

ITEM 1.03 | AWARD OF EXPENSES AND FEES ON MOTION TO COMPEL

A motion under Fla. R. Civ. P. 1.380(a)(2) is the most widely used vehicle for seeking sanctions as a result of discovery abuses. Subsection (4) provides:

Award of Expenses of Motion. If the motion is granted and after opportunity for hearing, the court shall require the party or deponent whose conduct necessitated the motion or the party or counsel advising the conduct to pay to the moving party the reasonable expenses incurred in obtaining the order that may include attorneys' fees, unless the court finds that the movant failed to certify in the motion that a good faith effort was made to obtain the discovery without court action, that the opposition to the motion was justified, or that other circumstances make an award of expenses unjust. If the motion is denied and after opportunity for hearing, the court shall require the moving party to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion that may include attorneys' fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust. If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred as a result of making the motion among the parties and persons. (emphasis added).

As set forth in the Rule, it is required that the court shall award expenses unless the court finds the opposition was justified or an award would be unjust. The trial court should in every case, therefore, award expenses which may include attorney fees where there is no justified opposition, as it would seem that the absence of a justifiable position should, "by definition," render a sanction just. The party against whom the motion is filed is protected in that the Rule provides that the moving party shall pay the opposing party's expenses if the motion is denied. If the court finds that the motion was substantially justified, then it can award expenses against the non-moving party.

The Rule contemplates that the court should award expenses in the majority of cases. The courts should take a consistent hard line to ensure compliance with the Rule. Counsel should be forced to work together in good faith to avoid the need for motion practice.



Generally, where a party fails to respond to discovery and does not give sound reason for its failure to do so, sanctions should be imposed.¹⁵ For purposes of assessing failure to make discovery, an evasive or incomplete answer must be treated as a failure to answer.¹⁶ The punishment should fit the fault.¹⁷ Trial courts are regularly sustained on awards of attorney fees for discovery abuse.¹⁸ The same holds for award of costs and expenses.¹⁹

Failure to make a good faith effort to obtain the discovery without court action, and to so certify in the motion to compel, will be fatal to obtaining relief under subsection (4) of the rule.

Expenses, including fees, can be awarded without a finding of bad faith or willful conduct.²⁰ The only requirement under Fla. R. Civ. P. 1.380 is that the motion to compel be granted and that opposition was not justified. The party to be sanctioned is entitled to a hearing before the sanction is imposed.²¹

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Footnotes

¹⁵ *Ford Motor Co. v. Garrison*, 415 So. 2d 843 (Fla. 1st DCA 1982).

¹⁶ Fla. R. Civ. P. 1.380(a)(3).

¹⁷ *Eastern Airlines, Inc. v. Dixon*, 310 So. 2d 336 (Fla. 3d DCA 1975).

¹⁸ *First & Mid-South Advisorv Co. v. Alexander/Davis Properties, Inc.*, 400 So. 2d 113 (Fla. 4th DCA 1981); *St. Petersburg Sheraton Corp. v. Stuart*, 242 So. 2d 185 (Fla. 2d DCA 1970).

¹⁹ *Summit Chase Condominium Ass'n Inc. v. Protean Investors, Inc.*, 421 So. 2d 562 (Fla. 3d DCA 1982); *Rankin v. Rankin*, 284 So. 2d 487 (Fla. 3d DCA 1973); *Goldstein v. Great Atlantic and Pacific Tea Co.*, 118 So. 2d 253 (Fla. 3d DCA 1960).

²⁰ Where the attorney, and not the client, is responsible for noncompliance with a discovery order, a different set of factors must be applied in determining sanctions. *Sonson v. Hearn*, 17 So. 3d 745 (Fla. 4th DCA 2009).

²¹ *Burt v. S.P. Healthcare Holdings, LLC* (citation pending).