

2003

Guide to Understanding Discovery Sanctions under Illinois Supreme Court Rule 219(c) and Fashioning an Appropriate Judicial Response to Serious Discovery Misconduct, A

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Recommended Citation

Sheldon Gardner, & Scott W. Gertz, *Guide to Understanding Discovery Sanctions under Illinois Supreme Court Rule 219(c) and Fashioning an Appropriate Judicial Response to Serious Discovery Misconduct, A*, 34 Loy. U. Chi. L. J. 613 (2003).
Available at: <http://lawcommons.luc.edu/lucj/vol34/iss3/3>

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A Guide to Understanding Discovery Sanctions Under Illinois Supreme Court Rule 219(c) and Fashioning an Appropriate Judicial Response to Serious Discovery Misconduct

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I. INTRODUCTION

Discovery sanctions have become an important fact of life in the world of modern litigation. Whether viewed as a necessary evil to combat discovery abuses or a useful tool to keep litigation costs down,¹ one consideration has become readily apparent with respect to discovery sanctions: confusion abounds.² Too often, attorneys seeking to invoke discovery sanctions do not properly plead the applicable Illinois Supreme Court Rules. In many cases, such confusion has a minimal effect on the course of the litigation. Frequently, courts elect not to entertain sanction motions, the party complies after the court threatens to impose discovery sanctions, or the discovery sanction imposed does not cause the dilatory party great financial or tactical hardship.

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1. Hon. George W. Timberlake & Nancy Pionk, *Attorney Sanctions in Illinois Under Illinois Supreme Court Rule 137*, 20 LOY. U. CHI. L.J. 1027, 1047-48 (1989) (discussing the tension between the trial court's reluctance to impose sanctions and the desire of the trial bar and clients to seek sanctions in order to keep litigation expenses down).

2. For example, in Room 2306 of the Daley Center in Chicago, it is not uncommon for litigants to simply request "sanctions" against opposing counsel, without complying with Rule 201(k), without filing a sanction petition, or without specifying under which rule the motion is brought.

Occasionally, however, serious discovery misconduct is alleged, such as repeated violations of court orders or the destruction of evidence. When this type of allegation is made, there is little room for confusion on the part of the bar or the bench. Indeed, it is only with a firm command of the relevant rules, case law, and practical considerations that a court can adequately navigate through the discovery sanction process and emerge with an order that not only is just but also can survive an appeal.

One of the goals of this Article is to assist judges and practitioners in better understanding discovery sanctions under Illinois Supreme Court Rule 219(c).³ It is the authors' hope that, with a greater understanding

3. Rule 219(c) provides:

(c) Failure to Comply with Order or Rules. If a party, or any person at the instance of or in collusion with a party, unreasonably fails to comply with any provision of part E of article II of the rules of this court (Discovery, Requests for Admission, and Pretrial Procedure) or fails to comply with any order entered under these rules, the court, on motion, may enter, in addition to remedies elsewhere specifically provided, such orders as are just, including, among others, the following:

- (i) That further proceedings be stayed until the order or rule is complied with;
- (ii) That the offending party be debarred from filing any other pleading relating to any issue to which the refusal or failure relates;
- (iii) That the offending party be debarred from maintaining any particular claim, counterclaim, third-party complaint, or defense relating to that issue;
- (iv) That a witness be barred from testifying concerning that issue;
- (v) That, as to claims or defenses asserted in any pleading to which that issue is material, a judgment by default be entered against the offending party or that the offending party's action be dismissed with or without prejudice; or
- (vi) That any portion of the offending party's pleadings relating to that issue be stricken and, if thereby made appropriate, judgment be entered as to that issue.
- (vii) That in cases where a money judgment is entered against a party subject to sanctions under this subparagraph, order the offending party to pay interest at the rate provided by law for judgments for any period of pretrial delay attributable to the offending party's conduct.

In lieu of or in addition to the foregoing, the court, upon motion or upon its own initiative, may impose upon the offending party or his or her attorney, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred as a result of the misconduct, including a reasonable attorney fee, and when the misconduct is wilful, a monetary penalty. When appropriate, the court may, by contempt proceedings, compel obedience by any party or person to any subpoena issued or order entered under these rules. Notwithstanding the entry of a judgment or an order of dismissal, whether voluntary or involuntary, the trial court shall retain jurisdiction to enforce, on its own motion or on the motion of any party, any order imposing monetary sanctions, including such orders as may be entered on motions which were pending hereunder prior to the filing of a notice or motion seeking a judgment or order of dismissal.

Where a sanction is imposed under paragraph (c), the judge shall set forth with specificity the reasons and basis of any sanctions so imposed either in the judgment order itself or in a separate written order.

of the complexities of Rule 219(c), the need to resort to discovery sanctions can be reduced. It is also hoped that, through this Article, courts will become better equipped to respond to allegations of serious discovery misconduct. This latter objective is a recognition that no matter how much education and guidance may exist, some litigants and attorneys will continue to abuse the discovery process.

In an effort to achieve the abovementioned goals, Part II of this Article discusses the purposes and scope of Rule 219(c).⁴ Part III compares and contrasts Rule 219(c) with Rule 137, the other Illinois Supreme Court rule through which a trial court can sanction an attorney or party for a discovery violation.⁵ Part IV then analyzes factors that courts consider when determining whether to impose discovery sanctions under Rule 219(c).⁶ Part V discusses what options are available to ensure that a court's order is "just"⁷ when a court elects to sanction an attorney or other offending party.⁸ Part VI suggests a proposal for altering the rationale governing Rule 219(c) for cases in which allegations of serious discovery misconduct have been substantiated.⁹ The authors provide suggestions and recommendations throughout this Article where no clear guidance exists.

II. THE PURPOSES AND EXPANSIVE SCOPE OF RULE 219(C)

Rule 219(c) is designed to coerce compliance with discovery rules and orders, not to punish dilatory parties.¹⁰ To this end, courts should strive to strike a balance between enforcing discovery rules and resolving cases on the merits.¹¹ Courts are assisted in carrying out these

ILL. SUP. CT. R. 219(c).

4. See *infra* Part II (exploring the purposes and scope of Rule 219(c)).

5. See *infra* Part III (comparing Rule 219(c) and Rule 137).

6. See *infra* Part IV (discussing factors that courts take into account when determining whether to impose sanctions under Rule 219(c)).

7. ILL. SUP. CT. R. 219(c) (stating that "the court . . . may enter . . . such orders as are just").

8. See *infra* Part V (analyzing what options are available to ensure that a court's sanction order is just).

9. See *infra* Part VI (arguing that Rule 219(c) should adopt the purpose of Rule 137 by imposing punishment for serious discovery misconduct).

10. *Blakey v. Gilbane Bldg. Corp.*, 708 N.E.2d 1187, 1191 (Ill. App. Ct. 4th Dist. 1999) ("When imposing sanctions, the court's purpose is to coerce compliance with discovery rules and orders, not to punish the dilatory party.").

11. *Id.* ("A just order of sanctions under Rule 219(c) is one which, to the degree possible, ensures both discovery and a trial on the merits."); see also *Bachman v. Gen. Motors Corp.*, 776 N.E.2d 262, 290 (Ill. App. Ct. 4th Dist. 2002) ("In fashioning a sanction, the court must weigh the competing interests of the offending party's right to maintain a lawsuit against the need to accomplish the objectives of discovery and promote the unimpeded flow of litigation."); Kathleen M. Potocki, Comment, *Policing Discovery Under Illinois Supreme Court Rule 219(c): A Search*

goals through the expansive scope of Rule 219(c), manifested in both the plain language of the rule and the case law construing it.

First, the language of Rule 219(c) is couched in broad terms. For example, Rule 219(c) provides that “any person” who unreasonably fails to comply with any provision of the Illinois Supreme Court’s discovery rules, or any order entered pursuant to these rules, may be subject to pre-trial sanctions.¹² Thus, the use of “any person” allows an offending party to be an individual other than an attorney.¹³ Further, when imposing sanctions, the court is free to fashion any order that is “just.”¹⁴ A just order can range from a mere oral reprimand to dismissal of the dilatory party’s cause of action with prejudice.¹⁵ The primary limitation on the court is that the sanction order cannot amount to punishment of the dilatory party.¹⁶

Second, a party can be subject to sanctions under Rule 219(c) for conduct that took place even before a lawsuit was filed. Courts have held that a pre-suit duty exists to ensure that evidence is maintained properly.¹⁷ For example, it is sanctionable conduct to destroy relevant evidence, such as a steering mechanism in an automobile accident case, prior to the filing of the lawsuit.¹⁸

for *Judicial Consistency*, 21 LOY. U. CHI. L.J. 973, 977–78 (1990) (“Rule 219(c) purports to strike a balance between enforcing discovery rules and resolving cases on the merits.”).

12. ILL. SUP. CT. R. 219(c); *see also supra* note 3 (detailing Rule 219(c)).

13. *See Workman v. St. Therese Med. Ctr.*, 640 N.E.2d 349, 354 (Ill. App. Ct. 2d Dist. 1994) (dismissing the cause with prejudice where, inter alia, plaintiff failed to comply with discovery deadlines ordered by the trial court and failed to pay monetary sanctions that were also ordered by the trial court); *see also Hartnett v. Stack*, 607 N.E.2d 703, 711 (Ill. App. Ct. 2d Dist. 1993) (ordering the pleading struck and default judgment entered where, inter alia, defendant failed to follow the trial court’s orders to file an affidavit, answer interrogatories, supply requested documentation, and appear at a deposition).

14. ILL. SUP. CT. R. 219(c); *see also supra* note 3 (providing the language of Rule 219(c)).

15. *See* ILL. SUP. CT. R. 219(c). The sanction options enumerated are not the only sanctions upon which a court may draw in fashioning a sanction order; a court may impose a sanction that is *less* onerous than those options that are enumerated in Rule 219(c), as long as the sanction order does not amount to a punishment and is just. *See Dyduch v. Crystal Green Corp.*, 582 N.E.2d 302, 307 (Ill. App. Ct. 2d Dist. 1991) (finding that trial courts are not limited to the sanctions listed in Rule 219 for discovery misconduct and may enter such orders that are just, as long as the order does not inflict punishment).

16. *Blakey v. Gilbane Bldg. Corp.*, 708 N.E.2d 1187, 1191 (Ill. App. Ct. 4th Dist. 1999) (holding that the trial court abused its discretion in ordering dismissal with prejudice as a sanction).

17. *See Shimanovsky v. Gen. Motors Corp.*, 692 N.E.2d 286, 290 (Ill. 1998) (“[A] potential litigant owes a duty to take reasonable measures to preserve the integrity of relevant and material evidence.” A breach of this pre-suit duty can lead to the imposition of sanctions.).

18. *Id.* (holding that the trial court had authority to impose a sanction on plaintiffs for the destructive testing of evidence); *see also infra* notes 127–65 (discussing the opinion in *Shimanovsky*).

Third, an attorney or party can also be subject to sanctions after the underlying lawsuit has been dismissed. Under Rule 219(c), the court retains jurisdiction to sanction a dilatory party after the lawsuit has been dismissed.¹⁹

Finally, courts are endowed with broad discretion to determine whether to impose sanctions and, if so, the type of sanction to impose on dilatory parties for discovery violations.²⁰ As a consequence of its broad mandate, Rule 219(c) brings a wide range of misconduct under its ambit.

III. RULE 219(C) COMPARED TO RULE 137

A. *General²¹ Principles Under Rule 137*

Rule 219(c) is not the only vehicle by which a court can sanction discovery misconduct. Illinois Supreme Court Rule 137 is also available to trial courts in this regard.²² Under Rule 137, the party who

19. See ILL. SUP. CT. R. 219(c) (noting that the trial court retains jurisdiction to enforce a monetary sanction order, even after the underlying case has been dismissed); see also *Transamerica Ins. Group v. Lee*, 518 N.E.2d 413, 415 (Ill. App. Ct. 1st Dist. 1987) (imposing monetary sanctions, by the trial court, at a hearing conducted *after* the court granted summary judgment in favor of plaintiff).

20. *Peterson v. Ress Enters., Inc.*, 686 N.E.2d 631, 640 (Ill. App. Ct. 1st Dist. 1997) (“The decision to impose sanctions pursuant to Rule 219(c), and, if so, the type of sanction, is largely within the sound discretion of the trial court”); see also Potocki, *supra* note 11, at 978–79 (explaining that trial courts have “vast discretion” to determine whether to impose sanctions and, if so, what the appropriate sanction should be).

21. The authors intend for their discussion of Rule 137 to be illustrative, not comprehensive.

22. In pertinent part, Rule 137 provides:

Every pleading, motion and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney fee.

requests that sanctions be imposed bears the burden of proof.²³ Specifically, the party petitioning for sanctions must show that the opposing party made untrue and false allegations without reasonable cause.²⁴

Rule 137 requires a party or litigant to: (1) sign pleadings and other papers to certify that he or she has read the document; (2) make reasonable inquiry into the basis of the lawsuit; (3) believe that the lawsuit is well-grounded both in fact and in law, or that there is a good-faith argument for the extension, modification, or reversal of existing law; and (4) not interpose the suit for any improper purpose, such as harassment, unnecessary delay, or needless increase in the cost of litigation.²⁵

While Rule 219(c) and Rule 137 are both sanction provisions and share various similarities to one another,²⁶ there are significant distinctions that characterize the respective rules. Three important areas in which the two rules differ include their rationales, the different levels of specificity that are required, and whether a hearing is required to determine if a sanction should be imposed. A discussion of these differences follows.

B. Contrasting Goals: Punishment Versus Balance

Rule 219(c) and Rule 137 have strikingly different rationales, despite the fact that both are sanction provisions. Rule 137 is directed at punishing parties found to be in violation of its requirements.²⁷ As a result of this penal focus, the provisions of Rule 137 must be strictly construed.²⁸ Accordingly, under the strict construction of Rule 137, sanctions cannot be imposed for all acts of misconduct. Rather,

Where a sanction is imposed under this rule, the judge shall set forth with specificity the reasons and basis of any sanction so imposed either in the judgment order itself or in a separate written order.

ILL. SUP. CT. R. 137.

23. *Tech. Innovation Ctr., Inc. v. Advanced Multiuser Techs.*, 732 N.E.2d 1129, 1134 (Ill. App. Ct. 1st Dist. 2000) (citing *Yassin v. Certified Grocers of Ill.*, 551 N.E.2d 1319, 1322 (Ill. 1990)); see also *infra* Part IV (discussing the burden shifting scheme under Rule 219(c)).

24. *Tech. Innovation Ctr.*, 732 N.E.2d at 1134 (citing *In re Estate of Wernick*, 535 N.E.2d 876, 883 (Ill. 1989)).

25. *Rankin v. Heidlebaugh*, 747 N.E.2d 483, 486 (Ill. App. Ct. 5th Dist. 2001) (citing ILL. SUP. CT. R. 137).

26. See *infra* Part VI (explaining that Rule 219(c) has adopted some of the language and requirements of Rule 137).

27. *Rankin*, 747 N.E.2d at 488 (“The purpose of Rule 137 is to prevent the abuse of the judicial process by penalizing those who bring vexatious or harassing actions without sufficient foundation.”).

28. *Id.*

sanctions can be imposed only for the filing of pleadings, motions, or other paper in violation of the rule itself.²⁹

In contrast, Rule 219(c) does not focus on punishing dilatory parties. Indeed, punishing a party under Rule 219(c) can be grounds for reversal.³⁰ Instead, sanctions under Rule 219(c) are designed to strike a balance³¹ between enforcing discovery rules and resolving cases on the merits.³²

The lines of demarcation between the rules are clear in the context of a violation of a pre-trial court order. In this setting, it is Rule 219(c), not Rule 137, that governs.³³ Rule 137 is triggered only when a pleading or other paper has been filed.³⁴ Pleadings are generally not at issue when a court issues a pre-trial order, such as an order compelling a party to submit to a deposition. However, a degree of ambiguity comes into play in the context of a written discovery violation (that is, where a pleading has been filed). In such an instance, both rules could theoretically apply, as the pleading and filing requirements of Rule 137 have been satisfied. For example, either rule could govern in a situation in which a pleading was filed that was allegedly intentionally untrue or

29. *In re Marriage of Adler*, 648 N.E.2d 953, 957 (Ill. App. Ct. 1st Dist. 1995) (“By its terms, [Rule 137] authorizes the imposition of sanctions against a party or his attorney for filing a pleading, motion, or other paper that is not well grounded in fact and warranted by existing law or which has been interposed for any improper purpose.”).

30. *See Shimanovsky v. Gen. Motors Corp.*, 692 N.E.2d 286, 293 (Ill. 1998) (finding that dismissal of the cause of action with prejudice, without any regard to the unique facts of the case or the relevant factors employed to determine an appropriate sanction, constituted a punishment); *see also Dyduch v. Crystal Green Corp.*, 582 N.E.2d 302, 307 (Ill. App. Ct. 2d Dist. 1991) (finding that the trial court’s award of fees and costs was a punishment where the fees and costs were out of proportion to the level of discovery misconduct).

31. An alternative theory to proper balance is grounded in *detering* future discovery abuse. Under this view, any balancing must take into consideration the use of serious sanctions to curb noncompliance in the judicial system as a whole. *See Potocki, supra* note 11, at 978; *see also Workman v. St. Therese Med. Ctr.*, 640 N.E.2d 349, 354 (Ill. App. Ct. 2d Dist. 1994) (“[I]t is also appropriate to consider the need for using discovery sanctions as a general deterrent which will provide a strong incentive for *all* litigants to fully . . . comply with discovery rules.”).

32. *Blakey v. Gilbane Bldg. Corp.*, 708 N.E.2d 1187, 1191 (Ill. App. Ct. 4th Dist. 1999) (“A just order of sanctions under Rule 219(c) is one which, to the degree possible, ensures both discovery and a trial on the merits.”); *see also Bachman v. Gen. Motors Corp.*, 776 N.E.2d 262, 290 (Ill. App. Ct. 4th Dist. 2002) (“In fashioning a sanction, the court must weigh the competing interests of the offending party’s right to maintain a lawsuit against the need to accomplish the objectives of discovery and promote the unimpeded flow of litigation.”); Potocki, *supra* note 11, at 977–78 (“Rule 219(c) purports to strike a balance between enforcing discovery rules and resolving cases on the merits.”).

33. *See ILL. SUP. CT. R. 219(c)* (stating that a court may impose sanctions on a party who fails to comply with a *court order* pertaining to, *inter alia*, *discovery*).

34. *In re Marriage of Adler*, 648 N.E.2d at 957 (“Rule 137 does not authorize a trial court to impose sanctions for all acts of misconduct . . . *only* for the *filing of pleadings, motions, or other papers* in violation of the rule itself.” (emphasis added)).

the result of an inadequate investigation. In this setting, which rule is the proper procedural vehicle with which to analyze the alleged misdeed? Consistent with its broad discretion, a court is free to choose either rule, as long as the court first considers the purposes behind each rule.³⁵

C. *The Specificity Requirements*

1. *Petition Specificity*

Both rules impose a number of procedural safeguards on litigants and the courts. One of these requirements concerns the level of specificity that is necessary for a proper petition for sanctions. Under Rule 137, a sanction petition must identify: (1) the offending pleading, motion, or other paper; (2) which statements in the document are false; and (3) the fees and costs that have directly resulted from the untrue allegations.³⁶ This level of specificity is required to afford the responding party an opportunity to challenge and defend against the allegations and to enable the trial court to make a determination of the reasonable expenses that were a consequence of the alleged misdeeds.³⁷

However, no such petition-drafting guidance exists under Rule 219(c). To date, no reviewing court has addressed whether a petition for sanctions under Rule 219(c) requires a similar level of specificity as petitions do under Rule 137. Nevertheless, prudence dictates that attorneys file Rule 219(c) sanction petitions that comply with the same specificity standards as those required under Rule 137. This practice exists because the reasoning that underlies Rule 137 petition drafting also applies to petitions under Rule 219(c).

First, as under Rule 137, persons alleged to have violated Rule 219(c) should have the opportunity to challenge and defend against the misconduct allegations. The imposition of sanctions under Rule 219(c) can produce serious consequences. For example, while sanctions under 219(c) are not designed to punish, a stigma is clearly associated with

35. See *William J. Templeman Co. v. W.E. O'Neil Constr. Co.*, Nos. 1-96-3434 & 1-96-3557, 1998 Ill. App. LEXIS 587 (Ill. App. Ct. 1st Dist. Aug. 19, 1998) (finding that a discovery violation can be sanctioned under Rule 137 as long as a writing is involved); see also *Evers v. Edward Hosp. Ass'n*, 617 N.E.2d 1211, 1226 (Ill. App. Ct. 2d Dist. 1993) (noting that the court should consider the purpose that underlies the respective rules before deciding which rule is more appropriate in a discovery dispute).

36. *In re Marriage of Adler*, 648 N.E.2d at 957.

37. *Id.*

having sanctions imposed on an attorney or a party.³⁸ No attorney or party desires to have his or her reputation tarnished by a court sanction. Further, discovery sanctions under Rule 219(c) can have a substantial monetary or evidentiary impact on a party or case, including the termination of the litigation.³⁹ A detailed sanction petition and a detailed response allow the dilatory party a greater opportunity to challenge the allegations, as he or she is armed with additional information with which to mount a defense.

Second, like Rule 137, a detailed sanction petition also provides the court with a basis with which to assess the reasonableness of the fees requested. Indeed, short of a hearing on fees, the petition may be the only source of information detailing the nature and extent of the expenses borne by counsel. Thus, like the rationale underlying Rule 137 petition specificity, the goals of Rule 219(c) are best achieved with both a detailed sanction petition and a detailed response to the sanction petition.

2. Court Rationale Specificity

Under both rules, once a court decides to impose sanctions on a dilatory party, it must “set forth with specificity” its rationale for so ruling in the judgment order or in a separate written order.⁴⁰ Specific findings by the trial court are necessary to enable a reviewing court to determine whether: (1) the trial court’s decision was an informed one; (2) the decision was based on valid reasons that fit the case; and (3) the decision followed logically from the application of the reasons stated to the particular circumstances of the case.⁴¹

Under Rule 137, not only must the trial court specify the reasons and basis of any sanction, it must also specify the manner in which it computed the sanction when the sanction is substantial.⁴² Trial courts

38. See *infra* note 168 (stating that dishonest and lazy attorneys should be sanctioned under 137). It is difficult to imagine that an attorney would *desire* to have his or her conduct characterized in this way.

39. See ILL. SUP. CT. R. 219(c) (noting that a court may impose a sanction that will result in a default judgment or the dismissal of the cause of action with prejudice); see also *infra* notes 113–26 and accompanying text (discussing the dismissal of the cause in *Sander v. Dow Chemical Co.*, 651 N.E.2d 1071, 1081 (Ill. 1995), for willful violation of a court order).

40. ILL. SUP. CT. R. 137 (“Where a sanction is imposed under this rule, the judge shall set forth with specificity the reasons and basis of any sanction so imposed either in the judgment order itself or in a separate written order.”); ILL. SUP. CT. R. 219(c) (“Where a sanction is imposed . . . the judge shall set forth with specificity the reasons and basis of any sanction so imposed either in the judgment order itself or in a separate written order.”).

41. *In re Marriage of Schneider*, 697 N.E.2d 1161, 1163–65 (Ill. App. Ct. 1st Dist. 1998).

42. *In re Marriage of Adler*, 648 N.E.2d at 957 (entering a judgment in the amount of \$25,000).

may also be required to specify reasons when they decide to *deny* sanction petitions.⁴³

What level of specificity is required under Rule 219(c)? Guidance on this question is provided in two appellate court decisions. In *Chabowski v. Vacation Village Ass'n*,⁴⁴ the trial court dismissed a plaintiff's complaint with prejudice, after the plaintiff, inter alia, violated a court order by failing to appear for depositions on two occasions and failing to appear for court hearings on two occasions.⁴⁵ On appeal, the plaintiff argued, inter alia, that the trial court committed reversible error by not indicating in writing the reasons for its decision.⁴⁶

The appellate court affirmed.⁴⁷ It noted that the trial court's failure to state its reasons in writing was not per se reversible error because the dismissal order was entered pursuant to a written motion by defendants, which articulated the reasons for dismissal, and the reasons for the dismissal were supported by the record.⁴⁸

In *Wright v. Desate, Inc.*,⁴⁹ the plaintiffs filed a complaint against Sears, Roebuck & Co. and several other defendants after one of the plaintiffs was injured while unloading a truck at a Sears warehouse.⁵⁰ In a pre-trial motion, Sears sought to bar testimony of two of the plaintiffs' expert witnesses because the plaintiffs had not responded to discovery requests in a timely manner.⁵¹ Without stating any basis for the determination in its written order, the trial court granted the motion to bar.⁵² At the conclusion of a hearing on a written motion to reconsider, the judge stated, inter alia:

I think it should have been abundantly clear to the plaintiff, and I think I made it clear, that the case would not be continued beyond December and that it would be tried this year. And then to wait until the middle of November to notice up the evidence depositions of two essential witnesses seems to me a pretty fast and loose method of handling cases⁵³

43. *See* *N. Shore Sign Co. v. Signature Design Group, Inc.*, 604 N.E.2d 1157, 1163 (Ill. App. Ct. 2d Dist. 1992) (“[W]e believe the trial court must at least express succinctly the basis for its decision even when it denies a motion for sanctions.”).

44. *Chabowski v. Vacation Vill. Ass'n*, 690 N.E.2d 115 (Ill. App. Ct. 2d Dist. 1997).

45. *Id.* at 117.

46. *Id.*

47. *Id.* at 119.

48. *Id.*

49. *Wright v. Desate, Inc.*, 686 N.E.2d 1199 (Ill. App. Ct. 3d Dist. 1997).

50. *Id.* at 1200.

51. *Id.*

52. *Id.* at 1201.

53. *Id.* at 1200–01.

On appeal, one of the questions addressed was whether the order barring the plaintiffs' experts from testifying should be vacated because it failed to specify the basis for the sanction.⁵⁴ Relying heavily on the reasoning in *Chabowski*, the *Wright* court affirmed, finding that the reasons for the sanction were specifically stated in both the written motion to bar the testimony and the written reply to the motion to reconsider.⁵⁵ The court also found a sufficient basis in the record for the trial court's ruling, noting that the trial judge's findings were clearly articulated at the conclusion of the hearing on the motion to reconsider hearing.⁵⁶ As a result, the court found that it could make an informed decision regarding the appropriateness of the order from the record.⁵⁷

In sum, under *Chabowski* and *Wright*, a court is *not* required to draft a written opinion articulating its legal basis for imposing sanctions under 219(c). Rather, a court can satisfy the specificity requirement of Rule 219(c) by adopting the reasoning of a written motion in which the rationale for sanctions is expressed, as well as by articulating the reasons for imposing sanctions on the record.⁵⁸

D. The Hearing Requirements

Is an evidentiary hearing required before a court imposes discovery sanctions? It depends. Under Rule 137, such a hearing should always be held when a sanction award is based on a pleading filed for an improper purpose, such as harassment of an opponent.⁵⁹ When a court is called upon to determine if an untrue statement within a pleading was made without reasonable cause, however, the court is not required to conduct a hearing if it can make a determination based upon the pleadings or the trial evidence.⁶⁰ Once the court finds that a pleading is sanctionable, Rule 137 requires an evidentiary hearing on the reasonableness of any fee to be awarded.⁶¹ A fee hearing is required because the issue of reasonableness is a matter of proof that should be subject to cross-examination.⁶²

54. *Id.* at 1201.

55. *Id.*

56. *Id.*

57. *Id.* at 1202.

58. *Id.*

59. *Century Rd. Builders, Inc. v. City of Palos Heights*, 670 N.E.2d 836, 838 (Ill. App. Ct. 1st Dist. 1996).

60. *Id.*

61. *Id.* at 839.

62. *Id.*

When a court proceeds under Rule 219(c), case law suggests, but does not require, that the trial court conduct a hearing on the merits. In *Shimanovsky v. General Motors Corp.*,⁶³ the appellate court held that a party is not automatically entitled to a specific sanction just because evidence is destroyed or altered.⁶⁴ Instead, a court must consider the unique factual situation of the case presented and apply the appropriate criteria in determining what sanction, if any, it should impose.⁶⁵ The appellate court reversed and remanded the case for the trial court to conduct a hearing to determine the degree of prejudice the defendant suffered as a result of the plaintiffs' alteration of evidence.⁶⁶ The Illinois Supreme Court affirmed the appellate court's ruling.⁶⁷ The supreme court added that once the trial court ascertained the level of the defendant's prejudice, it was required to determine what sanction, if any, was warranted.⁶⁸

While no bright line rule was announced, *Shimanovsky* appears to endorse the practice of trial courts conducting hearings to determine what sanction should be imposed. It is through this approach that a trial court is poised to "consider the unique factual situation that each case presents," and after consideration, impose a just order.⁶⁹

Rule 219(c), like Rule 137, provides that appropriate sanctions can include "a reasonable attorney fee."⁷⁰ Surprisingly, courts of review have provided little guidance on whether a hearing by the trial court is required to determine the "reasonableness" of the fee. For example, in *Transamerica Insurance Group v. Lee*,⁷¹ the majority held that the trial court's award to the plaintiff of twice the amount of her attorney's fees as a penalty against the defendant was not an abuse of discretion.⁷² The majority reasoned that a penalty sanction was "just" because it was a means of discouraging litigants from considering discovery violations

63. *Shimanovsky v. Gen. Motors Corp.*, 648 N.E.2d 91 (Ill. App. Ct. 1st Dist. 1994), *modified, aff'd, remanded by* 692 N.E.2d 286 (Ill. 1998).

64. *Id.* at 96-97.

65. *Id.* at 97.

66. *Id.* at 97-98.

67. *Shimanovsky v. Gen. Motors Corp.*, 692 N.E.2d 286, 293 (Ill. 1998).

68. *Id.*

69. *Id.* at 292-93.

70. ILL. SUP. CT. R. 219(c); *see also supra* note 3 (detailing Rule 219(c)).

71. *Transamerica Ins. Group v. Lee*, 518 N.E.2d 413 (Ill. App. Ct. 1st Dist. 1987).

72. *Id.* at 415.

as a litigation strategy⁷³ and a vehicle through which the courts could avoid additional burdens on their resources.⁷⁴

In a vigorous dissent, Justice McMorrow argued, *inter alia*, that the majority's award of fees without an evidentiary hearing by the trial court to determine the award's reasonableness was an abuse of discretion.⁷⁵ Justice McMorrow noted that Rule 219(c) provides that "the award of attorney fees must be 'reasonable' and 'incurred by [the innocent] party as a result of the misconduct.'" ⁷⁶ Justice McMorrow concluded that the case record did not demonstrate evidence of any prejudice to plaintiff by the defendant's discovery violation.⁷⁷ Therefore, Justice McMorrow would have reversed the trial court's decision and remanded the matter for an evidentiary hearing on the reasonableness of the attorney's fees actually incurred by plaintiff due to the discovery violation.⁷⁸

Other reviewing courts have concurred with Justice McMorrow's reasoning on the question of monetary sanctions.⁷⁹ No court, however, has stated that a fee hearing *must* be conducted pursuant to Rule 219(c).⁸⁰ Despite the paucity of authority on this matter, the sound practice would be for trial courts to conduct such a hearing. Like Rule 137, the "reasonableness" of the fee is at issue when courts impose fee sanctions under Rule 219(c).⁸¹ Therefore, a hearing should be conducted "because the issue of reasonableness is a matter of proof that should be subject to cross-examination."⁸² At a minimum, if a court

73. *Id.* at 416 ("If the only sanction imposed upon discovery of the violation is the payment of attorney fees and costs, it may prove a cost effective measure to be tried in future cases.").

74. *Id.* ("Additionally, and at least as significant as the burden on the plaintiff is the burden on the courts struggling to handle the massive amount of pending litigation.").

75. *Id.* at 419 (McMorrow, J., dissenting).

76. *Id.* (McMorrow, J., dissenting) (quoting ILL. SUP. CT. R. 219(c)).

77. *Id.* (McMorrow, J., dissenting).

78. *Id.* (McMorrow, J., dissenting).

79. *See, e.g.,* Dyduch v. Crystal Green Corp., 582 N.E.2d 302, 307 (Ill. App. Ct. 2d Dist. 1991) ("We agree with Justice McMorrow and her conclusion that monetary sanctions pursuant to Rule 219(c) are limited to the reasonable expenses incurred by the innocent party as a result of the misconduct.").

80. Perhaps the closest the courts have come to endorsing the concept of a fee hearing under Rule 219(c) was in a case in which the appellate court cited the use of a fee hearing approvingly in affirming the reasonableness of a fee award. *See* Martzaklis v. 5559 Belmont Corp., 510 N.E.2d 1148, 1152 (Ill. App. Ct. 1st Dist. 1987) ("In determining the amount of fees to be awarded to plaintiff's attorneys, the trial court reviewed . . . the hearing testimony and concluded that the time claimed was necessary.").

81. *Compare* ILL. SUP. CT. R. 137, *with* ILL. SUP. CT. R. 219(c).

82. *Century Rd. Builders Inc. v. City of Palos Heights*, 670 N.E.2d 836, 839 (Ill. App. Ct. 1st Dist. 1996) (vacating and remanding the trial court's order for sanctions where the trial court

elects not to hold such a hearing, it should review and cite time records and affidavits in making its findings.⁸³

IV. FACTORS COURTS CONSIDER IN DETERMINING WHETHER TO IMPOSE SANCTIONS UNDER RULE 219(C)

A. *Illinois Supreme Court Rule 201(k)*

As a threshold matter, litigants must comply with Illinois Supreme Court Rule 201(k) before filing a motion for sanctions.⁸⁴ Rule 201(k) provides as follows: “Every motion with respect to discovery shall incorporate a statement that counsel responsible for trial of the case after personal consultation and reasonable attempts to resolve differences have been unable to reach an accord. . . .”⁸⁵ The purpose behind Rule 201(k) is to urge counsel to adopt a spirit of cooperation with regard to discovery. Counsel is not to “use discovery rules to engage in ‘harassment, delay, and pettifoggery.’”⁸⁶

Strict compliance with Rule 201(k) is generally required in that counsel responsible for trial must make reasonable attempts to resolve differences over discovery with opposing counsel prior to the filing of a sanction petition.⁸⁷ Ideally, this Rule 201(k) compliance statement should be a part of the sanction petition.

B. *Unreasonable Noncompliance*

Once Rule 201(k) has been satisfied, the court must decide whether or not to impose sanctions. The critical inquiry at this stage is to assess the reasonableness of the discovery noncompliance.⁸⁸ Unreasonable noncompliance can be defined as a “deliberate, contumacious, or

failed to conduct an evidentiary hearing on the merits of the sanctions motion or a hearing on the reasonableness of the fees awarded).

83. See *Martzaklis*, 510 N.E.2d at 1151 (affirming a trial court on the amount of fees awarded, where “the trial court reviewed the pleadings, the time records of counsel and the hearing testimony and concluded that the time claimed was necessary”).

84. *Antkiewicz v. Pax/Indianapolis, Inc.*, 627 N.E.2d 185, 189 (Ill. App. Ct. 1st Dist. 1993).

85. ILL. SUP. CT. R. 201(k).

86. *In re Marriage of Lai*, 625 N.E.2d 330, 334 (Ill. App. Ct. 1st Dist. 1993) (quoting *Spiller v. Cont'l Tube Co.*, 434 N.E.2d 850, 853 (Ill. App. Ct. 3d Dist. 1982)).

87. *In re Estate of Andernovics*, 759 N.E.2d 501, 508 (Ill. 2001).

88. See *id.* at 507 (“A party disputing a sanction order for failure to comply with discovery must establish that noncompliance was reasonable or justified under the circumstances.”); see also *Workman v. St. Therese Med. Ctr.*, 640 N.E.2d 349, 354 (Ill. App. Ct. 2d Dist. 1994) (“[S]anction orders under Rule 219(c) are to be imposed only when the noncompliance is unreasonable and the order entered is just.”).

unwarranted disregard of the court's authority."⁸⁹ Alternatively, unreasonable compliance can be "a deliberate and pronounced disregard both for the discovery rules and for the court."⁹⁰ Unreasonable noncompliance with discovery rules can be determined, in part, by the importance of the information or product that has not been produced, rather than by the fault of the dilatory party.⁹¹

Initially, the burden is on the complainant to show that the noncompliance was unreasonable.⁹² Once the court establishes that the dilatory party was noncompliant, the burden shifts, and the dilatory party has the burden of demonstrating that the noncompliance was reasonable or justified under the circumstances.⁹³

The court's assessment of the alleged unreasonable noncompliance should begin with a detailed sanction petition and a detailed response to the petition. It is through this procedure that a court can make a threshold determination as to whether or not the alleged misconduct was deliberate. If the court is satisfied that the alleged violation warrants further attention, it should consider holding an evidentiary hearing on the merits to assess the validity of the allegations.

C. Sanction Considerations

The factors a trial court must use in determining what sanction, if any, to apply include:

- (1) the surprise to the adverse party;
- (2) the prejudicial effect of the proffered testimony or evidence;^[94]
- (3) the nature of the testimony or evidence;
- (4) the diligence of the adverse party in seeking discovery;
- (5) the timeliness of the adverse party's objection to the testimony or

89. *Blott v. Hanson*, 670 N.E.2d 345, 349 (Ill. App. Ct. 2d Dist. 1996).

90. *Gausselein v. Commonwealth Edison Co.*, 631 N.E.2d 1246, 1256 (Ill. App. Ct. 1st Dist. 1994).

91. *Shelbyville Mut. Ins. Co. v. Sunbeam Leisure Prods. Co.*, 634 N.E.2d 1319, 1322 (Ill. App. Ct. 5th Dist. 1994); *see also* Leonard E. Gross, *Supreme Court Rule 219: The Consequences of Refusal to Comply with Rules or Orders Relating to Discovery or Pretrial Conferences*, 24 LOY. U. CHI. L.J. 471, 479 (1993) (noting that courts should consider the importance of the information withheld to determine what type of sanction to impose, not whether sanctions are appropriate).

92. Potocki, *supra* note 11, at 979 ("Determining whether a party's noncompliance is 'unreasonable' is a question of fact with the burden of proof on the complainant.").

93. *In re Estate of Andernovics*, 759 N.E.2d 501, 507 (Ill. 2001).

94. Considerations relevant in determining the degree of prejudice include "the strength of the undisclosed evidence, the likelihood that prior notice could have helped the opposing party discredit the evidence, the feasibility of continuance rather than a more drastic sanction, and the willfulness of the opposing party in failing to disclose the witness." *Phillips v. Gannotti*, 763 N.E.2d 820, 826 (Ill. App. Ct. 1st Dist. 2002).

evidence; and (6) the good faith of the party offering the testimony or evidence.⁹⁵

However, no single factor is determinative.⁹⁶

Practical considerations also come into play in the discovery sanctions analysis. In particular, courts should be mindful that proper compliance with Rule 219(c) for serious discovery misconduct could be a time consuming and contentious endeavor, especially if they conduct an evidentiary hearing. Proper compliance with all of the procedural safeguards mandated under Rule 219(c) will likely require the investment of significant judicial resources. For example, if the court elects to sanction a dilatory party, the court will be called on to monitor all aspects of the discovery sanction process, from ensuring compliance with Rule 201(k) to making certain that the court's sanction order is sufficiently specific.⁹⁷ It is only through this type of time commitment that a court can ensure that its order will withstand an appeal.

Beyond the required safeguards, courts should also give careful attention to whether it should provide protections that are not mandated, such as a hearing on the merits or a hearing on fees. Unlike its counterpart, Rule 137, Rule 219(c) does not *require* an evidentiary hearing on the merits or on the fees.⁹⁸ It would, however, be prudent practice for courts to conduct such hearings. As described in greater detail below, the court's consideration of testimony can be decisive in reaching a just order.⁹⁹

In terms of the acrimonious nature of the discovery sanction process, it is important to consider what is at stake. The party requesting that the discovery sanction be imposed is asking the court to find that the adverse attorney or party has engaged in some form of misconduct. This "wrong" might range from laziness to a lack of candor, or it may be an honest mistake.¹⁰⁰ Therefore, the process will be "intensely personal" at every stage of the sanction process, as the party alleged to have engaged in the serious discovery misconduct will likely mount a vigorous defense to clear his or her name.¹⁰¹ Moreover, the imposition

95. *Shimanovsky v. Gen. Motors Corp.*, 692 N.E.2d 286, 291 (Ill. 1998).

96. *Id.*

97. *See In re Estate of Andernovics*, 759 N.E.2d at 507–08 (detailing the steps that a trial court took before ultimately dismissing a plaintiff's complaint for failure to comply with discovery orders); *see also* ILL. SUP. CT. R. 219(c) (discussing the specificity requirement).

98. *See* ILL. SUP. CT. R. 219(c); *see also supra* note 3 (detailing Rule 219(c)).

99. *See infra* Part V (discussing the appropriate method for imposing sanctions).

100. *See Timberlake & Pionk, supra* note 1, at 1048 (illustrating a variety of litigant behaviors but cautioning that "Rule 137 should be reserved for dishonest litigants, lazy or careless attorneys, and the dilettantes of trial practice").

101. *Id.*

of discovery sanctions could have dramatic consequences, resulting, for example, in large fee awards or the end of the lawsuit. In short, emotions will likely be running high, as reputations, parties' rights, and large sums of money will be at stake. By understanding the legal and practical considerations that come into play, the trial judge will be better prepared to fulfill his or her vital role.

V. THE IMPOSITION OF APPROPRIATE SANCTIONS

A. *Imposing Just Orders*

If a court elects to impose discovery sanctions, it may enter any order that is "just,"¹⁰² where a party fails to comply with discovery rules or any order entered under the discovery rules.¹⁰³ But what constitutes a just order? A just sanction order is one that, to the degree possible, strikes a balance "between enforcing discovery rules and resolving cases on the merits."¹⁰⁴ In determining the type of sanction to impose, courts should consider the same factors they evaluate when deciding whether to impose a sanction.¹⁰⁵

In arriving at a just order, the trial court has a broad mandate. The decision to impose sanctions under Rule 219(c), as well as the type of sanction to impose, is a matter within the sound discretion of the trial court.¹⁰⁶ A reviewing court will uphold a sanction order, absent an abuse of discretion, such as the entry of an unjust order where the record demonstrates that the accused party's conduct was not unreasonable.¹⁰⁷

102. ILL. SUP. CT. R. 219(c); *see also supra* note 3 (detailing Rule 219(c)); *supra* notes 14–16 and accompanying text (explaining that a just order can range from an oral reprimand to a dismissal with prejudice).

103. *Blakey v. Gilbane Bldg. Corp.*, 708 N.E.2d 1187, 1191 (Ill. App. Ct. 4th Dist. 1999).

104. *Id.*; *see also* *Bachman v. Gen. Motors Corp.*, 776 N.E.2d 262, 290 (Ill. App. Ct. 4th Dist. 2002) ("In fashioning a sanction, the court must weigh the competing interests of the offending party's right to maintain a lawsuit against the need to accomplish the objectives of discovery and promote the unimpeded flow of litigation."), *appeal denied by* 202 Ill. 2d 598 (2002); Potocki, *supra* note 11, at 977–78 (explaining that "Rule 219(c) purports to strike a balance between enforcing discovery rules and resolving cases on the merits").

105. *Brooke Inns, Inc. v. S & R Hi-Fi & TV*, 618 N.E.2d 734, 746 (Ill. App. Ct. 1st Dist. 1993); *see also supra* Part IV.C (discussing the factors a court should consider when determining whether to impose discovery sanctions).

106. *Peterson v. Ress Enters.*, 686 N.E.2d 631, 640 (Ill. App. Ct. 1st Dist. 1997).

107. *Wegman v. Pratt*, 579 N.E.2d 1035, 1041–42 (Ill. App. Ct. 5th Dist. 1991); *see also* *Buffington v. Yungen*, 748 N.E.2d 844, 847–48 (Ill. App. Ct. 2d Dist. 2001) (concluding that the trial court abused its discretion when it entered a default judgment against a party that failed to timely respond to discovery because there was no evidence of a "deliberate, contumacious disregard of the court's discovery orders").

B. Sanction Options

Rule 219(c) enumerates certain options that a court may consider in fashioning a discovery sanction order. These options include: (1) staying proceedings until the offending party has complied with an order or rule; (2) prohibiting the offending party from filing any other pleading relating to any issue to which the refusal or failure relates; (3) prohibiting the offending party from maintaining any particular claim, counterclaim, third-party complaint, or defense related to that issue; (4) barring witness testimony; (5) entering a default judgment or a dismissal of claims or defenses with or without prejudice; (6) striking a portion of the offending party's pleadings; and (7) where a money judgment is imposed as a Rule 219(c) sanction, ordering the offending party to pay interest at the rate provided by law for judgments for any period of pretrial delay attributable to the offending party's conduct.¹⁰⁸ The court may impose other appropriate sanctions in addition to or in lieu of the seven options provided for in Rule 219(c).¹⁰⁹ Other possible sanctions referred to in Rule 219(c) include reasonable attorney's fees, a monetary penalty for willful conduct, and the institution of contempt proceedings.¹¹⁰

C. Drastic Sanctions

This Article has focused on serious discovery misconduct. Accordingly, it is appropriate to describe what recourse is available to a court when it determines that the allegations of serious abuse have been substantiated.¹¹¹ An order of dismissal with prejudice or a sanction that results in a default judgment is regarded as a drastic sanction to be employed only as a last resort.¹¹² Thus, these sanctions should be

108. ILL. SUP. CT. R. 219(c); *see also supra* note 3 (detailing Rule 219(c)).

109. ILL. SUP. CT. R. 219(c); *see also* Nasrallah v. Davilla, 762 N.E.2d 25, 32 (Ill. App. Ct. 1st Dist. 2001) (finding that a willful violation of Illinois Supreme Court Rule 237 allowed for the imposition of any sanction under Rule 219(c), including an adverse inference jury instruction); Dyduch v. Crystal Green Corp., 582 N.E.2d 302, 307 (Ill. App. Ct. 2d Dist. 1991) (noting that "the trial court is not limited to the sanctions enumerated in Rule 219(c) for discovery violations"); Gross, *supra* note 91, at 484 (noting that two sanction examples not specified under Rule 219(c) that are available to a court include awarding a new trial and using an unfavorable jury instruction).

110. ILL. SUP. CT. R. 219(c); *see also supra* note 3 (providing the language of Rule 219(c)).

111. Necessarily, if the facts bear out that the dilatory party did not engage in willful misconduct, the court should impose a less severe discovery sanction, such as barring claims or defenses. Shimanovsky v. Gen. Motors Corp., 692 N.E.2d 286, 293 (Ill. 1998); *see also* Gross, *supra* note 91, at 491 (describing dismissal and default judgment as "last resort" sanctions under Rule 219(c)).

112. *Shimanovsky*, 692 N.E.2d at 291. Illinois courts have also characterized lesser sanctions as drastic when the underlying conduct was not sufficiently egregious. *See, e.g.,* Phillips v.

invoked only for cases in which the misconduct demonstrates a “deliberate, contumacious, or unwarranted disregard of the court’s authority” and such disregard is likely to continue.¹¹³

Two Illinois Supreme Court cases provide guidance with respect to the type of misconduct that warrants litigation-ending sanctions. In *Sander v. Dow Chemical Co.*, the plaintiffs filed a complaint on February 27, 1990, in the Circuit Court of Cook County against twenty-six chemical manufacturing companies and the Des Plaines Park District.¹¹⁴ One plaintiff alleged that, while employed with the Park District as a pesticide applicator, he was injured as a result of his exposure to pesticides, while the other plaintiffs alleged injury as a result of contamination through direct contact with him.¹¹⁵ During the last five months of litigation, the plaintiffs’ attorney violated four separate court orders setting the deadlines for the filing of their complaint.¹¹⁶ Further, the plaintiffs’ attorney failed to reply to one of defendant’s motions for a protective order and “continued to replead matters in the amended complaints that had been previously stricken by court order.”¹¹⁷

On December 5, 1991, the court dismissed the plaintiffs’ complaint with prejudice.¹¹⁸ The court denied the plaintiffs’ motion to vacate a prior dismissal order, noting that they had had ample time to amend their complaint yet failed to do so.¹¹⁹ The plaintiffs appealed.¹²⁰ The appellate court reversed, finding, *inter alia*, that Rule 219(c) empowers the trial courts to dismiss a complaint with prejudice in only very limited circumstances, which were not present in that case.¹²¹ The appellate court then remanded the case for further proceedings.¹²²

The Illinois Supreme Court reversed the appellate court and affirmed the trial court, finding, *inter alia*, that dismissal of the plaintiffs’

Gannotti, 763 N.E.2d 820, 826 (Ill. App. Ct. 1st Dist. 2002) (describing the trial court’s bar of witness testimony as drastic when the offending party’s conduct did not support such a sanction).

113. *Sander v. Dow Chem. Co.*, 651 N.E.2d 1071, 1081 (Ill. 1995).

114. *Id.* at 1073.

115. *Id.* *Sander* also alleged that his wife and two minor children were exposed to the pesticides as a result of their contact with his body, breath, clothing, and automobile. *Id.*

116. *Id.* at 1081.

117. *Id.* at 1081–82.

118. *Id.* at 1076–77.

119. *Id.* at 1077.

120. *Id.*

121. *Id.* (concluding that, because the trial court did not find a violation of a discovery order or pretrial order, it lacked the authority under Rule 219(c) to dismiss a valid complaint with prejudice).

122. *Id.*

complaint by the trial court was not an abuse of discretion.¹²³ The court noted that “the trial judge must weigh the competing interests of the parties’ rights to maintain a lawsuit against the necessity to accomplish the objectives of discovery and promote the unimpeded flow of litigation.”¹²⁴ As part of this balancing process, the trial court must consider the importance of maintaining the integrity of the court system.¹²⁵ When it becomes clear that a party has willfully disregarded the court’s authority and that such disregard is likely to continue, the interests of the offending party must bow to the interests of its opposing party.¹²⁶

In *Shimanovsky v. General Motors Corp.*, plaintiffs Mildred and Almarvin Shimanovsky were involved in an automobile accident in which Ms. Shimanovsky suffered severe injuries.¹²⁷ Soon after the accident, the plaintiffs’ counsel retained a mechanical engineer to investigate whether the automobile had a defect that may have caused the crash.¹²⁸ The engineer recommended that the plaintiffs’ counsel retain a metallurgist to determine whether grooves found on the power-steering mechanism indicated a possible defect or whether they were a result of the crash.¹²⁹ Consequently, the plaintiffs’ counsel hired a metallurgist who concluded that the grooves did not result from the crash but rather from long-term wear.¹³⁰ Based on the metallurgist’s findings, the mechanical engineer concluded that wear and deterioration in the power-steering mechanism caused the automobile’s power steering to fail.¹³¹

The plaintiffs filed a complaint alleging that the accident occurred because the power-steering mechanism in their automobile was defective.¹³² During discovery, the plaintiffs’ engineering expert

123. *Id.* at 1082–83.

124. *Id.* at 1081.

125. *Id.* (quoting *People v. Gholson*, 106 N.E.2d 333, 337 (Ill. 1952) (finding that courts must have the “power to . . . determine if contumacious acts . . . have been perpetrated against” them to adequately “protect and preserve” judicial authority)).

126. *Id.*

127. *Shimanovsky v. Gen. Motors Corp.*, 692 N.E.2d 286, 287 (Ill. 1998).

128. *Id.*

129. *Id.* The engineer conducted an initial investigation, which did not reveal the presence of any defect that would have resulted in a loss of power-steering control. *Id.* The engineer then disassembled the power-steering mechanism to conduct an internal inspection, which indicated that various components were damaged by the accident. *Id.* The engineer also found grooves in one of the power-steering components. *Id.*

130. *Id.* The metallurgist sectioned the components of the mechanism and tested the sectioned pieces. *Id.*

131. *Id.* at 287–88.

132. *Id.* at 288.

produced the power-steering components to defense counsel.¹³³ The defendant's experts examined the power-steering components and opined that the plaintiffs' automobile contained no defect or unreasonably dangerous condition that caused or contributed to the crash.¹³⁴ In addition, the defendant's experts concluded that the sectioning of the power-steering components by the plaintiffs' experts deprived defendant of the opportunity to show the jury further evidence of the proper manufacture and operation of the mechanism.¹³⁵

On the eve of trial, the "plaintiffs filed a motion *in limine*, seeking to bar the defendant from cross-examining the plaintiffs' experts regarding their methods of testing the power-steering components."¹³⁶ Defendant responded with its own motion to dismiss the case or, in the alternative, to bar any evidence of the condition of the power-steering mechanism, as a Rule 219(c) sanction, for the destruction of the power-steering components by the plaintiffs' expert witness without notice to the defendant.¹³⁷ Following a hearing, the trial court granted the defendant's motion to dismiss the plaintiffs' complaint with prejudice.¹³⁸

The plaintiffs filed a motion for reconsideration, arguing that the defendant had not shown that it suffered prejudice to a degree that mandated dismissal of the complaint.¹³⁹ The trial court denied the plaintiffs' motion for reconsideration, and they appealed.¹⁴⁰ The appellate court found that the destructive testing of the power-steering components was sanctionable conduct on the part of the plaintiffs.¹⁴¹ The appellate court, however, reversed the trial court's dismissal order and remanded the case to determine whether the degree of prejudice suffered by the defendant warranted dismissal of the plaintiffs' cause of action.¹⁴² The appellate court found that the trial court abused its discretion by dismissing the plaintiffs' case without first considering the

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* The plaintiffs' motion included an affidavit from an additional mechanical engineer retained by the plaintiffs' counsel. *Id.* In the affidavit, the second engineer opined that the tests would not have yielded data relevant to the alleged defects of the power-steering mechanism. *Id.* Further, the second engineer noted that the destructive testing of the power-steering components had not hindered his ability to form his opinions. *Id.*

140. *Id.*

141. *See id.*

142. *Id.*

degree of prejudice suffered by the defendant.¹⁴³ The plaintiffs filed a petition for leave to appeal, which the Illinois Supreme Court granted.¹⁴⁴

The Illinois Supreme Court affirmed the appellate court's judgment but ordered the trial court to enter an order other than dismissal.¹⁴⁵ In so holding, the court first addressed the issue of whether the trial court had authority under Rule 219(c) to impose a sanction on the plaintiffs for destructive testing of evidence before commencement of the lawsuit.¹⁴⁶ The court noted that the plaintiffs' experts tested the power-steering components approximately eight months prior to the date that the plaintiffs filed their complaint and that, therefore, the trial court had not entered any order prohibiting such testing.¹⁴⁷

Nevertheless, the court held that a potential litigant owes a duty to take reasonable measures to preserve the integrity of relevant and material evidence.¹⁴⁸ Without such a duty, the court reasoned, a potential litigant could circumvent discovery rules or escape liability simply by destroying the proof before filing the complaint.¹⁴⁹ The court concluded that the plaintiffs' destructive testing interfered with the defendant's discovery rights.¹⁵⁰ Thus, under the specific circumstances of this case, the court affirmed the trial court's finding that the plaintiffs' actions constituted unreasonable noncompliance with discovery rules.¹⁵¹

The court then addressed the question of whether dismissal was the appropriate sanction. It noted that an order of dismissal with prejudice is a drastic sanction to be invoked only for cases in which the party's actions "show a deliberate, contumacious, or unwarranted disregard of the court's authority."¹⁵² The court further stated that dismissal should be employed only as a last resort and only after all of the court's other enforcement powers have failed to advance the litigation.¹⁵³

143. *Id.*

144. *Id.* at 287.

145. *Id.* at 293.

146. *Id.* at 289.

147. *Id.*

148. *Id.* at 290.

149. *Id.*

150. *Id.*

151. *See id.* (stating that the court could not find that the trial court had abused its discretion in determining that the plaintiffs' actions unreasonably interfered with discovery).

152. *Id.* at 291.

153. *Id.*

Applying the six-part sanction test,¹⁵⁴ the court found that a majority of the factors considered in determining which sanction to impose weighed in favor of the plaintiffs.¹⁵⁵ The court went on to note that the act of destroying or altering evidence, while prejudicial, does not automatically mandate that a cause of action should be dismissed with prejudice.¹⁵⁶ Rather, a court must consider the unique factual situation that each case presents and then apply the appropriate criteria to those facts in order to determine which particular sanction, if any, should be imposed.¹⁵⁷ To do otherwise, according to the court, would serve to punish the party and fail to further the objectives of discovery.¹⁵⁸ Accordingly, the court remanded the case to the trial court for a hearing to determine the degree of prejudice that the defendant suffered as a result of the plaintiffs' alteration of evidence.¹⁵⁹ The court also instructed the trial court that, once it had ascertained the level of prejudice suffered by the defendant, it should have then determined what sanction, if any, was warranted.¹⁶⁰

The court, however, went on to explain that, regardless of the trial court's findings, the defendant was not prejudiced to the degree that dismissal with prejudice was the appropriate sanction.¹⁶¹ First, the plaintiffs' testing only altered or partially destroyed the automobile components and was done in a good faith effort to better determine the legitimacy of their legal claims.¹⁶² Second, the "plaintiffs' actions were not a knowing and willful defiance of the discovery rules or the trial court's authority."¹⁶³ As a result, the court found that the dismissal of the plaintiffs' case was an unreasonable sanction.¹⁶⁴ According to the court, a reasonable sanction would have been one other than dismissal or one that did not totally prevent plaintiffs from presenting evidence regarding the condition of the power-steering mechanism.¹⁶⁵

Thus, under the principles articulated in *Sander* and *Shimanovsky*, only a very narrow class of cases warrants litigation-ending sanctions.

154. See *supra* Part IV.C (discussing factors that courts consider in determining whether to impose discovery sanctions).

155. *Shimanovsky*, 692 N.E.2d at 291.

156. *Id.* at 293.

157. *Id.* at 293–94.

158. *Id.* at 293.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

First, a trial court should conduct a hearing, applying the appropriate criteria.¹⁶⁶ Such a hearing permits the court the opportunity to assess the unique factual situation that is presented. Second, if after such a hearing, the court determines that the party's misconduct rises to the level of willful defiance of the court's authority and other less onerous enforcement options have not been effective, a trial court may exercise its discretion and impose drastic sanctions.

VI. A PRESCRIPTION FOR CHANGE: PUNISHMENT FOR SEVERE DISCOVERY MISCONDUCT

When a court imposes litigation-ending sanctions, it is difficult to discern how any meaningful distinction exists between Rule 137 and Rule 219(c), despite their conflicting purposes. In effect, the court *does* punish the dilatory party by dismissing his or her lawsuit. The rationale for dismissal under Rule 219(c) may be couched in terms of balance,¹⁶⁷ but the practical effect is the same. Perhaps the more intellectually accurate approach would be for courts to recognize that when they order drastic sanctions, they are engaging in punishment. This shift in judicial focus properly highlights the extreme nature of discovery misconduct.

Because of the penal emphasis of Rule 137, sanctions under the rule are regarded as more severe than those under its counterpart, Rule 219(c).¹⁶⁸ Thus, for extreme misconduct, Rule 219(c) should adopt the rationale of Rule 137 in explicitly endorsing punishment as its stated purpose.¹⁶⁹ Employing this approach would send an important message to would-be violators of Rule 219(c) that if they engage in willful discovery misconduct, courts would not hesitate to deal harshly with them, both in name and in deed.

166. See *supra* Part IV.C (discussing factors a court should look at in determining what type of sanction to apply to an offending party).

167. *Bachman v. Gen. Motors Corp.*, 776 N.E.2d 262, 290 (Ill. App. Ct. 4th Dist. 2002) ("In fashioning a sanction, the court must weigh the competing interests of the offending party's right to maintain a lawsuit against the need to accomplish the objectives of discovery and promote the unimpeded flow of litigation.").

168. See *Timberlake & Pionk*, *supra* note 1, at 1048 ("Rule 137 [sanctions] should be reserved for dishonest litigants, lazy or careless attorneys, and the dilettantes of trial practice.").

169. This approach would be consistent with other instances in which the language of Rule 219(c) has paralleled the language of Rule 137. See ILL. SUP. CT. R. 219(c), comm. cmt. (explaining that the 1995 revisions adopted, on two occasions, the language of Rule 137, giving trial courts greater discretion to fashion an appropriate sanction and requiring a judge who imposes a sanction to specify his or her reasons for the sanction in the judgment order or in a separate written order).

If Rule 219(c) were transformed into a limited¹⁷⁰ punitive provision, a second necessary change to the current sanction approach would be to require that Rule 219(c) provide the same procedural safeguards that are in place under Rule 137. A detailed sanction petition, an evidentiary hearing on the merits, and a fee hearing, if appropriate, would provide due process¹⁷¹ protection for the parties involved. With these safeguards in place, a person accused of engaging in serious discovery misconduct would be better positioned to assert a vigorous defense.

As a corollary to these procedural due process protections, adequate notice must also be provided.¹⁷² There can be no ambiguity or uncertainty that the standard used to assess serious misconduct is willfulness, that the penalty the sanctioned party will bear will be the dismissal of his or her cause of action, and that this dismissal will be considered a punishment.

VII. CONCLUSION

This Article has attempted to assist judges and attorneys in better understanding the discovery sanction process. In so doing, this Article has focused on providing the legal framework with which to analyze serious discovery abuse, as well as the practical considerations that are necessary to ensure that the court's order is "just." This Article has also sought to provide guidance on the question of how courts should respond to serious discovery misconduct. The authors have proposed altering the rationale governing Rule 219(c) for cases in which allegations of serious discovery misconduct have been substantiated. Under this proposal, Rule 219(c) would adopt punishment as its stated objective in an effort to properly highlight the extreme nature of the violation. Finally, the authors have attempted to provide recommendations for areas in which little or no guidance currently exists.

Serious discovery misconduct is a topic of vital concern to the judiciary. The manner in which the court system responds to discovery abuses will likely have a profound impact on the rights and reputations

170. For discovery misconduct that does not rise to the level of a willful violation of an order or rule, the non-punitive approach that Rule 219(c) has adopted should continue, balancing enforcement and resolving cases on their merits. *See* *Blakey v. Gilbane Bldg. Corp.*, 708 N.E.2d 1187, 1191 (Ill. App. Ct. 4th Dist. 1999).

171. *See* *Potocki*, *supra* note 11, at 996–97 & 996 n.158 (citing *Societe Internationale Pour Participants Industrielles et Commerciales, S.A. v. Roger*, 357 U.S. 197, 209 (1958)) (noting that the Fourteenth Amendment's due process clause must be read in conjunction with Rule 219(c)).

172. *See id.* at 997 ("Adequate notice of the standards to be used by the courts for the imposition of severe sanctions is essential." Such notice promotes "clarity and consistency.").

of attorneys and litigants. Because of the judiciary's pivotal role in this process, it is imperative that courts are well equipped to shoulder this responsibility.