

# The Sedona Conference WG1

## Discovery Sanctions Brainstorming Group

### Executive Summary

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## **Sedona Conference Working Group 1 Brainstorming Group on Discovery Sanctions Executive Summary of Draft Outline**

### ***Purpose of This Outline***

The Sedona Conference Working Group 1 Brainstorming Group on Discovery Sanctions (“BG”) has drafted this outline to identify relevant issues, present our research and analysis, and provide guidance on the topic of discovery-related sanctions available under the Federal Rules of Civil Procedure (“FRCP”) and the court’s inherent authority. The BG proposes that Sedona Conference Working Group 1 (“WG1”) prepare a paper for publication to provide guidance on discovery-related sanctions to assist the Judicial Conference, courts, and litigants in more effectively meeting the shared responsibility for the just, speedy, and inexpensive determination of actions and proceedings in the Federal Courts.

### ***Topics Recommended for Publication***

Based on our extensive research, analysis, and discussion the BG has engaged in over the course of the past year, we recommend that the WG1 publish a paper relating to discovery-related sanctions.

As demonstrated in the BG’s outline, discovery-related sanctions present numerous issues worthy of further discussion and publication. Some of these issues are presented below, categorized as “priority topics” or “other potential topics,” based on our collective determination about the importance of the issues to the courts, litigants, and attorneys. In addition to the thematic topics below, the BG believes the WG1 could leverage our research to develop a useful primer on sanctions rules that the judiciary and legal practitioners could turn to as a go-to source for discovery-related sanctions.

Overall, the paper would seek to evaluate whether sanctions rules are, collectively or individually, being effectively used to achieve their intended purpose, which include deterring misconduct, promoting cooperation, remediating harm, punishing the wrongdoer, ensuring fairness, protecting judicial integrity, and furthering Rule 1’s mandate. To the extent they are not, the paper would evaluate whether and how courts and rulemakers should react. More specific topics are set forth below.

### **Priority Topics**

1. Address the effectiveness of the 2015 amendments to Rule 37(e) in achieving the goals of deterrence and remediation for spoliation of ESI.

- i. Address 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.
  - ii. Discuss the discretion courts possess to apportion the burden of proof.
  - iii. Provide guidance on use of circumstantial evidence to prove intent to deprive.
  - iv. Identify tools available under Rule 37(e)(1) and evaluate whether remedies applied by courts under Rule 37(e)(1) are sufficient to remedy harm from spoliation.
  - v. Address the lack of consistency among courts relating to the quantum of evidence (preponderance vs. clear and convincing).
  - vi. Discuss the effectiveness and appropriateness, as a remedial measure or sanction, of submitting evidence of spoliation and the factual questions of intent to the jury.
2. Guidance, by way of specific examples, regarding the level of misconduct and degree of prejudice (if prejudice is a factor to be considered under the Rule or jurisprudence) that courts have found warrant and do not warrant sanctions under each relevant provision of the FRCP.
  - i. Discuss whether Rule 26(g)'s certification requirement has been effective in reducing overbroad discovery requests and boilerplate discovery objections, and address inconsistency among the courts regarding whether the Rule includes a prejudice requirement.
  - ii. Discuss what constitutes compensable expenses under Rule 37(a)(5), and address the effectiveness of sanctions under Rule 37(a)(5) where a motion to compel is granted in part and denied in part.
3. Best practices and/or guidelines for attorneys to avoid the circumstances that often give rise to sanctions motions.
4. Address some courts' and practitioners' continued reliance on pre-2015 amendment caselaw.

## Other Potential Topics

5. Discussion of the factors that courts consider in determining whether sanctions should be imposed on a party, the attorney, or both, and guidelines for making that determination in a consistent and even-handed manner in light of competing policies and due process requirements when privileged communications with clients are involved, as well as balancing the duty of zealous advocacy with discovery obligations.
6. Evaluating whether courts, litigants, and/or attorneys perceive sanctions motions as creating unnecessary satellite litigation and whether that view outweighs the usefulness of the deterrence, remediation and compensatory goals which may be achieved.
7. Providing recommendations for the interplay between sanctions rules within the FRCP and the court's inherent authority, including how to determine when inherent authority authorizing sanctions should be used when one or more of the Federal Rules could apply.
8. Evaluate the degree to which the increased complexity of modern eDiscovery impacts the appropriate application of sanctions, and, if so, what impact should these challenges have on the court's decision to impose discovery sanctions, including the challenge of the increasing complexity to ethical duties of competence.

## ***Basis for Recommendations***

The BG believes the topics identified above are worthy of the WG1's consideration for publication because they address some of the key issues related to discovery sanctions that the BG has identified in our work, including:

- The effectiveness of sanctions rules.
- The need for uniformity and predictability in the application of sanctions rules.
- The need to address confusion and uncertainty, particularly as it relates to the application of the 2015 amendments to Rule 37(e).
- The utility of clear guidance for the bench and bar related to which provisions of the rules should authorize sanctions when more than one applies to the discovery misconduct.
- The practical benefits to courts and attorneys of avoiding the conduct and circumstances that may give rise to sanctions motions and avoiding satellite litigation that can sometimes accompany sanctions disputes.

## ***Noteworthy Issues***

The BG generally reached consensus on the majority of topics discussed and that are presented in this outline. In some areas of discussion, there was not unanimity, including related to:

- Whether it is possible to have standards and guidelines that provide consistency in the application of sanctions, given the fact-specific nature of cases in which sanctions motions arise, and judicial discretion afforded by sanctions caselaw.
- Whether sanctions rules are applied in an even-handed manner to similarly-situated parties and levels of misconduct across the federal courts, and how or whether the Advisory Committee and courts can address the fact or perception of inconsistency and arbitrariness in the imposition of sanctions with objective standards and guidance.
- Discussion of the need for criteria in the imposition of sanctions as it relates to individual attorneys.
- As related to Rule 37(e):
  - Whether the lack of consistency in application of Rule 37(e) is problematic;
  - Whether courts continue to rely on inherent authority and whether reliance on pre-amendment case law is problematic;
  - Whether courts need guidance related to evaluating prejudice and burden;
  - Whether the barriers for achieving relief under the amendments or the rarity of sanctions under 37(e)(2) may undermine the Rule's deterrent and remedial goals.

We have identified the following areas that the WG1 may wish to further develop with additional research and analysis:

- Additional research may be needed to include caselaw or court orders in which courts have declined to issue sanctions. Because courts may be more likely to issue opinions that justify the decision to impose sanctions, the body of sanctions caselaw may not be representative of all sanctions rulings and court orders denying sanctions may be underrepresented (including in this outline).

The research material and suggestions included in this outline is the product of our efforts to date and, although it represents a significant amount of work by the BG members, it is not intended to be a comprehensive analysis of all possible caselaw and authorities on the issues. Our hope is that this outline will provide the WG1 drafting team with a “jumping off” point, from which it can further develop these topics and analyze these issues, with the end goal of drafting publications that are helpful to the legal community.