

# The Sedona Conference WG1 Discovery Sanctions Drafting Team Outline

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**THE SEDONA CONFERENCE**  
**WORKING GROUP 1– DRAFTING TEAM – SANCTIONS OUTLINE**

**CHARTER MANDATE**

The drafting team is tasked with developing a Sedona Conference commentary that: (i) evaluates whether current discovery sanctions rules are effective and makes recommendations to improve their effective use to achieve the intended objectives of sanctions rules; (ii) addresses the effectiveness of the 2015 amendments to Rule 37(e) to achieve deterrence and remediation for spoliation of electronically stored information (“ESI”); (iii) provides guidance regarding the type of conduct and degree of prejudice (if applicable) that courts have found warrant sanctions and recommends a national standard for addressing certain sanctions requirements, where possible; (iv) discusses factors the courts consider and suggests guidelines for determining whether to sanction a party, the attorney, or both; (v) provides recommendations related to the interplay of sanctions rules within the Federal Rules and the court’s inherent authority; and (vi) evaluates the degree to which the increased complexity of modern eDiscovery impacts the imposition of sanctions, including providing consensus recommendations (if possible) for changes in the Rules or guidance on this issue.

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## **I. BACKGROUND ON DISCOVERY SANCTIONS RULES, OBJECTIVES, AND CHALLENGES**

### **A. Previous Sedona Publications Addressing Discovery Sanctions.**

1. What Prior Sedona Publications Say About Sanctions
2. Gaps in Prior Sedona Publications About Sanctions that this Commentary will Address

### **B. The Importance of Discovery and the Role of Effective Sanctions.**

Discovery is a critical stage of a lawsuit because it affords parties the opportunity to exchange information related to the witnesses and evidence that will be presented in motions practice and at trial, and to make informed decisions related to litigation strategy and potential settlement discussions.

1. Determining the Facts
2. Gathering Evidence for Motions Practice and/or Trial
3. Evaluating the Strengths and Weaknesses of the Case
4. Informing Settlement Negotiations

Given the importance of discovery in the overall management of a case, discovery sanctions rules are designed to facilitate cooperation during discovery and to ensure that the discovery process is fair. More specifically, discovery sanctions rules accomplish these objectives primarily through the following means:

1. Deterring Discovery Misconduct
2. Punishing Discovery Misconduct
3. Remediating Harm Caused by Discovery Misconduct

Where a court uses discovery sanctions rules effectively to help manage the discovery process, there are measurable benefits to the parties and the court, both during the discovery process and throughout the lifecycle of the case.

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1. Facilitating the Objective of Rule 1 – to ensure “the just, speedy, and inexpensive determination of every action and proceeding”
2. Promoting Good-Faith Participation in the Discovery Process
3. Promoting Fairness in the Judicial Process
4. Protecting the Integrity of the Judicial Process

Determining whether, as a general matter, courts are effectively employing discovery sanctions provisions in real-life cases to accomplish the desired objectives of the sanctions rules is a challenging task.

1. No easily quantifiable metric to measure effectiveness of discovery sanctions; need to rely on anecdotal evidence
2. Inconsistent use of discovery sanctions rules by courts
3. Wide discretion in application of discovery sanctions rules by courts

#### **C. Overview of the Rules Governing Discovery Sanctions.**

1. Federal Rules of Civil Procedure

The Federal Rules include numerous provisions authorizing discovery sanctions, depending on the nature of the discovery misconduct, and the court may impose sanctions pursuant to any and all Rules that apply.

- Specifically, and as discussed in detail in this Commentary, certain provisions of Federal Rules 16, 26, and 37 provide for sanctions against a party and/or its attorney for various forms of discovery misconduct.
- Provide examples of discovery misconduct covered by the Federal Rules (e.g., failure to make initial disclosures, violating a court’s discovery order, spoliation of ESI).
- In some cases, a court will impose sanctions for discovery misconduct under more than one Federal Rule.
- Many of the Rules contain exceptions that would negate the imposition of sanctions where a party can show that its conduct was substantially justified or that other circumstances would make the award of sanctions unjust.

The Federal Rules governing discovery sanctions differ, not only in terms of the misconduct they govern, but also in the nature and severity of the sanctions that may be issued.

- Under some Federal Rules, violation results in mandatory sanctions, whereas other Rules provide the court with discretion on whether to impose sanctions.

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- Certain Federal Rules provide specific examples of sanctions that a court may issue (e.g., Rule 37(b)(2)), whereas other Rules provide the court with wide discretion on the type and severity of sanctions that may be imposed.
- Payment of reasonable expenses, including attorney's fees, is available as a sanction under most Rules.
- The most severe sanctions are reserved for spoliation of ESI under Rule 37(e)(2).

2. Equivalent State Rules, Federal District and State Court Local Rules, and Judges' Standing Orders

#### **D. Federal Courts' Inherent Authority**

1. Basis for Courts' Inherent Authority in the Common Law
2. Requirements for Invoking Inherent Authority
3. Sanctions Available under Courts' Inherent Authority
4. Modern Day Invocation of Courts' Inherent Authority

#### **E. Challenges Posed by Discovery Sanctions Rules.**

1. Uncertainty Regarding Discovery Sanction Rules

There is a lack of certainty and predictability related to the legal requirements for the imposition of discovery sanctions under the Rules, as well as the application of those Rules to the specific facts of a given case.

- a. Due to a lack of clear standard in the rules
  - b. Due to inconsistency among courts
  - c. Due to the exercise of judicial discretion
2. Difficulty navigating the interplay of discovery sanctions rules and other rules, guidelines, and authorities that govern attorney conduct
  3. Increased Complexity of Modern eDiscovery

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## **II. APPLICABLE DISCOVERY SANCTIONS RULES THROUGHOUT THE LIFECYCLE OF THE CASE**

### **Discovery Sanctions May Apply at Various Stages of the Lifecycle of a Case.**

Numerous Federal Rules, as well as a court's inherent authority, provide the court with a basis for imposing discovery sanctions when a party and/or its attorney engages in discovery misconduct. Figuring out which Rule or Rules apply, whether sanctions must or may be imposed, and what type of sanctions should be issued can be challenging.

This is particularly true because, in many cases, more than one Federal Rule may apply to the same discovery misconduct, leaving courts with wide discretion to determine how best to address a party's discovery failure. The availability of multiple bases for imposing sanctions may cause uncertainty among litigants as to what sanctions rules they will be subject to, how a court will apply those sanctions rules to the facts of their case, and what degree of sanctions the court will impose.

This Commentary is intended to provide clarity, where possible, on the requirement and effective use of various discovery sanctions rules and to offer best practices to help attorneys avoid the circumstances that give rise to sanctions. It is organized in a way that discusses sanctions rules as they apply throughout the stages of the lifecycle of a case, beginning with pre-complaint investigation and/or notice and ending with appeal from the final case resolution, whether that be trial or dispositive motion.

#### **A. Pre-Complaint Investigation and/or Notice of Potential Action**

1. Breach of the Duty of Preservation Leading to Spoliation of Evidence
2. Rule 37(e) – Requirements for Spoliation Sanctions
  - a. Requirements for Remedial Measures under Rule 37(e)(1)
  - b. Requirements for More Severe Sanctions under Rule 37(e)(2)
3. 2015 Amendments to Rule 37(e)

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- Substance of 2015 Amendments
- Purpose of 2015 Amendments
- Effectiveness of 2015 Amendments in Achieving Deterrence and Remediation for Spoliation of ESI, including continuing challenges such as:
  - Inconsistency among courts regarding what constitutes prejudice, including guidelines on the information necessary to demonstrate prejudice, and options available to courts when evidence regarding prejudice is unavailable;
  - Discretion courts possess to apportion the burden of proof and need for a consensus recommendation on a national standard;
  - Needed guidance on use of circumstantial evidence to prove intent to deprive;
  - Tools available under Rule 37(e)(1) to remedy harm from spoliation and whether remedies applied by courts under Rule 37(e)(1) are sufficient;
  - Lack of consistency among courts relating to the quantum of evidence (preponderance vs. clear and convincing) and need for a consensus recommendation on a national standard;
  - Effectiveness and appropriateness of submitting evidence of spoliation and the factual question of intent to the jury; and
  - Continued reliance by some courts and practitioners on pre-2015 amendment case law related to Rule 37(e), and guidance on how to eliminate misapplication of the law.
  - Consider adverse inference question (i.e. evidence of specific intent to deprive)
  - Consider problem of counsel failing to identify the correct sanctions provision (whether Rule 37(e) or other rules) and potentially confusing the analysis / orders

#### 4. Examples of Conduct that May Be Subject to Rule 37(e) Sanctions

##### **Rule 37(e)(1)**

- Inadvertent spoliation due to routine destruction policy or other routine procedure or software despite reasonable anticipation of litigation, after a specific or implied request to preserve, or after litigation commenced.
- Inadvertent spoliation after receipt of litigation hold letter.
- Spoliation in contravention of party's retention policy.

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- Failure to preserve email by migrating to a new email system after litigation was anticipated.
- Delayed issuance of litigation hold.
- Failure to issue, or issuing an inadequate, litigation hold.

### **Rule 37(e)(2)**

- Active deletion after notice that the information or device was sought for preservation or discovery.
- Failure to preserve despite court order to do so.
- Giving instructions to delete relevant evidence after litigation hold issued
- Alteration of evidence.
- “Double deletion” of email after litigation and production commenced.
- Affirmative use of technology to destroy data and/or use of technology to remove evidence of deletion of documents.
- Failure to preserve in combination with obstructive discovery tactics.

#### 5. Types of Sanctions that May Be Ordered under Rule 37(e)

- Additional discovery such as forensic examination of storage media, depositions related to the spoliation with costs borne by the spoliating party, and evidentiary hearings.
- Ordering spoliating party to pay costs of recovering spoliated information.
- Spoliating party waives objections to authenticity and business record status for evidence recovered from third parties.
- Courts sitting as fact finder will consider the spoliating conduct or give little weight to testimony of spoliating party.
- Evidence and argument preclusion.
- Fees and costs.
- Monetary sanctions.
- Presentation of evidence of spoliation at trial.
- Courts occasionally submit the question of the fact of spoliation or intent to deprive to the jury.
- Permissive adverse inference.
- Mandatory adverse inference (rarely imposed).
- Terminating sanctions (rarely imposed).

### **B. Pleadings.**

1. Rule 11 Sanctions
2. Pretrial Conferences and Case Management



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- Importance of meet and confer type discovery conferences to facilitate the discovery process
  - Requirements of Rule 16(a) Pretrial Conference
  - Requirements of Rule 26(f) Discovery Conference
3. Sanctions under Rule 16(f) related to Pretrial Conference; Scheduling; Management
- Requirements of Rule 16(f) Sanctions
    - Sanctions provision for violation of Rule 16(a)
    - Court must assess reasonable expenses, including attorney fees for violative conduct unless (1) noncompliance with the Rule was substantially justified; or (2) other circumstances make an award of expenses unjust.
  - Purpose of Rule 16(f) Sanctions: Intended to encourage judicial management and punish parties and attorneys for conduct that causes “unreasonable delays or otherwise interferes with the expeditious management of trial preparation.”
  - Examples of conduct that may be subject to Rule 16(f) sanctions:
    - Party fails to appear at a scheduling or other pretrial conference.
    - Party is substantially unprepared to participate—or does not participate in good faith—in the conference.
    - Party fails to obey a scheduling or other pretrial order.
  - Types of sanctions that may be ordered under Rule 16(f)
    - Left to court discretion
    - References sanctions authorized by Rule 37(b)(2)(A)(ii)-(vii)
    - Court must order party, its attorney, or both to pay reasonable expenses, including attorney fees, incurred

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because of the any noncompliance that was not  
substantially justified unless award would be unjust

4. Sanctions under Rule 37(f) related to Failure to Participate in Framing a Discovery Plan
  - Requirements of Rule 37(f) Sanctions
    - Sanctions provision for violation of Rule 26(f)
  - Purpose of Rule 37(f) Sanctions
    - Promote cooperation to aid the parties and court in developing a discovery plan that furthers the objectives of Rule 1
    - Deter “hide the ball” behavior in discovery at the outset of discovery
  - Examples of conduct that may be subject to Rule 37(f) sanctions
    - Where a party or attorney fails to meet and confer or to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f).
    - Where a party or attorney does not have a reasonable understanding of ESI and the law related to production of ESI.
  - Types of sanctions that may be ordered under Rule 37(f)
    - Court may order the party or attorney who violates Rule 26(f) to pay reasonable expenses, including attorney fees, caused by the failure.

**C. Discovery – Initial Disclosures under Rule 26(a)(1)**

1. Failure to Disclose, Supplement or Admit under Rule 37(c)

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- Requirements for sanctions under Rule 37(c)
- Purpose of Rule 37(c) sanctions
  - Deter failures to comply with Rules 26(a) and (e) and Rule 36
  - Facilitating the discovery process – parties’ need for timely, complete, and ongoing disclosure of relevant evidence
  - Prevent prejudice to the opposing party due to late disclosures or failure to correct or supplement disclosures
- Examples of conduct that that may be subject to Rule 37(c) sanctions
  - Party fails to make initial disclosures under Rule 26(a) without substantial justification and where failure is not harmless
  - Party fails to supplement or correct initial disclosures under Rule 26(e) without substantial justification and where failure is not harmless
    1. Requirements of supplemental disclosure under Rule 26(e) related to initial disclosures or responses to interrogatories, requests for production, or requests for admission
      - a. Applies when party learns that prior submission is incorrect or incomplete
      - b. Must be made in a timely manner
      - c. Applies only where the other parties are not aware of the new or

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## corrective information

### 2. Requirements of supplemental disclosure under Rule 26(e) related to expert witnesses

- Party seeks to conceal (by not disclosing or failing to supplement) evidence that is harmful to its case
- Party fails to admit what is requested under Rule 36 and the moving party later proves a document to be genuine of a fact to be true, unless:
  - The request was objectionable under Rule 36(a);
  - The requested admission was not of “substantial importance”;
  - There was “a reasonable ground to believe” that the party failing to admit might prevail on the matter; or
  - There was “other good reason” for the failure to admit
- Types of sanctions that may be ordered under Rule 37(c)
  - Self-executing sanction preventing a party from using any evidence it failed to disclose under Rule 26(a) or 26(e) without substantial justification, unless the failure was harmless
  - Court has authority to impose additional sanctions upon a motion and after a hearing

### 2. Rule 26(g) Sanctions Related to Initial Disclosures

Sanctions for party’s failure to abide by the requirements for initial disclosures under Rule 26(a)(1) and (3) are authorized under Rule 26(g).

- Rule 26(a)(1) and (3) Initial Disclosures
- Requirements of Rule 26(g) Sanctions
  - Rule 26(g) requires a party or its attorney to sign every pleading, written motion, and other paper, including

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discovery.

- The signature is a certification to the best of the person's knowledge, information and belief formed after a reasonable inquiry that they have responsibly engaged in discovery.
- The reasonable inquiry standard is an objective one based on what is reasonable under the circumstances.
- Certification requirement applies to discovery requests as well as responses or objections to discovery requests (e.g., overly broad discovery requests; boilerplate objections)
- Language of the Rule suggests sanctions are mandatory if a certification violates the Rule without substantial justification
- Purpose of Rule 26(g) Sanctions
  - Deter discovery abuse and ensure parties conduct themselves in good faith
  - Penalize non-compliant attorneys
  - Aimed at ensuring compliance with the rule of proportionality in discovery
- Examples of conduct that may be subject to Rule 26(g) sanctions
  - Failure to certify or improper certification that the party's initial disclosure is "complete and correct as of the time it is made"
- Types of sanctions that may be ordered under Rule 26(g)
  - Court has discretion to determine the nature of the sanctions imposed
  - Where a party fails to sign, the court should strike it unless the party cures the deficiency promptly upon being notified

**D. Discovery – Requests for Production of Documents (ESI).**

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## 1. Serving and/or Responding to Rule 34 Discovery Requests

- Sanctions under Rule 26(g) for Improper Discovery
  - Certification requirement applies to discovery requests, responses, and objections. Sanctions may be warranted under Rule 26(g) where party or attorney makes a discovery request, response, or objection that is:
    - Not consistent with the rules or warranted by existing law or a non-frivolous argument for changing the law;
    - Interposed for an improper purpose (e.g., to harass, cause unnecessary delay, or needlessly increase the cost of the litigation); or
    - Unreasonable or unduly burdensome or expensive.
- Examples of conduct that may be subject to Rule 26(g) sanctions
  - Overly broad or burdensome discovery requests
  - Boilerplate objections to reasonable discovery requests

## 2. Motions to Compel / Motions for a Protective Order – Rule 37(a) Sanctions

- Requirements for sanctions under Rule 37(a)
  - On motion to compel, sanctions award of fees and costs is mandatory under Rule 37(a) unless the losing party shows that its conduct was substantially justified or that an award of expenses would be unjust under the circumstances.
  - Substantial justification exception protects parties who file reasonably justified motions or oppositions, even if they lost the motion.
  - “Good faith” is not a factor in evaluating substantial justification.
  - Most courts find that attorney fees are recoverable as expenses under subsection (a)(5)(C), subject to the

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enumerated exceptions of subsection (a)(5)(A).

- Most courts conclude that Rule 37(a)(5) permits courts to impose sanctions for successful or unsuccessful motions for a protective order because Rule 26(c)(3) expressly directs resolution of fee and costs under Rule 37(a)(5).
- Purpose of Rule 37(a) sanctions
  - Compensate aggrieved parties
  - Deter discovery misconduct
  - Promote cooperation in discovery
- Examples of conduct that may be subject to Rule 37(a) sanctions
  - Sanctions are mandatory (unless an exception applies) when a motion to compel is granted or denied entirely, or where sought-after discovery is produced after the motion is filed.
  - When a motion to compel discovery or disclosure is granted in part and denied in part, sanctions may be apportioned at the court's discretion.
  - Specific examples where courts have issued sanctions:
    - Failure to substantiate burden objections with evidence.
    - Failure to fulfill multiple discovery obligations, forcing opposing counsel to file a motion to compel.
    - If motion to compel is denied, movant failing to show the motion was substantially justified.
    - Over-designation of privileged documents where in camera review identifies myriad documents

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improperly withheld.

- Types of sanctions that may be ordered under Rule 37(a)
  - Courts differ in what fees and costs are compensable under the Rule.
    - Only costs directly associated with briefing and arguing the motion to compel/for protective order.
    - Fees and costs for all tasks for which the discovery conduct was the but for cause or all costs that flow from the sanctioned conduct.
- Challenges related to Rule 37(a) sanctions
  - Question of whether deterrence and compensation goals are achieved when courts:
    - Award only *de minimis* awards;
    - Do not effectively use the threat of sanctions to encourage reasonable resolution of discovery disputes;
    - Fail to award sanctions where a party's actions were not substantially justified; or
    - Discourage the filing of sanctions motions.

### 3. Violation of Court's Discovery Order

- Requirements for sanctions under Rule 37(b)
  - Failure to comply with a court discovery order.
  - Definition of "order" has been read broadly, but there must be more than general discovery abuse.
  - In deciding whether and to what extent to impose sanctions, courts consider the following elements: (1) the prejudice to the moving party, (2) the ability to cure the prejudice, (3) the extent to which the evidence would disrupt the orderly and efficient trial of the case or other cases in the court, and



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(4) the offending party's bad faith or willfulness in violating the court's order.

- Finding of bad faith is not required to impose sanctions.
- Purpose of Rule 37(b) sanctions
  - To penalize a party who violates a court discovery order and to deter future violations of discovery orders.
- Examples of conduct that that may be subject to Rule 37(b) sanctions
  - Failure to comply with an order compelling discovery responses.
  - Failure to comply with a preservation order.
  - Failure to comply with a scheduling order.
  - Failure to comply with an order designed to facilitate discovery.
  - Failure to comply with an ESI protocol.
  - Failure to comply with a protective order.
  - Failure to appear for examination.
- Types of sanctions that may be ordered under Rule 37(b)
  - Sanction imposed must be proportionate and related to the party's specific discovery violation.
  - Case terminating sanctions may be appropriate against a party who has shown "bad faith, willfulness, or fault".

4. Spoliation under Rule 37(e)

- a. Although the duty to preserve and the attendant spoliation of ESI typically occurs either at the pre-complaint or early pleadings stages of the case, the opposing party usually learns of the spoliation and moves for sanctions during the discovery phase. (See analysis of Rule 37(e) sanctions above).
- b. The duty to preserve exists throughout the course of the litigation. Thus, spoliation can occur at any stage of the case, including during the discovery stage where parties are identifying, preserving, collecting, and reviewing ESI. (See analysis of Rule

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37(e) sanctions above).

**E. Written Discovery (Interrogatories, Requests for Admission, Inspection) and Depositions**

1. Written Discovery and Depositions under Rules 30, 31, 33, 34

- Requirements for sanctions under Rule 37(d)
  - A court may sanction a party that fails to appear for their deposition, or that fails to serve responses to discovery requests under Rule 33 and Rule 34
- Purpose of Rule 37(d) sanctions
  - Rule is intended to address the fact that complete noncompliance with discovery obligations can cause severe inconvenience or hardship on the discovering party and substantially delay the discovery process.
- Examples of conduct that that may be subject to Rule 37(d) sanctions
  - A court may sanction a party that fails to appear for their deposition, or that fails to serve responses to discovery requests under Rule 33 and Rule 34.
- Types of sanctions that may be ordered under Rule 37(d)
  - Court has broad discretion to order sanctions it considers just.
  - Sanctions available include those listed in Rules 37(b)(2)(A)(i)-(vi).
  - Court also may require party, attorney, or both to pay reasonable expenses, including attorney fees, caused by the failure unless it was substantially justified or award of expenses would be unjust under the circumstances

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**F. Pre-Trial Preparation and Motions.**

1. Motion for Sanctions to Exclude Evidence/Testimony/Experts Based on Failure to Disclose or Supplement under Rule 37(c)
  - a. Where a party fails to disclose or supplement evidence or required expert disclosures prior to the filing of dispositive or pre-trial motions, the opposing party can move for sanctions under Rule 37(c) (see analysis of Rule 37(c) sanctions above), including for the exclusion of such evidence or certain arguments from pre-trial motions practice
2. Motion for Sanctions to Exclude Evidence/Testimony/Experts Based on Failure to Obey Court's Discovery Order under Rule 37(b)
  - a. Where a party fails to obey a court discovery order, the opposing party can move for sanctions under Rule 37(b) (see analysis of Rule 37(b) sanctions above), including for the exclusion of such evidence or certain arguments from pre-trial motions practice
3. Motion for Sanctions to Exclude Evidence/Testimony/Experts Based on Spoliation of ESI under Rules 37(e)
  - a. Where a party engages in the spoliation of ESI, the opposing party can move for sanctions under Rule 37(e) (see analysis of Rule 37(e) sanctions above), including for the exclusion of such evidence or certain arguments from pre-trial motions practice

**G. Trial.**

1. Motion for Sanctions to Exclude Evidence/Testimony/Experts Based on Failure to Disclose or Supplement under Rule 37(c)
  - Where a party fails to disclose or supplement evidence or required expert disclosures prior to trial, the opposing party can move for sanctions under Rule 37(c), including for the exclusion of such evidence or certain arguments at trial (see analysis of Rule 37(c)

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sanctions above)

2. Motion for Sanctions to Exclude Evidence/Testimony/Experts Based on Failure to Obey Court's Discovery Order under Rule 37(b)
  - a. Where a party fails to obey a court discovery order, the opposing party can move for sanctions under Rule 37(b) (see analysis of Rule 37(b) sanctions above), including for the exclusion of such evidence or certain arguments from trial
3. Motion for Sanctions Based on Spoliation of ESI under Rule 37(e) May Lead to Sanctions Imposed at Trial.

Where a party engages in the spoliation of ESI, the opposing party can move for sanctions under Rule 37(e) (see analysis of Rule 37(e) sanctions above).

### III. APPENDIX

- A. **Who to Sanction – the Party or the Party's Attorney**
  - a. Including principles from the cases and best practices
  - b. Conflict issues from sanctions cases (i.e. if counsel is following instructions from the client)
- B. **Other Potential Consequences of Attorney Misconduct**
- C. **Interplay Between Sanctions Rules and Attorneys' Ethical Obligations**
  - a. Discovery failures caused by attorney incompetence
- D. **Best Practices for Avoiding Circumstances Giving Rise to Sanctions Motions**
- E. **Summary of the Federal Rules of Civil Procedure related to Discovery Sanctions**
  - a. Federal Rule of Civil Procedure 16(f)

Rule 16(f) relates to pre-trial conference and case management issues, and provides the court with broad discretion to issue sanctions on a party, attorney, or both for failure to appear or participate in good faith, being substantially unprepared, or failing to obey a scheduling or other pretrial order.

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b. Federal Rule of Civil Procedure 26(f)

Rule 26(f) requires that a party participate in good faith in the development of a proposed discovery plan, including related to identifying, preserving, collecting, and producing ESI. Failure to comply with this discovery rule may lead to sanctions under rule 37(f).

c. Federal Rule of Civil Procedure 26(a)

Rule 26(a) requires that a party make initial disclosures. Failure to comply with this discovery rule may lead to sanctions under Rule 37(a) or (c).

d. Federal Rule of Civil Procedure 26(e)

Rule 26(e) requires that a party timely supplement or correct any initial disclosures or responses to an interrogatory, request for production, or request for admission, as well as expert witness reports and testimony, where the additional or corrective information is not known to the other parties. Failure to supplement may lead to sanctions under Rule 37(c).

e. Federal Rule of Civil Procedure 26(g)

Rule 26(g) provides that a court must impose sanctions on a party, attorney, or both who improperly certifies initial disclosures or discovery responses without substantial justification.

f. Federal Rule of Civil Procedure 37(a)

Rule 37(a)(5)(A) provides that, where a motion to compel discovery is granted or disclosure or discovery is provided after the filing of such a motion, a court must require the party or attorney whose conduct necessitated the motion, or both, to pay reasonable expenses, including attorney fees, unless the movant did not confer in good faith, the opposing party's conduct was substantially justified, or other circumstances make the award unjust.

Rule 37(a)(5)(C) provides that 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.

g. Federal Rule of Civil Procedure 37(b)

Rule 37(b) authorizes a variety of sanctions where a party fails to obey a discovery order. Further, instead of or in addition to these sanctions, a court must order the offending party, attorney, or both to pay reasonable expenses, including attorney fees, unless the failure was substantially justified or other circumstances make the award unjust.

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h. Federal Rule of Civil Procedure 37(c)

Rule 37(c) states that a court may sanction a party who fails to disclose or supplement discovery unless the failure was substantially justified or is harmless. Sanctions may include prohibiting the party from using the evidence, payment of reasonable expenses, including attorney fees, informing the jury of the failure, and sanctions permitted under Rule 37(b)(2). The court may order a party who improperly fails to admit to a request for admission to pay reasonable expenses, including attorney fees, in making the proof, absent certain conditions.

i. Federal Rule of Civil Procedure 37(d)

Rule 37(d) provides the court with broad discretion to issue sanctions permitted under Rule 37(b)(2), where a party fails to appear for deposition or respond to written discovery requests. The court must require a party, attorney or both to pay reasonable expenses, including attorney fees, unless the failure was substantially justified or other circumstances make an award unjust.

j. Federal Rule of Civil Procedure 37(e)

Rule 37(e) provides for varying levels of sanctions related to spoliation of ESI where a party did not take reasonable steps to preserve the ESI and the lost ESI cannot be restored or replaced. Severity of sanctions imposed depends on whether the court finds the spoliating party acted with intent to deprive the other party of the use of the ESI in litigation. Imposition of sanctions under this Rule is discretionary, not mandatory.

k. Federal Rule of Civil Procedure 37(f)

Rule 37(f) is the means by which a court may impose reasonable expenses, including attorney fees, on a party or attorney for failure to participate in good faith in the development of a proposed discovery plan, as required by Rule 26(f).

#### IV. CONCLUSION