR DISCOVERY.**
- (5) **Payment of Expenses; Protective Orders.**
- (A) **If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing).** If the motion is granted—or if the disclosure or requested discovery is provided after the motion was filed—the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if:
- (i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;
 - (ii) the opposing party's nondisclosure, response, or objection was substantially justified; or
 - (iii) other circumstances make an award of expenses unjust.
- (B) **If the Motion Is Denied.** If the motion is denied, the court may issue any protective order authorized under Rule 26(c) and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.
- (C) **If the Motion Is Granted in Part and Denied in Part.** If the motion is granted in part and denied in part, the court may issue any protective order

authorized under Rule 26(c) and may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion.

28 U.S. Code § 1927 - Counsel's liability for excessive costs

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery;

(a) MOTION FOR AN ORDER COMPELLING DISCLOSURE OR DISCOVERY.

(5) Payment of Expenses; Protective Orders.

- (A) If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing).** If the motion is granted—or if the disclosure or requested discovery is provided after the motion was filed—the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if:
 - (i)** the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;
 - (ii)** the opposing party's nondisclosure, response, or objection was substantially justified; or
 - (iii)** other circumstances make an award of expenses unjust.
- (B) If the Motion Is Denied.** If the motion is denied, the court may issue any protective order authorized under Rule 26(c) and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.
- (C) If the Motion Is Granted in Part and Denied in Part.** If the motion is granted in part and denied in part, the court may issue any protective order

authorized under Rule 26(c) and may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion.

**Rule 37. Failure to Make Disclosures or to Cooperate in Discovery;
Sanctions**

- (e) FAILURE TO PRESERVE ELECTRONICALLY STORED INFORMATION. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
 - (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
 - (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
 - (A) presume that the lost information was unfavorable to the party;
 - (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
 - (C) dismiss the action or enter a default judgment.