

# The Sedona Conference WG1 Discovery Sanctions Drafting Team Topics for Dialogue

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## **Sedona Conference Working Group 1 Drafting Team on Discovery Sanctions Topics for Dialogue**

### ***Overview***

The Sedona Conference Working Group 1 Brainstorming Group on Discovery Sanctions (“BG”) presented its findings in an Outline at the October 2021 Annual Meeting identifying relevant issues, presenting the group’s research and analysis, and providing guidance on the topic of discovery-related sanctions available under the Federal Rules of Civil Procedure (“FRCP”) and the court’s inherent authority (*see* Recommended Reading, 6.2, “Sedona Conference Working Group 1 Brainstorming Group on Discovery Sanctions August 2021 Draft Outline” [hereinafter “BG Outline”]).

The BG proposed 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. This proposal was subsequently approved by the WG1 Steering Committee and a new drafting team was formed in March 2022.

### ***“Effectiveness” Topics***

A key recommendation from the Brainstorming Group was a paper that 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.

As the drafting team begins its efforts, we would like to explore and obtain guidance from the membership on the specific topics set forth below related the “effectiveness” of available discovery sanctions under the Rules and the exercise by the courts of their inherent authority.

1. Address the effectiveness of the 2015 amendments to **Rule 37(e)** in achieving the goals of deterrence and remediation for spoliation of ESI (BG Outline, pp.3, 40-50).
  - a. 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.
  - b. Discuss the discretion courts possess to apportion the burden of proof.
  - c. Provide guidance on use of circumstantial evidence to prove intent to deprive.
  - d. 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.
  - e. Address the lack of consistency among courts relating to the quantum of evidence (preponderance vs. clear and convincing).
  - f. 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. Whether **Rule 16(f)** is effectively used to achieve its objectives. (BG Outline, p.10).
- a. 1983 Advisory Committee Note:
    - i. “[C]ourts have not hesitated to enforce [Rule 16(f) sanctions] by appropriate measures. To reflect that existing practice, and to obviate dependence upon Rule 41(b) or the court’s inherent power to regulate litigation, Rule 16(f) expressly provides for imposing sanctions on disobedient or recalcitrant parties, their attorneys, or both in four types of situations. Furthermore, explicit reference to sanctions reinforces the rule’s intention to encourage forceful judicial management.” (*internal citations omitted*).
    - ii. “Among the sanctions authorized by the new subdivision are: preclusion order, striking a pleading, staying the proceeding, default judgment, contempt, and charging a party, his attorney, or both with the expenses, including attorney’s fees, caused by noncompliance. The contempt sanction, however, is only available for a violation of a court order. The references in Rule 16(f) are not exhaustive.”
3. Whether **Rule 26(g)**’s certification requirement has been effective in reducing overbroad discovery requests and boilerplate discovery objections. (BG Outline, p.12).
- a. Although courts seem willing to impose sanctions under Rule 26(g) where the substantive provisions of the rule have been met, there is at least some commentary suggesting that Rule 26(g) is not fully leveraged to achieve its deterrent effect.
  - b. Many courts have noted the mandatory nature of sanctions under this provision.

4. Whether **Rule 37(a)(5)** is effectively used to achieve its objectives. (BG Outline, p.16).
- a. Rule 37(a)(5)(A) sanctions are mandatory absent one of the enumerated exceptions, i.e., if the motion to compel is granted the opposing party shows the moving party filed before attempting to meet and confer; or, if the motion to compel is granted or the motion is denied, the losing party's motion or opposition to the motion was substantially justified, or the award would be unjust.
  - b. **Proactive courts:** Courts may consider taking a proactive approach to reduce the need for motions to compel or protective orders along with the attendant awards for attorney fees and expenses incurred.
    - i. Reminding parties, as appropriate, of the risk of Rule 37(a)(5) sanctions to encourage cooperation, communication, and transparency.
    - ii. Explaining that legitimate discovery disputes are not discouraged, but counsel should “stop and think” about whether a position is truly “substantially justified” under the applicable law before involving the court.
    - iii. Cautioning parties that they equally share the responsibility to cooperate in seeking a resolution prior to resorting to motion practice.
  - c. **Privilege:** Courts may use Rule 37(a)(5) sanctions to disincentivize over-designation of documents as privileged in logs.
  - d. **Moot motions:** Courts have imposed sanctions even if the requested discovery is voluntarily produced after the motion is filed, mooting the motion.
    - i. The Rule requires sanctions even if subsequently produced discovery moots the motion. “If the motion is granted—or if the disclosure or requested discovery is provided after the motion was filed— . . .” Rule 37(a)(5)(A).
    - ii. Voluntary production post-filing does not compensate the moving party for its costs in bringing the motion or deter the abusive practice of forcing the requesting party to proceed with drafting and filing the motion.
  - e. **Motions granted in part:** Courts award and apportion expenses even where a motion to compel or motion protective order is granted in part and denied in part.
    - i. Motions that are granted overwhelmingly, even if not entirely, may demonstrate that the opposition was not substantially justified.
    - ii. Apportionment may be appropriate even if the moving party prevailed on only a small part. Further, a sanctions award does not have to be proportionate to the percentage of the motion

granted, if the opposing party's conduct was deleterious or egregious.

- f. **Attorney fees if motion is granted in part:** Courts should interpret subsection (a)(5)(C), where a motion is granted only in part, to permit reimbursement of attorney fees.
  - i. Rule 37(a)(5)(A) expressly addresses attorneys' fees as part of a movant's "reasonable expenses incurred in making the motion..." but it is not expressly included in Rule 37(a)(5)(C).
  - ii. Majority view is that fees are included under Rule 37(a)(5)(C) because it incorporates the substantive standards of (a)(5)(A).
  - iii. One viewpoint is failure to grant attorneys' fees would eliminate the deterrence purposes of Rule 37(a)(5) because non-fee "expenses" associated with a motion to compel (or opposition to it) are generally de minimis.
- g. **Sanctioning attorneys vs. clients:** Courts should consider whether it is appropriate to issue sanctions on attorneys when misconduct is clearly attorney-driven rather than client-driven.
  - i. The Rule expressly permits courts to sanction either or both the party and its attorneys, which may encourage attorneys to "weigh carefully considerations of relevancy and privilege, and to advise in accordance with their best judgment." 8B Fed. Prac. & Proc. Civ. § 2288 (3d ed.) (quotation and citation omitted).
- h. **Compensable Expenses:** Courts differ in what fees and costs are compensable under the Rule.
  - i. Some courts hold that only costs directly associated with briefing and arguing the motion are compensable. Other courts permit fees and costs for all tasks for which the discovery conduct was the but-for cause or for all costs that "flow" from the sanctioned conduct.
  - ii. Special master fees may be allocated to the losing party when specially appointed to address the dispute at issue per Rule 53(h), but apportionment of fees is less clear when the master was appointed at the outset of the case to manage discovery disputes.
  - iii. Where courts have appointed a special master at the outset of discovery, but not as a result of any particular dispute, and have apportioned payment of the master's fees across the parties as a matter of case management, consider whether fees may be shifted where motions are brought or opposed without substantial justification.

5. Whether **Rule 37(b)** is effectively used to achieve its objectives “to penalize a party who violates a discovery order and to deter future violations of discovery orders.” (BG Outline, pp. 19, 22).
  - a. Parties are pursuing Rule 37(b) sanctions—often in conjunction with sanctions pursuant to other rules, statutes, or authorities—and courts are imposing Rule 37(b) sanctions.
  - b. Courts have imposed Rule 37(b) sanctions in a number of contexts.
6. Whether **Rule 37(c)** is effectively used to achieve its objectives to deter failures to comply with Rules 26(a) and (e) related to initial disclosures, and Rule 36 related to requests for admission. (BG Outline, pp. 23-24).
  - a. Particularly in light of the automatic nature of the sanctions under Rule 37(c), courts seem willing to impose automatic sanctions and/or to impose additional discretionary sanctions under this Rule.
7. Whether **Rule 37(f)** is effectively used to achieve its objectives to deter hide-the-ball behavior by failing to participate in framing a discovery plan. (BG Outline, p.27).
  - a. Rule 37(f) appears to be a “sleeper sanction.”  
When parties request sanctions under Rule 37(f) for “obstructionist tactics”, courts frequently turn to Rule 37(b).
8. Whether **inherent authority** is effectively used to achieve its objectives. (BG Outline, p.30).
  - a. Examples of how courts are using inherent authority to address eDiscovery abuses:
    - i. **Attempted Spoliation:** Inherent authority can be used where a party attempted but failed to spoliage evidence.
    - ii. **Falsification of Evidence:** Inherent authority can be used to address a party’s intentional creation of false evidence, as opposed to the destruction of evidence, as there is nothing in the Rules that per se prohibits the falsification of evidence.