

Discovery Disputes
Civil Procedure — Gómez-Arostegui Fall 2023 v1.1

- I. Purpose of discovery sanctions
 - A. Secure compliance with discovery rules.
 - B. Deter offender and others from violating the rules.
 - C. Compensate those harmed by the violation.
 - D. And sometimes punish those who have violated the rules.
- II. Certification requirements
 - A. Every discovery disclosure (including initial), request, response, or objection must be signed by an attorney or by an unrepresented party.
 - B. It certifies the following:
 - 1. Reasonable inquiry undertaken.
 - 2. Disclosures are complete and correct.
 - 3. For requests, responses, and objections, it also certifies:
 - a. Legal positions are sound.
 - b. No improper purpose, like harass, delay, etc.
 - c. Proportional.
- III. Motions to compel and motions for protective orders
- IV. Grounds for a discovery sanction
 - A. Violating the discovery certification requirements (see above II).
 - B. Violating a court order to provide discovery.
 - C. Not responding to or not producing under a discovery request.

- D. Refusing to file disclosures (including initial disclosures).
- E. Not supplementing responses or disclosures when incorrect or incomplete.
- F. Failing to preserve discoverable information.
 - 1. The duty to preserve evidence is triggered when a party knows or should have known that evidence may be relevant in current or anticipated litigation.
 - a. The common law imposes this requirement, but so do some statutes and regulations, court orders, and party agreements. FRCP 37 provides such an obligation for ESI.
 - 2. Preserve information that is reasonably likely to be the subject of a discovery request.

III. Sanctions available

- A. For violating the certification requirements: generally must impose an “appropriate sanction” on the signer, the party, or both. A public censure might be appropriate for example. May include an order to pay reasonable expenses, including attorney’s fees, caused by the violation.
 - 1. Unlike Rule 11 sanctions, there is no safe harbor.
- B. For violating a court order relating to discovery, considering the efficacy of the lesser sanctions first:
 - 1. Generally must order the disobedient party, her attorney, or both to pay reasonable expenses including attorney’s fees caused by the violation.
 - 2. Prevent the disobedient party from supporting or opposing claims, or introducing evidence.
 - 3. Order that certain facts are established, either presumptively or conclusively.

4. Strike pleadings.
 5. Dismiss the case or enter default judgment (*i.e.*, terminating sanctions).
 6. Find the person in contempt.
 - a. Civil contempt—coerce obedience with the order in question and compensate the other for losses sustained. Sanction is indeterminate and ends upon compliance with the order in question. This can include a periodic fine (*e.g.*, \$500 a day) or jail time, but the offending party must be able to get out of jail or stop the fine by complying.
 - b. Criminal contempt—punitive and designed to vindicate and protect the dignity of the court. Sanction tends to be a fine and/or imprisonment which is determinate and unconditional. Does not terminate upon compliance with the order in question. Afforded special procedural protections because this becomes a criminal case.
- C. For not responding to discovery: same as above (B) except not # 6.
- D. For refusing to file disclosures: not tested.
- E. For failing to supplement: not tested.
- F. For failing to preserve discoverable ESI:
1. If no intent to deprive of ESI but prejudice shown, sanctions can be no greater than necessary to cure the prejudice. Prejudice is a range that spans inability to prove claims or defenses to little or no impact on the case.
 - a. Wide discretion to craft sanctions.
 - b. But severe sanctions are not allowed, meaning cannot: strike pleadings, issue an adverse-inference instruction, dismiss a suit, or enter default.

2. If intent to deprive another of ESI is shown, then no finding of prejudice needed, and more severe sanctions are allowed.
 - a. Order that certain facts are established, either presumptively or conclusively. Basically treating the missing evidence as if it were unfavorable to the party who lost it.
 - b. Dismiss the case or enter default judgment (*i.e.*, terminating sanctions).
- G. For failing to preserve discoverable non-ESI information: just generally know that a variety of sanctions are possible here, including severe sanctions, but that the case law takes diverse approaches as to the requirements for obtaining sanctions, especially severe ones.