

# **Motions for Sanctions under Civil Rule 11, R.C. 2323.51 and Civil Rule 37**

*Presented by:*

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## *Introduction to Today's Presenters*



Holly Marie Wilson is a shareholder in Reminger Co., LPA's Cleveland office. Holly focuses her practice on litigation that encompasses a range of interconnected legal disciplines. She strives to find solutions for the individuals and businesses she serves that are practical and impactful. Holly leverages her years of experience and a willingness to understand her clients' strategic goals in employing sensible and successful approaches to the defense of each dispute, including professional liability, retail and hospitality, employment practices, and public entity liability.



Katie Lynn Zorc is a shareholder in Reminger Co. LPA's Cleveland office. Katie focuses her practice on Employment Law and Professional Liability. She also has experience defending providers from Medical Malpractice. Katie has experience handling all aspects of litigation through trial in courts throughout the state of Ohio, in federal court, and in private arbitration.

## *What are Sanctions?*

Sanctions are financial or other penalties imposed by a court on a party or attorney for violation of a court rule, for receiving a special waiver of a rule, or as a fine for contempt of court.

The sanction may be paid to the court or to the opposing party.

Ohio law provides two separate mechanisms for an aggrieved party to recover attorney fees for frivolous conduct: R.C. 2323.51 and Civ.R. 11.

# *Ten Scenarios that Provoke Motions for Sanctions*

1. Testifying Falsely in Deposition
2. Failure to Timely Respond to Written Discovery
3. Spoliation of Evidence
4. Changing Records
5. Communicating Directly With the Opposing Party
6. Obstructive Behavior at Deposition
7. Abuse of Process
8. Asserting a Nonjusticiable Issue of Law or Fact
9. Late Disclosure of Witnesses
10. Unprofessional Conduct Toward Opposing Counsel and the Court

# *Civil Rule 11*

Civ.R. 11 governs the signing of pleadings, motions and other documents.

For a “willful” violation of this rule, an attorney or pro se party, upon motion of a party or upon the court’s own motion, may be subjected to appropriate action, including an award to the opposing party of expenses and reasonable attorney fees.

Similar action may be taken if scandalous or indecent matter is inserted.

In deciding whether a violation under Civ.R. 11 is willful, the trial court must apply a subjective bad-faith standard.

# *Civil Rule 11*

## Caselaw Interpretations:

*Jones v. Billingham*, 105 Ohio App.3d 8, 663 N.E.2d 657 (2d Dist.1995) (An agreed entry by the parties dismissing all their claims without prejudice does not necessarily preclude motions for sanctions under Civ.R. 11)

*Krlich v. Shelton*, 11th Dist. Trumbull No. 2018-T-0104, 2019-Ohio-3441 (Civil rule was not applicable when a magistrate imposed sanctions upon a litigant for frivolous conduct because an award was authorized under the rule only against attorneys or pro se parties, not represented parties such as the litigant.)

*Goff v. Ameritrust Co., N.A.*, 8th Dist. Cuyahoga Nos. 65196, 66016, 1994 Ohio App. LEXIS 1916 (May 5, 1994) (A court retains jurisdiction to hear a motion for attorney fees pursuant to Civ.R. 11 even after an unfounded complaint has been dismissed.)

## ***R.C. 2323.51***

“Frivolous conduct” means either of the following:

- (i)** It obviously serves merely to harass or maliciously injure another party to the civil action or appeal or is for another improper purpose, including, but not limited to, causing unnecessary delay or a needless increase in the cost of litigation.
- (ii)** It is not warranted under existing law, cannot be supported by a good faith argument for an extension, modification, or reversal of existing law, or cannot be supported by a good faith argument for the establishment of new law.
- (iii)** The conduct consists of allegations or other factual contentions that have no evidentiary support or, if specifically so identified, are not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.
- (iv)** The conduct consists of denials or factual contentions that are not warranted by the evidence or, if specifically so identified, are not reasonably based on a lack of information or belief.

# ***R.C. 2323.51***

## Caselaw Interpretations:

*Soler v. Evans, St. Clair & Kelsey*, 152 Ohio App.3d 781, 2003-Ohio-2582, 790 N.E.2d 365 (10th Dist.) (In awarding attorney fees pursuant to R.C. 2323.51, a court should endeavor to cite the specific fees necessitated by frivolous conduct. Any attorney fees incurred after the point of frivolous conduct are appropriately awarded as sanctions.)

*Turowski v. Johnson*, 70 Ohio App.3d 118 (9th Dist.1990) (R.C. 2323.51 is not intended to punish mere misjudgment or tactical error. The statute was designed to chill egregious, overzealous, unjustifiable and frivolous action.)

*Orbit Electronics, Inc. v. Helm Instrument Co.*, 167 Ohio App.3d 301, 2006-Ohio-2317, 855 N.E.2d 91 (8th Dist.) (Trial court did not err in awarding attorney fees, but did err in its awards for “stress and lost time” and “miscellaneous.”)



## *Similarities Between R.C. 2323.51 and Civ.R. 11*

- A court may deny a Civ.R.11 or R.C. 2323.51 motion without a hearing. A hearing is required, however, on those motions that show arguable merit under Civ.R.11, and R.C. 2323.51 mandates a hearing if sanctions are to be awarded.
- A motion under either provision can be heard after the dismissal of an action.
- Pro se litigants are subject to both Civ.R.11 and R.C. 2323.51.

## *Distinctions Between R.C. 2323.51 and Civ.R. 11*

- While both Civ.R. 11 and R.C. 2323.51 authorize the award of attorney fees as a sanction for frivolous conduct, they have separate standards of proof and differ in application.
- Civ.R. 11 requires a finding of *subjective* bad faith before sanctions can be imposed.
- R.C. 2323.51 applies an *objective* standard in determining frivolous conduct. The determination is made “without inquiry as to what the individual knew or believed.”

## *Standards of Review*

- An R.C. 2323.51 determination involves a mixed question of law and fact. Where a court finds that claims or defenses are factually frivolous (as opposed to legally frivolous) its determination that frivolous conduct took place will be affirmed so long as that decision is supported by competent credible evidence.
- A decision that a claim is legally frivolous, on the other hand, is reviewed *de novo*.
- The decision to grant sanctions under Civ.R. 11 rests within the sound discretion of the trial court and is reviewed under an abuse of discretion standard.
- If the trial court makes a finding of frivolous conduct and proceeds to order an award of monetary sanctions, that decision is reviewed for abuse of discretion.

# *Special Considerations*

## *Civil Rule 11 & R.C. 2323.51*

- A voluntary dismissal does not remove jurisdiction to hear a motion for frivolous conduct. *See ABN AMRO Mtge. Group, Inc. v. Evans*, 8th Dist. Cuyahoga No. 96120, 2011-Ohio-5654
- No need for a disinterested attorney to establish the amount of attorney fees expended so to constitute the monetary amount of sanctions. *See Grove v. Gamma Ctr.*, 3d Dist. Marion No. 9-12-41, 2013-Ohio-1734.
- Prime example of frivolous conduct is maintaining an action when subjectively and objectively clear that the statute of limitations had expired on the action. *See Stafford v. Columbus Bonding Ctr.*, 177 Ohio App.3d 799, 2008-Ohio-3948, 896 N.E.2d 191 (10th Dist.)
- Court should hold a hearing or put factual findings on the record to protect the ruling on appeal. *See Brisco v. U.S. Restoration & Remodeling, Inc.*, 10th Dist. Franklin Nos. 14AP-533, 14AP-543, 2015-Ohio-3567.

# *General Discovery Sanctions*

## *Civil Rule 37*

Categories of Sanctions under Civil Rule 37:

- (1) Not obeying a discovery order. Civ.R. 37(B)(1)
- (2) Not producing a person for examination. Civ.R. 37(B)(2)
- (3) Failure to supplement an earlier response or admission. Civ.R. 37(C)(1)-(2)
- (4) Failure to attend deposition, serve answers to interrogatories. Civ.R. 37(D)
- (5) Failure to preserve electronically stored information. Civ.R. 37(E)

# *Not Obeying a Discovery Order* *Civil Rule 37(B)(1)*

## Caselaw Interpretations:

*Tepper v. Saner*, 1st Dist. Clermont No. 566, 1975 Ohio App. LEXIS 6417, at \*4-5 (Oct. 6, 1975) (finding that sanctions were improperly imposed where plaintiff was never directly asked question he did not respond to.)

*Sowers v. Macioce*, C.P. No. 07 CV11-11-15172, 2010 Ohio Misc. LEXIS 14789, at \*1 (Jan. 31, 2010) (finding that pursuant to Civil Rule 37(B)(1)(a) that the facts as alleged by the plaintiffs, asserted in the complaint shall be taken to be established for the purposes of this action and shall be deemed as admitted.)

# *Special Considerations*

## *Civil Rule 37(B)(1)*

- Things to Keep in Mind:
  - Wide array of potential sanctions available and the court has broad discretion.
  - If litigant has had opportunity to apply for a protective order or be heard as to issue of the discovery order, it is not unconstitutional to eliminate the relevant vital issue from trial. *See Ward v. Hester*, 32 Ohio App.2d 121, 288 N.E.2d 840 (3d Dist.1972)
  - The more excessive the dilatory conduct, the more likely the sanction will be upheld on appeal.
  - Before entering dismissal pursuant to Civil Rule 37(B)(1), the court should, on the record, consider: (1) other available sanctions; and (2) whether there was willfulness, bad faith, or fault on behalf of the sanctionable party. *See Furcello v. Klammer*, 67 Ohio App.2d 156, 426 N.E.2d 187 (8th Dist.1980)
  - Dismissal may be done with prejudice as long as the Court gives prior notice to the sanctionable party that dismissal is a potential sanction. *See In re T.D.J.*, 8th Dist. Cuyahoga No. 98963, 2013-Ohio-1454.

# *Not Producing a Person for Examination*

## *Civil Rule 37(B)(2)*

### Caselaw Interpretations:

*Fulmer v. W. Licking Joint Fire Dist.*, 5th Dist. Licking No. 14-CA-58, 2014-Ohio-5843, ¶ 9 (noting that “Civil Rule 37(B)(2)(c)” allows for dismissal after a violation of an order to compel discovery” and that “[a]n appellate court's review of a dismissal under Civil Rule 37(B)(2)(c)...is within the sound discretion of the trial court.”)

*Russo v. Goodyear Tire & Rubber Co.*, 36 Ohio App.3d 175, 521 N.E.2d 1116 (9th Dist.1987) (Dismissal of employees' class action against employer was proper sanction because employees' repeated noncompliance with a discovery order for information that was neither privileged nor unascertainable was presumptively willful or made in bad faith.)

*Edison Sys., Inc. v. Ficken*, 10th Dist. Franklin No. 90AP-1389, 1991 Ohio App. LEXIS 3329 (July 11, 1991) (The trial court's judgment dismissing an employer's action as a discovery sanction was reversed where the trial court dismissed the action without prior notice.)



# *Special Considerations*

## *Civil Rule 37(B)(2)*

- Things to Keep in Mind:
  - Court again has a wide array of sanctions available to it, as well as broad discretion.
  - Where a deponent fails to appear multiple times, granting of sanctions is more likely to be affirmed by the appellate court. *See Ohio Bar Liab. Ins. Co. v. Silverman*, 10th Dist. Franklin No. 05AP-923, 2006-Ohio-3016.
  - Notice is required for dismissal with prejudice. *See Spragling v. Oriana House, Inc.*, 9th Dist. Summit No. 23501, 2007-Ohio-3245.
  - Court should also inquire, on the record, whether the sanctionable conduct resulted from willfulness or bad faith of the sanctionable party. *See Sedgwick v. Kawasaki Cycleworks, Inc.*, 24 Ohio App.3d 109, 493 N.E.2d 308 (10th Dist.1985).
  - Waiver of the attorney-client privilege is not a proper sanction. *See Janus Beck v. First Fin. Ins. Co.*, 12th Dist. Warren No. CA2005-11-123, 2006-Ohio-3463.

# *Failure to Supplement an Earlier Response or Admit Civil Rule 37(C)(1)-(2)*

## Caselaw Interpretations:

*Papadelis v. Charter One Bank, F.S.B.*, 8th Dist. Cuyahoga No. 84581, 2005-Ohio-288 (There was no abuse of discretion in dismissing the debtors' complaints with prejudice as they willfully failed to supplement discovery.)

*Wright v. Structo*, 88 Ohio App.3d 239, 623 N.E.2d 694 (6th Dist.1993) (In a personal injury action resulting from an explosion in a propane gas grill, the seller was granted motions in limine that excluded the consumers' expert witness and evidence of lost wages due to the consumers' failure to comply with discovery.)

*Progressive Cas. Ins. Co. v. Harrison*, 2d Dist. Montgomery No. 21521, 2007-Ohio-579 (A trial court properly granted judgment in favor of an insurer in its subrogation action against a perpetrator who allegedly shot a gun into its insured's vehicle, as the perpetrator had failed to fully respond to requests for admissions under Civ. R. 36(A) despite having been given numerous opportunities to do so.)

# *Special Considerations*

## *Civil Rule 37(C)(1)-(2)*

- Things to Keep in Mind:
  - Where the court does not expressly make a ruling on a motion under 37(C), the appellate court will presume the motion was denied. *See Kmetz v. MedCentral Health Sys.*, 5th Dist. Richland No. 02CA0050, 2003-Ohio-6115.
  - Court should investigate the objectionable nature, the substantial importance, and the reasons for non-compliance, regarding the matter sought to be responded to or admitted. *See Progressive Cas. Ins. Co. v. Harrison*, 2d Dist. Montgomery No. 21521, 2007-Ohio-579.
  - The taking of an appeal does not deprive the court of jurisdiction to award sanctions. *See Harris v. Southwest Gen. Hosp.*, 84 Ohio App.3d 77, 616 N.E.2d 507 (8th Dist.1992).
  - The determination to award fees lies within the sound discretion of the trial court. *See Kmetz, supra.*

# *Failure to Attend Deposition, Serve Answers to Interrogatories Civil Rule 37(D)*

## Caselaw Interpretations:

*Dafco, Inc. v. Reynolds*, 9 Ohio App.3d 4, 457 N.E.2d 916 (1983) (lessee was not required to first obtain an order compelling discovery before requesting costs and the dismissal of the damages actions because the lessors failed to attend a properly noticed deposition without obtaining a protective order.)

*E. I. Du Pont de Nemours & Co. v. Thompson*, 29 Ohio App.3d 272, 504 N.E.2d 1195 (8th Dist.1986) (The imposition of sanctions against the counsel for defendant was proper for instructing their client not to respond to deposition questions for lack of jurisdiction without objecting and seeking a protective order.)

*Mossburg v. Phillabaum*, 6th Dist. Ottawa Court of Appeals No. OT-96-061, 1997 Ohio App. LEXIS 2751 (June 27, 1997) (finding that the trial court did not abuse its discretion by barring a lienholder from testifying at his foreclosure trial as a discovery sanction where there was sufficient evidence that his failure to appear twice for his own scheduled deposition was willful.)

# *Special Considerations*

## *Civil Rule 37(D)*

- Things to Keep in Mind:

- A hearing is not required before awarding Civil Rule 37(D) sanctions. *See Shikner v. S & P Solutions*, 8th Dist. Cuyahoga No. 86291, 2006-Ohio-1339.
- An award of reasonable expenses may be mandatory, but the exclusion of evidence is not mandatory. *See Soloman v. Excel Marketing*, 114 Ohio App.3d 20, 682 N.E.2d 724 (2d Dist.1996).
- Court should inquire into justifiable reasons for failure to comply with 37(D) and refuse to apply sanctions if those reasons override. *See Papadelis v. Charter One Bank, F.S.B.*, 8th Dist. Cuyahoga No. 84581, 2005-Ohio-288.
- Dismissal of an action is a drastic remedy and should only be applied where there is willfulness or bad faith. *See Furcello v. Klammer*, 67 Ohio App.2d 156, 426 N.E.2d 187 (8th Dist.1980).

# *Ohio Civ. R. 37(E) and Sanctions Framework*

A court will not reach a sanctions decision under Ohio Civ.R.37(E) unless all of the following have been satisfied:

**1**

Relevant ESI  
“should have  
been preserved  
in anticipation  
of litigation”

**2**

Relevant ESI  
was “lost”

**3**

The relevant party  
charged with  
safekeeping the  
lost ESI “failed to  
take reasonable  
steps to preserve  
the information”

**4**

The lost ESI  
“cannot be  
restored or  
replaced  
through  
additional  
discovery”

## *What are “reasonable steps to preserve?”*

- Factors that have a significant impact on the issue of “reasonable steps to preserve” include information systems, technology choices, and information retention policies and practices.
- There is nothing in the rule’s language addressing these issues, but the federal committee note indicates that the lawyers should understand “clients’ information systems and digital data...to address the issues.”

## *Special Considerations*

### *Civil Rule 37(E)*

- Sanctions may even rise to dismissal with prejudice depending on whether conduct was willful or done in bad faith. *See Altercare, Inc. v. Clark*, 9th Dist. Lorain No. 12CA010211, 2013-Ohio-2785.
- Electronically stored information must be preserved until the claim is resolved. *See Thayer v. Diver*, C.P. No. G-4801-CI-200501011-000, 2010 Ohio Misc. LEXIS 13590 (Aug. 30, 2010).
- Court again has broad discretion, including, upon a finding of intent to deprive, dismissal of the action.



# QUESTIONS?

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