

# Don't Bank on It: Recovering Expenses for Motions to Compel Discovery

August 1, 2024

Harrisburg, PA

## **Pretrial Practice & Discovery**

### **American Bar Association Litigation Section**

(by [Michael Libuser](#))

“Discovery sanctions serve the objectives of discovery by correcting for the adverse effects of discovery violations and deterring future discovery violations from occurring.” *Taylor v. Illinois*, 484 U.S. 400, 425 (1988) (Brennan, J., dissenting). Serving these objectives is important given the common refrain that “practitioners, judges, and academics . . . perceive discovery abuse . . . as a major, if not the major contributor to the growing cost and delay of litigation and to the dissatisfaction with our court systems in resolving civil disputes.” Earl C. Dudley, Jr., “Discovery Abuse Revisited: Some Specific Proposals to Amend the Federal Rules of Civil Procedure,” 26 U.S.F. L. Rev. 189, 190 (1992). Still, many litigators write off motions for sanctions as noncredible threats that rarely gain traction. See, e.g., William T. Gallagher, “IP Legal Ethics in the Everyday Practice of Law: An Empirical Perspective on Patent Litigators,” 10 J. Marshall Rev. Intell. Prop. L. 309, 341 (2011). And some judges have outspokenly decried them. A federal judge recently commented, “There are few things that I truly despise. The short list includes meatloaf, the Ohio State Buckeyes, and hangovers. It also includes motions for sanctions. It is no exaggeration to say that I hate, hate, hate motions for sanctions.” *Boshears v. Polaris Eng'g, Inc.*, 2023 WL 2572204, at \*1 (S.D. Tex. Mar. 20, 2023) (per Edison, J.). One form of discovery sanction—awards of expenses—is rarely imposed. Why that is so, and, more specifically, the extent to which state procedural rules authorize those awards, is the impetus for this practice point.

#### Majority Rule

A majority of states follow Federal Rule of Civil Procedure 37(a)(5). Under that rule, a court that grants a motion to compel discovery must order the party whose conduct necessitated the motion (or the party's attorney, or both) to pay the movant reasonable expenses. But there are three exceptions. Awards of expenses are not permitted if: (1) the moving party failed in good faith to obtain the discovery without involving the court; (2) the losing party was substantially justified in withholding the discovery; or (3) other circumstances make an award of expenses unjust. Conversely, a court that denies a motion to compel must order the moving party to pay expenses, subject to the second two exceptions. “The great operative principle of Rule 37(a)(5) is that the loser pays.” 8B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2288 (3d ed. June 2024 update). Thirty-nine states and the District of Columbia follow the federal model almost verbatim. Their procedural rules embrace a presumption in favor of awarding expenses—courts must award expenses to a party who prevails on a motion to compel, unless an exception applies. There are differences, to be sure. For instance, only 15 of these states authorize an award of expenses if the noncompliant party produces the sought-for discovery after a motion to compel is filed but before the court rules on it.

That most states have adopted the federal approach is notable when considered against the history of Rule 37(a)(5). Rule 37(a)(5) reflects the view that “expenses should ordinarily be awarded,” Fed. R. Civ. P. 37(a) advisory committee's note to 1970 amendment, and the belief that “potential or actual imposition of expenses is virtually the sole formal sanction in the rules to deter a party from pressing to a court hearing frivolous requests for or objections to discovery,” Proposed Amendments to The Federal Rules of Civil Procedure Relating to Discovery, 48 F.R.D. 487, 540 (1970).

#### Minority Rule

A minority of states—Arizona, Colorado, Massachusetts, Michigan, Rhode Island, Oregon, and Utah—permit awards of expenses in provisions that largely track Rule 37(a)(5), but with one significant change. These states have permissive rather than presumptive rules. Their courts “may” award expenses to the prevailing party, subject to similar exceptions in the federal model.

#### Outlier States

Five states—California, Connecticut, New Hampshire, New York, and Pennsylvania—do not track Rule 37(a)(5) in the same way.

In Pennsylvania, courts may not award expenses upon granting a motion to compel discovery. Parties must file the motion to compel, obtain an order compelling compliance, and then, if the noncompliant party disobeys the order, seek sanctions in a subsequent motion. Pa. R. Civ. P. 4019(g). If the court grants the sanctions motion, it “may” require payment of reasonable expenses incurred in obtaining both “the order of compliance and the order for sanctions.” *Id.* But as with Rule 37(a)(5), Pennsylvania courts’ discretion to award expenses is subject to the substantial-justification and unjust-circumstances exceptions.

New York discovery rules do not authorize awards of expenses or monetary sanctions of any kind. N.Y. CPLR 3126. Its courts, however, enjoy broad discretion to impose monetary sanctions for “frivolous conduct.” N.Y. Rules of the Chief Administrator of the Courts § 130-1.1(a). And that authority has been applied in the discovery context, including to impose monetary sanctions on a party that “should have produced” discovery but failed to do so. *Lis v. Lancaster*, 225 A.D.3d 568, 569 (N.Y. Sup. Ct. App. Div. 1st Dep’t 2024).

Courts in California, Connecticut, and New Hampshire can impose monetary sanctions for discovery abuses regardless of whether a motion to compel is filed or granted, although only California’s rules are presumptive in that its courts “shall impose” any authorized monetary sanction. Cal. Civ. Proc. Code § 2023.030(a); Conn. Practice Book Sec. 13-14(a)-(b); N.H. R. Dist. Ct. R. 3.21(d)(2)(A).

#### Takeaway

While rare, awards of expenses incurred in moving to compel discovery are sometimes granted, even if they are generally reserved for repeated abuses and violations of discovery orders. But attorneys—particularly multi-state practitioners—should be mindful of state-specific rules and practices, some of which are beyond the scope of this article. For instance, some state courts have alternate mechanisms for awarding expenses for discovery abuses, whether derived from an inherent power, or through additional rules like the provisions for “immediate sanctions” in Maryland’s rules. Md. Rules 2-432(a).

To view the full article, [click here](#).

© 2024. Discovery Disputes: Best Practices from the Bench, Pretrial Practice & Discovery, American Bar Association Litigation Section, July 24, 2024 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

