Discovery Disputes
Civil Procedure — Gómez-Arostegui Fall 2026 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.

V. 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, but consider 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 matter.

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: not tested.

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.