

- › **New lawyers must understand which hardball tactics will lead to sanctions**
- › **Respond to opposition requests in a timely manner or politely ask for an extension**
- › **Innocent mistakes and delays may still lead to punishment**

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Discovery Sanctions in Federal and State Court

In law school, we are taught to zealously advocate for our clients within the boundaries of our adversarial system of justice. What we learn in our practice is precisely where those boundaries lie. During discovery, for example, lawyers often coax documents and data from the opposing party while remaining evasive about their own information. Discovery, however, is meant to be a fair system in which each party can become familiar with the other side's evidence and witnesses.

Dodging discovery requests and counseling clients to refuse to cooperate with the opposing party can be a risky and expensive strategy. While sometimes it may be necessary for lawyers to play hardball to get the opposing party to the negotiating table, certain lines should not be crossed. New lawyers must understand which tactics cross those lines and will lead to sanctions.

FEDERAL DISCOVERY RULES According to the Federal Rules of Civil Procedure, parties in federal court are expected to cooperate in discovery and make mandatory disclosures. Under Rule 37(a), if a party fails to cooperate in discovery requests or make the mandatory disclosures, opposing counsel may make a motion for an order to compel. A motion for an order to compel also is appropriate if: 1) a party fails to make the mandatory disclosures required by Rule 26(a), 2) a deponent fails to answer a question under Rules 30 or 31, 3) an entity fails to designate an agent to testify on its behalf under Rules 30(b)(6) or 31(a), 4) a party fails to answer interrogatories submitted under Rule 33, or 5) a party fails to respond to a request for inspection under Rule 34 or fails to permit such an inspection. Evasive or incomplete responses are treated as a failure to respond, and a motion for an order to compel would be appropriate.¹

Keep in mind, however, that similar to

California state law, parties must satisfy a “meet and confer” requirement before making a motion for an order to compel. Parties bringing the motion must certify that they have conferred in good faith or at least attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action. If this requirement is not met, the court will not grant the motion and may impose sanctions on the moving party.²

If the motion is denied, the court must impose sanctions on the moving party or the attorney who filed the motion. The party or the attorney must pay the reasonable expenses incurred by the other side in opposing the motion, unless an exception applies.³ Likewise, if the motion is granted, the court, with certain exceptions, must impose sanctions and require the party whose conduct necessitated the motion, and/or the party's attorney, to pay the reasonable costs of the moving party, including attorney's fees.⁴

If the court does grant a motion for an order to compel, and the party compelled to respond fails to comply with the court order, the party and the party's attorney may be sanctioned.⁵ Similarly, if a party fails to participate in framing a discovery plan, the party and the party's attorney may be sanctioned.⁶ However, parties—not attorneys—face sanctions on their own for failing to disclose information, disclosing false or misleading information, failing to attend depositions, failing to serve answers to interrogatories, failing to respond to requests for inspection of documents, and improperly refusing to admit facts.⁷

The decision to impose sanctions generally falls within the discretion of the district

court. Rule 37 directs the court to impose monetary sanctions, such as costs and attorney's fees, on any party who, by failing to obey a court order or make the proper disclosures, necessitates the filing of a motion to compel. While an order imposing these types of sanctions is usually mandatory, the court in its discretion may find that the failure to comply was substantially justified and refuse to impose sanctions.⁸

While monetary sanctions are the most common method that the court uses to secure compliance with discovery orders, there is a wide range of other sanctions available to the court to impose on parties who fail to obey court orders. According to Rule 37(b)(2), in lieu of or in addition to monetary sanctions, the court can order that designated facts will be deemed established for the purpose of the action in accordance with the claim of the party obtaining the order. The court can prohibit the disobedient party from supporting or opposing claims or defenses, or introducing matters in evidence. Even worse, the court can make an order striking pleadings, staying further proceedings until the order is obeyed, dismissing the action in its entirety, or rendering a judgment by default against the disobedient party. In addition, the court can treat the failure to obey a court order as a contempt of court.

The harshest sanctions, however, may be imposed only in extreme circumstances. The moving party must show that the opposing party's failure to comply with the court order was due to willfulness, bad faith, or fault.⁹ The district court must engage in a balancing test and weigh various factors before imposing the sanction of dismissal or default.¹⁰

An attorney's abuse of discovery also

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can lead to sanctions imposed under the inherent authority of the federal court as well as under 28 U.S.C. Section 1927, which permits sanctions against an attorney who unreasonably or vexatiously complicates the proceedings.¹¹ These sanctions also can be imposed on attorneys when sanctions under the Federal Rules of Civil Procedure are not available, such as at depositions. An attorney who improperly refuses to produce a witness for deposition or directs a witness not to answer questions on substantive issues and fills the record with improper objections and remarks may be subject to pay the excess costs incurred as a result of his or her misconduct.¹² Attorneys also must make sure they comply with local court rules and the standing orders of individual courtrooms, as judges have the power to impose sanctions when these rules or orders are violated.

CALIFORNIA STATE COURT DISCOVERY

RULES Unlike Rule 26 of the Federal Rules of Civil Procedure, which mandates initial disclosures between litigants, the California Civil Discovery Act does not require parties to disclose and exchange information at the commencement of litigation. Instead the Discovery Act provides parties with broad flexibility to conduct discovery for any information that is relevant to the underlying action and not subject to privilege or protection.¹³ California's civil discovery sanctions are codified at Code of Civil Procedure Section 2023.010.

Special interrogatories are an effective tool for requesting answers from opposing parties to written questions. Responses to special interrogatories should be complete and straightforward.¹⁴ A party that fails to respond to interrogatories may be subject to monetary sanctions for the expenses incurred by the moving party to compel responses.¹⁵ Moreover, a party that fails to obey an order compelling answers to interrogatories may be subject to issue sanctions, an evidence sanction, or a terminating sanction in addition to monetary sanctions.¹⁶ A party requesting responses to interrogatories also may compel the responding party to provide further responses if the initial responses are inadequate.¹⁷ The same sanctions that are available on an initial motion to compel responses are also available on a motion to compel further responses.¹⁸

A request for production of documents is the method by which attorneys seek to obtain written materials that opposing parties have in their custody, possession, or control. Code of Civil Procedure Section

2031.210 provides the procedures for attorneys to follow when making requests for production of documents. If an opposing party fails to respond to a request for documents or fails to produce documents, the party making the request may move for an order compelling a response or responses.¹⁹ A party who unsuccessfully makes or opposes a motion to compel responses to a request for production of documents may be subject to the same sanctions that are available for similar actions with regard to interrogatories. A responding party who loses on a motion to compel, absent substantial justification for refusing to provide responses, is subject to monetary sanctions.²⁰ Failure to obey an order compelling responses subjects the party to the same sanctions for refusing to comply with an order regarding responses to interrogatories.²¹ A party who has received an inadequate response to a request for production of documents may move for an order compelling further responses to the demand.²² A party who unsuccessfully makes or opposes a motion compelling a further response to an inadequate response to a request for production faces the same sanctions as those available for inadequate interrogatory responses.²³

Requests for admissions are used by attorneys to force the opposing party to admit or deny the truth of a relevant fact or the genuineness of relevant documents.²⁴ Responding to requests for admissions requires an attorney to comply with Section 2033.210 of the Code of Civil Procedure. The genuineness of documents and/or the truth of any matters specified in the requests may be deemed admitted if the responding party fails to respond to the request.²⁵ Monetary sanctions also are available to a party that successfully compels a party to respond to requests for admissions.²⁶

Sanctions arise in connection with depositions under a number of circumstances. A new attorney should be aware of the two most important rules: 1) a party giving notice of a deposition who fails to attend the scheduled deposition is subject to monetary sanctions,²⁷ and 2) a deponent who fails to attend a duly noticed deposition is subject to sanctions.²⁸ When a deponent fails to attend his or her deposition, an attorney may file a motion to compel the attendance.²⁹ An attorney filing a motion to compel a party to appear at a deposition must first meet and confer with opposing counsel. The court is required, absent substantial justification by the deponent, to award monetary sanctions as compensation for the party that was

forced to file the motion to compel.³⁰ If a deponent fails to obey the order compelling attendance, the court may impose issue sanctions, an evidence sanction, or terminating sanctions against the party in addition to monetary sanctions.³¹

The discovery provisions of the Code of Civil Procedure are a compass for young lawyers navigating their way through discovery practice in California.³² The overarching message to new attorneys and their more experienced counterparts regarding abuse of the discovery process is "beware." While courts are more inclined to impose sanctions for conduct that is willful and in bad faith, this does not mean that innocent mistakes and inadvertent delays go unpunished.

Attorneys always must answer interrogatories and requests for admissions or production in a timely manner or politely request an extension from opposing counsel. Organization, proper calendaring, knowledge of the discovery rules, and effective communication between attorneys and their clients are the best defenses against being sanctioned. ■

¹ FED. R. CIV. P. 37(a)(3).

² FED. R. CIV. P. 37(a)(2)(A), 37(a)(4)(B).

³ FED. R. CIV. P. 37(a)(4).

⁴ *Id.*

⁵ FED. R. CIV. P. 37(b).

⁶ FED. R. CIV. P. 37(g).

⁷ FED. R. CIV. P. 37(c)-(d).

⁸ FED. R. CIV. P. 37(a)(4), 37(b)(2)(E), 37(c)(1).

⁹ *CFTC v. Noble Metals Int'l*, 67 F. 3d 766, 771 (9th Cir. 1995).

¹⁰ *Henry v. Gill Indus., Inc.*, 983 F. 2d 943, 948 (9th Cir. 1993).

¹¹ *Apex Oil Co. v. Belcher Co. of N.Y.*, 855 F. 2d 1009, 1019 (2d Cir. 1988); *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991).

¹² *Wine Mkts. Int'l v. Bass*, 977 F. Supp 601, 605 (D. N.Y. 1997).

¹³ CODE CIV. PROC. §2017.010.

¹⁴ CODE CIV. PROC. §2030.220(a).

¹⁵ CODE CIV. PROC. §2030.290(c).

¹⁶ *Id.*

¹⁷ CODE CIV. PROC. §2030.300.

¹⁸ *Id.* at (d) & (e).

¹⁹ CODE CIV. PROC. §2031.300(b).

²⁰ *Id.* at (c).

²¹ *Id.*

²² CODE CIV. PROC. §2031.310.

²³ *Id.* at (d) & (e).

²⁴ See CALIFORNIA CIVIL PROCEDURE BEFORE TRIAL §8:1255.

²⁵ CODE CIV. PROC. §2033.280(b).

²⁶ *Id.* at (c); see also CODE CIV. PROC. §2033.290(d).

²⁷ CODE CIV. PROC. §2025.430.

²⁸ CODE CIV. PROC. §2025.440.

²⁹ CODE CIV. PROC. §2025.450.

³⁰ *Id.* at (c)(2).

³¹ *Id.* at (d).

³² CODE CIV. PROC. §§2030.300(c), 2031.310(c), 2033.290(c)