Loyola University Chicago Law Journal

Volume 24
Issue 4 *Summer 1993 Illinois Judicial Conference Symposium* Article 4

1993

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Recommended Citation
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 (1993).
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Supreme Court Rule 219: The Consequences of Refusal to Comply with Rules or Orders Relating to Discovery or Pretrial Conferences

*Leonard E. Gross**

I. INTRODUCTION

To ensure the expedited resolution of cases on their merits, courts must diligently enforce discovery rules. To this end, Supreme Court Rule 219[1] authorizes a court to impose sanctions

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1. Rule 219 provides as follows:

(a) Refusal to Answer or Comply with Request for Production. If a party or other deponent refuses to answer any question propounded upon oral examination, the examination shall be completed on other matters or adjourned, as the proponent of the question may prefer. Thereafter, on notice to all persons affected thereby, he may move the court for an order compelling an answer. If a party or other deponent refuses to answer any written question upon the taking of his deposition or if a party fails to answer any interrogatory served upon him, or to comply with a request for the production of documents or tangible things or inspection of real property, the proponent of the question or interrogatory or the party serving the request may on like notice move for an order compelling an answer or compliance with the request. If the court finds that the refusal or failure was without substantial justification, the court shall require the offending party or deponent, or the party whose attorney advised the conduct complained of, or either of them, to pay to the aggrieved party the amount of the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees. If the motion is denied and the court finds that the motion was made without substantial justification, the court shall require the moving party to pay to the refusing party the amount of the reasonable expenses incurred in opposing the motion, including reasonable attorney's fees.

(b) Expenses on Refusal to Admit. If a party, after being served with a request to admit the genuineness of any documents or the truth of any matters of fact, serves a sworn denial thereof, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter of fact, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making the proof, including reasonable attorney's fees. Unless the court finds that there were good reasons for the denial or that the admissions sought were of no substantial importance, the order shall be made.

(c) Failure to Comply with Order or Rules. If a party, or any person at the

upon parties or their attorneys if the court determines that discovery rules and procedures have been abused.[2] This Article will analyze the various approaches to discovery sanctions. The Article will also examine situations in which discovery sanctions are appropriate, with particular reference to the degree of culpability required. Recommendations will then be made regarding means by which attorneys can be deterred from engaging in discovery abuse. Finally, the Article will focus on the question of how trial judges should determine the proper sanctions for particular discovery abuse.

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instance of or in collusion with a party, unreasonably refuses 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 he 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 his action be dismissed with or without prejudice; or
(vi) that any portion of his pleadings relating to that issue be stricken and, if thereby made appropriate, judgment be entered as to that issue.

In lieu of or in addition to the foregoing, the court may order that the offending party or his attorney pay the reasonable expenses, including attorney's fees incurred by any party as a result of the misconduct, and by contempt proceedings compel obedience by a party or person to any subpoena issued or order entered under the 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.

(d) Abuse of Discovery Procedures. The court may order that information obtained through abuse of discovery procedures be suppressed. If a party wilfully obtains or attempts to obtain information by an improper discovery method, wilfully obtains or attempts to obtain information to which he is not entitled, or otherwise abuses these discovery rules, the court may enter any order provided for in paragraph (c) of this rule.

ILL. REV. STAT. ch. 110A, para. 219 (1991).

2. King v. American Food Equip., 513 N.E.2d 958, 966 (Ill. App. Ct. 1987).

II. APPROACHES TO SANCTIONS

Imposing sanctions for discovery violations serves two basic purposes: it encourages future compliance with discovery rules, and it punishes noncompliance with discovery rules. The vast majority of the courts impose sanctions in order to encourage future discovery,[3] reasoning that it is better to decide a case on its merits than on a party's technical failure to comply with discovery rules.[4] Usually these courts impose the minimum sanction necessary to advance discovery and obtain a trial on the merits.[5] In *Zimmer v. Melendez*,[6] for example, the appellate court held that the trial court committed reversible error by barring a surprise witness for the plaintiff because the plaintiff had given the defendant sufficient information about the witness's testimony during discovery.[7]

Some courts, reasoning that sanctions should be used to coerce discovery, have imposed progressively harsher sanctions proportionate to the gravity of the violations. For example, in *Jaffe v. Fogelson*,[8] the appellate court held that a summary judgment sanction was inappropriate because there was no indication that the trial court had previously attempted to impose a less severe sanction. Similarly, in *Kubian v. Labinsky*[9] the appellate court reversed the trial court's dismissal of the plaintiff's complaint. The trial court had taken this action because the plaintiff had misrepresented certain information to the court and had failed to comply with discovery orders. After determining that sanctions were necessary and proper,[10] the *Kubian* court concluded that the trial court should not have dismissed the case; instead, the *Kubian* court reasoned, it should have imposed progressively harsher sanctions proportionate to the gravity of the violations.[11]

In contrast with courts that favor the nonpunitive approach to

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3. *See, e.g.*, Peoples Gas, Light & Coke Co. v. Chicago Black Improvement Ass'n, 502 N.E.2d 8, 10 (Ill. App. Ct. 1986) (sanctions should be the least drastic necessary to obtain the goal of discovery in that case; litigation-ending sanctions are drastic).

4. *See, e.g.*, *In re* Henry, 530 N.E.2d 571, 576 (Ill. App. Ct. 1988) (ascertainment of truth and elimination of surprise are the goals of discovery; the trial court should not impose sanctions when they would interfere with these goals).

5. *See King*, 513 N.E.2d at 967-68 (action dismissed for plaintiff's withholding evidence until trial is appropriate but further sanctions against plaintiff would not be justified); Nehring v. First Nat'l Bank in DeKalb, 493 N.E.2d 1119, 1125 (Ill. App. Ct. 1986) (once the party has fully complied with discovery, dismissal is inappropriate).

6. 583 N.E.2d 1158 (Ill. App. Ct. 1991).

7. *Id.* at 1162.

8. 485 N.E.2d 531, 533 (Ill. App. Ct. 1985).

9. 533 N.E.2d 22, 29 (Ill. App. Ct. 1988).

10. *Id.* at 28.

11. *Id.* at 29.

sanctions, in *Transamerica Insurance Group v. Lee*[12] the First District held that the purpose of sanctions is to penalize the offending individual. In *Transamerica*, the court affirmed an award of attorney's fees of $5,000 for giving a false interrogatory answer, even though only $2,500 of attorney's fees had been incurred.[13] This punitive approach is based on the Illinois Supreme Court's holding in *Buehler v. Whalen*.[14] In *Buehler*, the defendant gave false answers to interrogatories under oath and secreted evidence that would have been damaging to its case.[15] The supreme court stated in dicta that the trial court would have been justified in striking the defendant's answer.[16] According to the *Buehler* court, discovery would be ineffective if trial courts countenanced violations; thus, trial judges should unreservedly impose sanctions proportionate to the circumstances.[17]

Some courts justify the assessment of punitive sanctions as a deterrence.[18] Attorneys and parties, they reason, will be less likely to violate discovery orders if a big stick rather than a small stick is held over their heads.[19]

The punitive approach taken by the First District in *Transamerica* has serious flaws. The most troublesome aspect of the decision is its subjectivity, which invites appellate scrutiny. Without a clear standard for determining sufficient punishment, different judges may impose vastly different sanctions. On the other hand, unless all incentives for discovery abuse are removed, the abuse is likely to continue.

At present, law firms have some incentives to abuse discovery rules. First, an abuse, especially when it consists of a failure to provide relevant documents, may go undetected. Second, the opposing counsel may decide that obtaining the withheld information is not worth the necessary effort and expense. If a law firm suc-

12. 518 N.E.2d 413, 415 (Ill. App. Ct. 1987).

13. *Id.*

14. 374 N.E.2d 460 (Ill. 1977).

15. *Id.* at 467.

16. *Id.*

17. *Id.*

18. *See* Colls v. City of Chicago, 571 N.E.2d 951, 984 (Ill. App. Ct. 1991).

19. Phelps v. O'Malley, 511 N.E.2d 974, 982 (Ill. App. Ct. 1987) (since plaintiff did not disclose expert witness upon request by defendant, barring witness would have been the proper sanction even though defendant had deposed witness); Perimeter Exhibits, Ltd. v. Glenbard Molded Binder, Inc., 461 N.E.2d 44, 53 (Ill. App. Ct. 1984) (affirming trial court's ruling that the defendant's consistent delays warranted default judgment as a sanction and reasoning that such an action provided an incentive for future compliance). *See generally* Kathleen M. Potocki, Note, *Policing Discovery Under Illinois Supreme Court Rule 219(c): A Search for Judicial Consistency*, 21 LOY. U. CHI. L.J. 973 (1990).

ceeds in withholding information, its client stands to benefit directly and the law firm indirectly. The potential gain for a law firm working on a contingent fee basis is obvious. Even a law firm working on an hourly basis stands to gain in the eyes of its client from the firm's enhanced image as an aggressive litigator.[20]

To remove incentives for misconduct, courts can require firms that engage in discovery abuse to produce withheld information and pay opponents' legal fees. Obviously sanctions imposed against an attorney cannot be passed on to the client.[21] However, a firm retained on an hourly basis may try to bill a client for time spent in preparing an abusive set of interrogatories or for time spent in defending its discovery abuse. To further discourage discovery abuse, judges should order counsel not to bill their clients for such expenses.

Frequently, lawyers have been denied recovery for legal services connected with malpractice, negligence, or misconduct.[22] Discovery abuse should be treated like legal malpractice. Even if no sanctions are directly imposed against clients for violations, the lawyers should not be paid for their services. Moreover, judges should not take the position that fee disputes resulting from discovery abuses are better left to civil lawsuits between attorneys and clients. Clients may not realize that work connected with defending improper discovery tactics should not be compensable. Thus, judges should specifically order attorneys not to charge their clients for time misspent on abusive discovery demands or on the wrongful withholding of requested discovery information. By directly addressing this issue in a discovery order, judges up the ante for lawyers. If a lawyer attempts to pass on costs to a client, the lawyer may be held in contempt of court or referred to the Attorney Registration and Disciplinary Commission for ethical sanctions.

It is appropriate for all courts to bar attorneys from charging clients for services rendered in conjunction with discovery abuse. Courts that espouse a nonpunitive view of discovery sanctions could impose these sanctions because the sanctions are directly tied

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20. *See* Gary Taylor, *Texas Sets its Sights on 'Rambo,'* NAT'L L.J., July 31, 1989, at 3, col. 1.

21. *Cf.* Association of the Bar of the City of New York, Op. 1989-3, *summarized in* ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ETHICS OPINIONS 901:6410 (unethical for a lawyer to enter into agreement with client to shift responsibility for sanctions that may be or have been incurred).

22. *See In re* Estate of Halas, 512 N.E.2d 1276 (Ill. App. Ct. 1987) (affirming denial of approximately one-half of a law firm's legal fees because of its breach of fiduciary duty and conflict of interest).

to the abuse itself and prevent the lawyer from profiting from the abuse. Moreover, these sanctions have the advantage of being less arbitrary than punitive sanctions.

III. RULE 201(K) - REASONABLE ATTEMPT TO RESOLVE DIFFERENCES REQUIRED

For discovery sanctions to be an effective tool, trial judges should encourage lawyers to work out their differences before coming to court with discovery motions. In this way, judges can save themselves a great deal of time. Supreme Court Rule 201(k) requires that lawyers incorporate into their discovery motions a statement describing their attempts to resolve the dispute between themselves.[23] The failure to facilitate discovery under this provision is itself subject to sanctions, including attorney's fees. In addition, judges should strictly enforce compliance with Supreme Court Rule 201(k) before providing any relief under Supreme Court Rule 219.[24]

In *Williams v. A. E. Staley Manufacturing Co.*, the Illinois Supreme Court emphasized the need for lawyers to adhere to Rule 201(k) requirements when requesting a court to impose a severe sanction.[25] In *Williams*, when the plaintiff refused to respond to production requests and interrogatories, the defendant made a motion to dismiss for noncompliance[26] that did not meet Rule 201(k) requirements.[27] The trial court vacated a previous order dismissing the plaintiff's action, but the appellate court reversed.[28] The Illinois Supreme Court affirmed the trial court's decision because the defendant had ignored the requirements of Rule 201(k).[29] The court indicated that the more drastic the relief requested, the more necessary it was for the moving party to comply with Rule

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23. Rule 201(k) provides:

> Every motion with respect to discovery shall incorporate a statement that after personal consultation and reasonable attempts to resolve differences the parties have been unable to reach an accord. The court may order that reasonable costs, including attorneys' fees, be assessed against a party or his attorney who unreasonably fails to facilitate discovery under this provision.

ILL. REV. STAT. ch. 110A, para. 201(k) (1991).

24. However, once the court has become involved in the litigation through the issuance of an order to compel discovery, no further compliance with Rule 201(k) is necessary. Gayton v. Levi, 496 N.E.2d 1045, 1048 (Ill. App. Ct. 1986).

25. 416 N.E.2d 252, 256 (Ill. 1981).

26. *Id.* at 253.

27. *Id.* at 256.

28. *Id.* at 253-54.

29. *Id.* at 256.

201(k).[30]

The Committee Comments to Rule 201(k) state that the rule is "designed to curtail undue delay in the administration of justice and to discourage motions of a routine nature."[31] Before *Williams*, some courts interpreted the committee language to mean that there was no need to comply with Rule 201(k) when the sanction for failure to comply with discovery was dismissal, since dismissal was not routine.[32] In *Williams*, however, the supreme court stressed the prophylactic purposes of the Rule.[33] Subsequently, appellate courts have strictly enforced Rule 201(k) requirements.[34]

IV. Sanctionable Conduct

In determining whether to sanction a party or a party's attorney, the trial court must decide whether the offender's noncompliance with discovery rules and/or orders is "unreasonable."[35] Appellate courts have not been consistent in determining what constitutes unreasonable noncompliance. Moreover, though most courts base their sanctions on the culpability of the transgressor, other courts base them on the importance of the material withheld by the transgressor.

A. *Willful Conduct*

Most Illinois courts impose sanctions only when parties or attorneys abuse the discovery process through willful conduct. Courts

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30. *Williams*, 416 N.E.2d at 256.

31. Ill. Rev. Stat. ch. 110A, para. 201(k) (1991) (Committee Comments).

32. Sanchez v. Phillips, 361 N.E.2d 36, 39 (Ill. App. Ct. 1977) (because plaintiff's motion to dismiss was not routine, defendant's failure to comply with Rule 201(k) was harmless); Urmoneit v. Purves, 338 N.E.2d 423, 425 (Ill. App. Ct. 1975) (defendant's motion to dismiss was not routine and therefore was not within Rule 201(k)).

33. *Williams*, 416 N.E.2d at 255 (disagreeing with the contention that "nonroutine" motions requesting drastic relief were not within the purview of Rule 201(k) and stating that "[t]o the contrary . . . the more drastic the relief requested, the more necessary compliance with Rule 201(k)").

34. *See* Keating v. Dominick's Finer Foods, Inc., 587 N.E.2d 57, 60 (Ill. App. Ct. 1992) (holding that since defendant's motion to dismiss for failure to respond to interrogatories did not include any evidence of attempts to obtain answers to its interrogatories, the motion should have been denied); Brandt v. John S. Tilley Ladders Co., 495 N.E.2d 1269, 1271 (Ill. App. Ct. 1986) (reversing trial court's dismissal of plaintiff's complaint because defendant's motion to dismiss did not include a statement of personal consultation).

35. Ill. Rev. Stat. ch. 110A, para. 219(c) (1991). In addition, Rule 219(a) provides for the sanction of attorney's fees if a party's failure to respond to a discovery request is "without substantial justification." This is a question of fact, with the burden of proof on the complainant. The Illinois Supreme Court has not, as yet, defined "unreasonable refusal to comply." *Id.*, para. 219(c).

characterize "willfulness" as "deliberate and pronounced disregard for the rule or order not complied with"[36] or "deliberate, contumacious or unwarranted disregard of the court's authority."[37]

B. Negligent Conduct

In one case, dictum suggests that under some circumstances, negligent misconduct might be sanctionable under Supreme Court Rule 219. In *White v. Henrotin Hospital Corp.*[38] the plaintiff failed to appear at a scheduled deposition because he had not been informed of the deposition by his attorneys. The appellate court held that because the plaintiff's noncompliance was not contumacious, the trial court abused its discretion in dismissing the case.[39] The court added in dictum: "This is not to say that a lesser sanction would not be appropriate."[40]

The *White* court dictum is not characteristic of the approach taken by most courts when they are faced with discovery noncompliance caused by negligence. Representative of the vast weight of authority is *B & Y Heavy Movers, Inc. v. Fluor Constructors, Inc.*,[41] in which the appellate court held that discovery sanctions were not warranted when the plaintiff's failure to disclose the identity of a witness prior to trial was inadvertent.[42]

Thus, an attorney's negligent conduct will not suffice to warrant the dismissal of a case. Ordinarily, a court will not characterize a failure to comply with discovery requests as unreasonable unless the failure is willful. This is consistent with the language of

36. Colls v. City of Chicago, 571 N.E.2d 951, 981 (Ill. App. Ct. 1991) (quoting King v. American Food Equip. Co., 513 N.E.2d 958, 966 (Ill. App. Ct. 1987)); *see also* Palmer v. Minor, 570 N.E.2d 774, 777 (Ill. App. Ct. 1991) (in a case in which the plaintiff perpetrated a "gross violation of the Rule," barring plaintiff's only witness from testifying was appropriate); Lewis v. Cotton Belt Rte.-St. Louis SW. Ry., 576 N.E.2d 918, 929 (Ill. App. Ct. 1991) (affirming trial court's refusal to order sanctions under Rule 219(c) because the record was "devoid of any evidence that plaintiff's counsel contumaciously refused to comply" with any pretrial discovery order).

37. 612 North Mich. Ave. Bldg. Corp. v. Factsystem, Inc. 340 N.E.2d 678, 682 (Ill. App. Ct. 1975); *see also In re* Marriage of Glusek, 523 N.E.2d 126, 129 (Ill. App. Ct. 1988) (the defendant's "contumacious [and] unwarranted disregard of the court's authority" during discovery warranted trial court's striking of pleadings and barring of testimony).

38. 398 N.E.2d 24 (Ill. App. Ct. 1979).

39. *Id.* at 28.

40. *Id.*; *see also* Wilkins v. T. Enters., Inc., 532 N.E.2d 469, 471 (Ill. App. Ct. 1988) (holding that plaintiff's failure to answer nine interrogatories did not warrant dismissal of the case and ordering the trial court to reinstate the case and give plaintiff additional time to respond to the interrogatories).

41. 570 N.E.2d 777 (Ill. App. Ct. 1991).

42. *Id.* at 783.

Supreme Court Rule 219(d), which only penalizes willful attempts to obtain discovery information through improper means.[43] In extreme cases, however, a lesser sanction may be warranted, particularly if it is imposed on the attorney and not on the innocent client.

C. *Importance of the Information Requested*

Some courts have focused on the importance of the undisclosed information rather than on the fault of the offending party.[44] In *Ideal Plumbing Co. v. Shevlin-Manning, Inc.*, for example, the court held that barring the party's exhibits was an appropriate discovery sanction for his failure to make the exhibits available before trial.[45] The court stated that whether a failure to disclose is unreasonable hinges on the importance of the undisclosed information rather than on the intentions of the party who failed to disclose.[46] Because the undisclosed documents were critical to the case, the court held that the conduct was unreasonable.[47] The *Ideal Plumbing* court's reasoning suggests that when the withheld material is important, the court may have to impose more severe sanctions to enforce compliance. Nevertheless, the importance of the withheld information should not determine whether sanctions are appropriate but only what type of sanction should be imposed.

D. *Application of the "Unreasonable Noncompliance" Standard*

Courts have applied the "unreasonable noncompliance" standard in different fashions. In *Zimmer v. Melendez*,[48] the court found that noncompliance was not unreasonable when the plaintiff failed to provide a specific, exhaustive answer to a general, open-ended interrogatory.[49] The plaintiff's noncompliance in *Zimmer*

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43. ILL. REV. STAT. ch. 110A, para. 219(d) (1991).

44. *E.g.* Ideal Plumbing Co. v. Shevlin-Manning, Inc., 421 N.E.2d 562, 565 (Ill. App. Ct. 1981); *see also* Eisenbrandt v. Finnegan, 509 N.E.2d 1037, 1039 (Ill. App. Ct. 1987) (plaintiff's delay in producing documents until four days before trial did not warrant sanctions because the materials "were not so crucial or complicated as to prejudice the defendant").

45. 421 N.E.2d at 565.

46. *Id.*

47. *Id.*

48. 583 N.E.2d 1158 (Ill. App. Ct. 1991).

49. The interrogatory asked for "any and all other expenses or losses you claim as a result of said occurrence." *Id.* at 1162. Defendant contended that he was asking about plaintiff's future medical treatment and expenses and specifically about the cost of surgery for rotator cuff repair. Plaintiffs thought this meant consequential damages, such as hotel and meal expenses. Therefore, they did not give defendant the information from a doctor's report that revealed the surgery would cost $5,000 to $6,000. *Id.*; *see also* Ford v. City of Chicago, 476 N.E.2d 1232, 1238 (Ill. App. Ct. 1985) (holding that lapse of

was due to a misunderstanding, which derived in part from the defendant's vague interrogatory.[50]

In other cases, courts have held that outside factors may determine whether a party's failure to comply with a discovery request is unreasonable. In *Serpe v. Yellow Cab Co.*,[51] for example, a defendant-employer's failure to comply with a court order to produce an employee at a deposition was not unreasonable when the employer notified the employee of the order but the employee refused to appear. There was no unreasonable noncompliance on the part of the defendant-employer because under its labor contract, the employer could not discharge the employee for refusal to attend the deposition.[52]

In cases in which the discovery request is clear and the offending party has given no valid excuse, the courts have found unreasonable noncompliance.[53] Courts have also found offers of partial compliance with discovery orders unreasonable when the party has had ample time to comply.[54]

E. Excuses for Noncompliance

Once failure to comply with a discovery rule or order has been determined, the burden shifts to the offending party to tender a justifiable excuse.[55] A common excuse is that the requested documents are not in the party's possession. If the documents are in the hands of the party's attorney or another agent, this excuse will not suffice. Under these circumstances the documents are considered to be in the party's control and therefore subject to production.[56]

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several weeks before defendant provided requested discovery information to the plaintiff, although an indication of tardiness on the defendant's part, was not unreasonable noncompliance).

50. *Zimmer*, 583 N.E.2d at 1162.

51. 293 N.E.2d 742, 744 (Ill. App. Ct. 1973).

52. *Id.*

53. *See In re* Marriage of Kutchins, 510 N.E.2d 1300, 1304 (Ill. App. Ct. 1987) (failure to submit to three court-ordered mental examinations constituted unreasonable noncompliance).

54. *See* Servbest Foods, Inc. v. Emessee Indus., 403 N.E.2d 1 (Ill. App. Ct. 1980) (finding defendant's three-year refusal to supply requested documents to be unreasonable and holding that defendant's offer of partial compliance at trial did not render noncompliance any less unreasonable).

55. *See, e.g.*, *Kutchins*, 510 N.E.2d at 1304 (rejecting offending party's argument that scope of court order for mental exam was improper and noncompliance was therefore justified).

56. *See* Hawkins v. Wiggins, 415 N.E.2d 1179, 1182 (Ill. App. Ct. 1980) (the fact that tax returns were not in party's actual physical control did not excuse failure to comply with request to produce since plaintiff had statutory right to inspect and reproduce copies of tax record); *cf.* Vortanz v. Elmhurst Memorial Hosp., 534 N.E.2d 625, 630 (Ill. App.

V. Who Should be Sanctioned?

The language of Rule 219 does not give any specific guidance concerning the person to be sanctioned for a discovery violation, and the courts have offered little direction.[57] The wording is different in each section of Rule 219. Rule 219(a) reads: "[T]he court shall require the offending party or deponent, or the party whose attorney advised the conduct complained of, or either of them, to pay . . . ."[58] Rule 219(b) states that the court may require "the other party" to pay.[59] Rule 219(c) states that "any person" who unreasonably refuses to comply can be sanctioned.[60] Finally, Rule 219(d) states that "a party" who abuses discovery can be sanctioned.[61]

Rule 219(c) is the section that is used most frequently for sanctioning discovery violations. It seems to be appropriate under this section to sanction whoever is responsible for the failure to comply with the discovery demand or order—the party or the attorney.

In the majority of cases in which the attorney is sanctioned, it is obvious that the attorney has personally obstructed the discovery process. For example, in *Martzaklis v. 5559 Belmont Corp.*,[62] the defendant's attorney had hired an investigator to coerce and manipulate witnesses.[63] The court granted attorney's fees against the defendant's attorney.[64] Logically, if an attorney advises a client

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Ct. 1989) (lack of control over expert witness was a valid excuse for noncompliance when expert failed to appear for deposition date set by court).

57. In Williams v. City of Chicago, 370 N.E.2d 119 (Ill. App. Ct. 1977), the trial court ordered the defendants to pay plaintiff's attorney's fees for not answering interrogatories. The court gave no specific reasoning concerning how it determined whom to sanction. On the other hand, in Savitch v. Allman, 323 N.E.2d 435 (Ill. App. Ct. 1975), the court imposed attorney's fees against plaintiff's attorney for unreasonable refusal to answer interrogatories. The facts seem to be similar in *Savitch* and *Williams*, yet the courts were inconsistent in whom they sanctioned.

58. Ill. Rev. Stat. ch. 110A, para. 219(a) (1991).

59. Ill. Rev. Stat. ch. 110A, para. 219(b) (1991).

60. Ill. Rev. Stat. ch. 110A, para. 219(c) (1991).

61. Ill. Rev. Stat. ch. 110A, para. 219(d) (1991).

62. 510 N.E.2d 1148 (Ill. App. Ct. 1987).

63. *Id.* at 1150.

64. *Id.* at 1152; *see also* American Directory Serv. Agency, Inc. v. Beam, 131 F.R.D. 15, 19 (D.D.C. 1990) (imposing sanctions against an attorney when the attorney advised his clients to give no answer during depositions and frequently objected, thereby preventing any meaningful testimony from being given).

In Barker v. Bledsoe, 85 F.R.D. 545, 546 (W.D. Okla. 1979), plaintiff's answers to interrogatories were late and were very vague when finally answered. These answers were signed by plaintiff's counsel and verified by an associate. *Id.* The court questioned why counsel did not verify his own signed answers. *Id.* at 549. Because counsel purposefully concealed other facts, the court believed that counsel was also responsible for the paltry interrogatory answers given. *Id.* In Smith v. Logansport Community School Corp., 139

not to comply with discovery, the attorney, not the client, should be sanctioned.

In a recent case, an appellate court held that attorney's fees were to be paid by the plaintiff and his attorney.[65] These sanctions were imposed because of the plaintiff's repeated failure to appear at scheduled depositions and his incomplete responses to requests to produce.[66] The court did not state what percentage each had to pay and did not specifically allocate fault for each discovery violation.

If fault is the basis for deciding whether it is the attorney or his or her client who should be sanctioned, then the trial judge must ascertain who is at fault. At a hearing on sanctions for discovery violations, fault determination can create a problem if an attorney blames the client for the noncompliance. This may result in the lawyer having a conflict of interest, necessitating his or her withdrawal from the case.[67] In addition, at a hearing in which the client is not present, the judge may hear a one-sided version of the events and impose a sanction that harms the client when the attorney was really to blame. At the recent Illinois Judicial Conference, one judge recommended that both attorney and client be required to attend the sanctions hearing. His experience had been that attorneys were much less likely to blame their clients when their clients were sitting next to them in the courtroom.

Although this approach may reduce the likelihood that attorneys will blame their clients for discovery violations for which they themselves are responsible, such hearings may end up causing rifts between attorneys and clients. An attorney might subtly try to shift the blame to the client. Even if the attorney accepts the blame, the client may feel that he or she has hired an incompetent attorney. Also, in trying to defend themselves, attorneys may re-

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F.R.D. 637 (N.D. Ind. 1991), plaintiff's counsel insisted on depositions being adjourned prior to completion, interrogatory answers were evasive, and document-production requests were not fulfilled. *Id.* at 641-49. The court stated that the responsibility for the discovery abuses rested solely upon plaintiff's counsel, and counsel was sanctioned. *Id.* at 651. It appears that the noncompliance with the deposition would be counsel's fault. However, not answering the interrogatories properly and not providing the requested documents could also have been the plaintiff's fault.

65. Klairmont v. Elmhurst Radiologists, S.C., 558 N.E.2d 328, 332 (Ill. App. Ct. 1990).

66. *Id.*

67. *See* Alabama Ethics Opinion 87-156 (1987), *summarized in* ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ETHICS OPINIONS 1986-1990 901:1037 (requiring a lawyer to withdraw from the case if the client and lawyer blame each other, unless the client consents to continued representation).

veal client confidences.[68] In order to avoid these problems, a judge may schedule a hearing on the discovery dispute itself following a motion by the affected party, but postpone a hearing on sanctions until after the conclusion of the case. Then, any breakdown in the attorney-client relationship will not adversely affect the client, at least in that particular case. This approach has the drawback of precluding the imposition of progressively severe sanctions as violations continue. Judges can try to delay hearings on sanctions, at least initially, in the hope that discovery disputes will not continue. If, however, a party or his or her attorney seems to be intransigent, a hearing on sanctions may have to be scheduled earlier in the proceeding.

A few Illinois courts have imposed attorney's fees against the law firm representing the offending party.[69] In *Krasnow v. Bender*,[70] at a pretrial conference the parties had agreed that the plaintiff would be examined by a physician.[71] On the advice of counsel, the plaintiff refused to give her medical history when she arrived for her appointment.[72] It seems that it would have been appropriate to sanction counsel, but without explanation, the court sanctioned the law firm.[73]

In some cases, it may be necessary to sanction the law firm instead of the attorney who attends the discovery hearing. A few large firms have used the ploy of sending a young associate with no experience with the case to the sanctions hearing in the hope that the judge will not impose a heavy sanction against somebody who is not at fault. Under such circumstances, when the judge does not know which attorney in the firm is to blame, it may be appropriate to impose sanctions against the law firm itself, although Rule 219

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68. The Illinois Rules and cases decided under the analogous provisions of the ABA Model Rules permit attorneys to reveal confidences to the extent necessary to defend themselves. *See* ILLINOIS RULES OF PROFESSIONAL CONDUCT Rule 1.6 (c)(3) ("A lawyer may use or reveal: . . . confidences or secrets necessary to establish or collect the lawyer's fee or to defend the lawyer . . . against an accusation of wrongful conduct."); *cf.* Brandt v. Schal Associates, Inc., 121 F.R.D. 368, 385 n.48 (N.D. Ill. 1988) (stating that a claim for sanctions under Rule 11 is an accusation of "wrongful conduct" giving a lawyer the right to reveal confidences in self defense).

69. *See, e.g.*, Krasnow v. Bender, 397 N.E.2d 1381, 1385 (Ill. 1979) (finding that counsel's advice to plaintiff was unreasonable and deserving of a monetary sanction); Transamerica Ins. Group v. Lee, 518 N.E.2d 413, 416 (Ill. App. Ct. 1987) (upholding the imposition of a $5,000 sanction against the law firm representing the defendant).

70. 397 N.E.2d 1381 (Ill. 1979).

71. *Id.* at 1383.

72. *Id.*

73. *Id.* at 1385.

does not expressly provide for sanctions against law firms.[74]

VI. APPROPRIATE SANCTIONS

After determining that discovery misconduct is sanctionable and that a particular person should be sanctioned, a court must then determine the appropriate sanction. Under Rule 219, the proper sanction depends upon the facts of the particular case. Rule 219(c) lists seven possible sanctions for failure to comply with a discovery request or order: (1) staying the proceedings; (2) debarring a party from filing any other pleading relating to any issue to which the refusal to comply relates; (3) debarring a claim, counterclaim, third party claim, or defense relating to the issue; (4) barring a witness from testifying; (5) entering a default judgment as to a claim or defense; (6) striking a portion of the pleadings; or (7) ordering the offending party or his or her attorney to pay the reasonable expenses, including attorney's fees incurred as a result of the discovery misconduct.[75] This list is not exclusive. For example, though not specified under Rule 219(c), unfavorable jury instructions and the award of a new trial have been used as sanctions.[76]

With the exception of attorney's fees that the court directs the client to pay, all the sanctions listed above will affect to some degree the way the case is viewed by the trier of fact. Therefore, before imposing sanctions that will impede a party's ability to prove or defend his or her case, the court must be sure that the client is to blame for failure to comply with discovery. Certainly, if a court bars a claim or precludes evidence because of discovery abuse for which the attorney is found to be responsible, a malpractice claim may be brought against the attorney.[77] It may be very difficult, however, to value that claim. Ordinarily, in legal malpractice cases the jury must determine not only the value of the case but also that the attorney's conduct was the proximate cause or a substantial contributing cause of the harm.[78] When the attor-

74. *Cf.* Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120, 127 (1990) (holding only the signatory and not the law firm liable for violation of Rule 11 of the Federal Rules of Civil Procedure).

75. ILL. REV. STAT. ch. 110A, para. 219(c) (1991).

76. *See, e.g.,* Buehler v. Whalen, 374 N.E.2d 460, 468 (Ill. 1977) (upholding severe sanctions against the defendant, including a jury instruction "to the effect that unfavorable inferences could be drawn because of failure to produce documents" and for purposely lying and withholding vital discovery information); Drehle v. Fleming, 274 N.E.2d 53, 55 (Ill. 1971) (new trial warranted because defendant failed to comply with a document production request).

77. *See, e.g.,* Fitzgerald v. Walker, 826 P.2d 1301, 1305 (Idaho 1992).

78. *See* Shehade v. Gerson, 500 N.E.2d 510, 512 (Ill. App. Ct. 1986).

ney's conduct results in the preclusion of certain evidence, the jury may find it difficult to ascertain whether the attorney's conduct caused the case to be lost.[79] Problems of proximate cause and valuation do not exist if the offending individual is sanctioned with attorney's fees based on the amount of time he or she has needlessly caused the other side to spend. Of course, if documents or other information are never provided, attorney's fees alone will not constitute an adequate sanction, and a stiffer sanction may be necessary.

A. *Attorney's Fees*

Rule 219 and Rule 237 state that recoverable attorney's fees must have been incurred as a result of misconduct or obtaining an order. This gives the courts little direction for determining reasonable attorney's fees. Unfortunately, in determining attorney's fees as sanctions, courts have not used a consistent formula, although most of them have stated that the fees must relate to specific misconduct.

In *Dyduch v. Crystal Green Corp.*,[80] the trial court imposed all of the costs and half of the attorney's fees as a sanction.[81] The appellate court held that sanctions should not take the form of a monetary penalty.[82] The *Dyduch* court stated that it did not see how the costs and fees related to the plaintiff's failure to answer interrogatories and therefore remanded the case to the trial court to determine what costs, if any, were directly related to the plaintiff's failure to answer.[83] This approach does not give any definite direction for determining the amount of attorney's fees; nevertheless, it is consistent with the theory that the fees should be compensatory rather than punitive in nature.[84]

Many courts have not used any specific formula to determine

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79. *See* Leonard E. Gross, *Suppression of Evidence as a Remedy for Attorney Misconduct: Shall the Sins of the Attorney Be Visited Upon the Client?*, 54 ALB. L. REV. 437 (1990).

80. 582 N.E.2d 302 (Ill. App. Ct. 1991).

81. *Id.* at 306.

82. *Id.* at 307. *But cf.* Transamerica Ins. Group v. Lee, 518 N.E.2d 413, 415 (Ill. App. Ct. 1987).

83. *Dyduch*, 582 N.E.2d at 307.

84. *See* Savitch v. Allman, 323 N.E.2d 435, 437 (Ill. App. Ct. 1975); *see also* Lynch v. Mullenix, 363 N.E.2d 645, 647 (Ill. App. Ct. 1977) (interpreting Rule 219(a) to permit imposition of fees when refusal was made without substantial justification); Humboldt-Armitage Corp. v. Illinois Fair Plan Ass'n, 408 N.E.2d 307, 310 (Ill. App. Ct. 1980) (finding that imposition of attorney's fees is appropriate when one party fails to comply with discovery rules); Williams v. City of Chicago, 370 N.E.2d 119, 122 (Ill. App. Ct. 1977) (concluding that trial courts may not impose sanctions as punishment).

attorney's fees but have estimated what they thought would be an appropriate dollar amount. In *Savitch v. Allman*,[85] the defendant served interrogatories on February 23, 1973, to be answered within twenty-eight days.[86] No answers had been filed by the middle of September. On September 18, 1973, the defendant's attorneys wrote a letter to the plaintiff's attorney reminding him that answers were long overdue.[87] Thirty days later, the interrogatories had still not been answered, and on October 18, 1973, the defendant filed a motion for sanctions under Rule 219(c).[88] Two hearings were postponed at the request of the plaintiff's attorney.[89] After a hearing on November 29, 1973, $160 in sanctions were imposed against the plaintiff's counsel.[90] The *Savitch* court gave no reason why $160 was the appropriate amount except to say that the defendant was required to pay that amount in additional attorney's fees for the sole purpose of obtaining compliance with discovery rules.[91]

Similarly, in *Rush v. Leader Industries, Inc.*,[92] the court determined that $1,000 was the appropriate sanction for the defendant's failure to produce requested documents.[93] In *Rush*, the plaintiff filed a notice to produce and subsequently wrote to the defendant requesting these documents on four separate occasions.[94] During this time, defendant submitted some but not all of the documents.[95] The plaintiff requested $1,500 in costs.[96] The trial court awarded $1,000 in costs for the time attributable to the plaintiff's efforts resulting from the defendant's noncompliance.[97] The appellate court affirmed the award, holding that the estimate of ten hours of effort at $100 per hour was related to the costs occasioned by defendant's noncompliance.[98] The *Rush* court did not articulate any definite standard used in arriving at this amount, relying instead on the trial judge's determination of a reasonable amount.[99]

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85. 323 N.E.2d 435 (Ill. App. Ct. 1975).
86. *Id.* at 437.
87. *Id.*
88. *Id.*
89. *Id.*
90. *Savitch*, 323 N.E.2d at 437.
91. *Id.* at 439.
92. 531 N.E.2d 863 (Ill. App. Ct. 1988).
93. *Id.* at 864.
94. *Id.*
95. *Id.*
96. *Id.* at 866. This amount was based on a calculation of 15 hours at $100 per hour.
97. *Rush*, 531 N.E.2d at 864.
98. *Id.* at 866.
99. *Id.*; *see also* Wach v. Martin Varnish Co., 422 N.E.2d 172, 175 (Ill. App. Ct.

The most objective approach to determining attorney's fees would be for the trial judge to make an assessment of the amount of time it would take a reasonable attorney to prepare the necessary moving papers and attend the hearing to obtain the wrongfully withheld discovery information. Then, the judge should multiply the number of hours by a lodestar figure based on the prevailing market rate charged by other attorneys in the area with similar experience and background.[100]

This was the approach taken in *Martzaklis v. 5559 Belmont Corp.*[101] In *Martzaklis*, the appellate court held that the amount of the fees should be based not on the number of pages of pleadings produced but on the amount of time it took to investigate and respond to the noncompliance.[102] In that case, the defendant's attorney had hired an investigator to intimidate and coerce witnesses.[103] The court granted the plaintiff's attorneys $10,347.50 in attorney's fees.[104] The defendant's attorney contended that the time claimed by the attorneys was excessive and that the motions and memoranda filed by the plaintiff, totaling only twenty-six pages, did not justify the 211.25 hours billed by the plaintiff's attorneys.[105] The appellate court upheld the award and stated that the trial court had reviewed the pleadings, had reviewed the time records of counsel, and had heard testimony regarding the amount before concluding that the time claimed was necessary.[106]

Of necessity, a trial judge must rely to some degree on his or her own experience when determining the appropriate award for attorney's fees for discovery violations. However, to avoid reversal, the judge should cite to time records, affidavits, testimony, or some form of data to support the necessity and reasonableness of counsel fees. The courts should base awards on more than the bare assertions of counsel regarding the amount of time spent and the value

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1981) (holding that the trial judge from his own observations and experiences could conclude that $1,000 was a reasonable fee for the attorney's services in attempting to enforce discovery order).

100. *See* Altschuler v. Samsonite Corp., 109 F.R.D. 353, 358 n.4 (E.D.N.Y. 1986) (accepting as appropriate the government attorney's request for compensation by multiplying the number of hours by the going hourly rate); Crawford v. American Fed'n of Gov't Employees, 576 F. Supp. 812, 816 (D.D.C. 1983) (attorney's fees calculated by multiplying the number of hours spent on discovery by the hourly rate of an attorney of this specialty).

101. 510 N.E.2d 1148 (Ill. App. Ct. 1987).

102. *Id.* at 1152.

103. *Id.* at 1150.

104. *Id.*

105. *Id.* at 1152.

106. *Martzaklis*, 510 N.E.2d at 1152.

of that time.[107]

B. *Barring Evidence*

If a discovery violation is found to be the fault of a party and not his or her attorney and if the award of attorney's fees does not produce discovery or sufficiently compensate the victimized party, the court should consider progressively stronger sanctions.[108] These sanctions should correspond to the misconduct in question and not constitute a penalty for failure to adhere to discovery rules.

Barring evidence is perhaps the least severe of the possible sanctions for discovery violations. It makes sense for the court to bar evidence—or in extreme cases, to bar a claim—when a client deliberately refuses to provide information on a particular issue.[109] For example, the Illinois Supreme Court found that barring a defendant from maintaining a defense based on her mental condition was a proper sanction for her refusal to comply with an order requiring a mental examination.[110]

In determining whether the exclusion of evidence is a suitable sanction, the overwhelming majority of Illinois courts have relied on the following factors: (1) surprise to the adverse party; (2) prejudicial effect; (3) diligence of the adverse party; (4) timely objections; and (5) good faith of the offending party.[111] In *Ashford v. Ziemann*,[112] a paternity action, the plaintiff requested the defendant to disclose the names of any men who the defendant asserted had had sexual intercourse with the plaintiff.[113] The defendant did not answer the interrogatory.[114] At trial, the defendant presented

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107. Transamerica Ins. Group v. Lee, 518 N.E.2d 413, 418-19 (Ill. App. Ct. 1987) (McMorrow, J., dissenting).

108. *See, e.g.,* Suttles v. Vogel, 513 N.E.2d 563, 571 (Ill. App. Ct. 1987) (laypersons might be required to pay costs when discovery violations are deliberate and repetitive); Jaffe v. Fogelson, 485 N.E.2d 531, 533 (Ill. App. Ct. 1985) (a progression of the severity of sanctions effectively promotes complete discovery and judicial efficiency).

109. *See* American Family Ins. Co. v. Village Pontiac GMC, Inc., 585 N.E.2d 1115, 1119-20 (Ill. App. Ct. 1992) (upholding trial court's decision for summary judgment against plaintiff who intentionally allowed a material piece of evidence to be destroyed).

110. *In re* Estate of Stevenson, 256 N.E.2d 766, 769 (Ill. 1970).

111. *See, e.g.,* Ashford v. Ziemann, 459 N.E.2d 940, 947 (Ill. 1984) (barring the testimony of a witness whose name was not furnished to the opposing party); Lindholm v. Wilson, 554 N.E.2d 501, 503 (Ill. App. Ct. 1990) (same). In these cases, surprise refers to the fact that the witness's name was not supplied. The prejudicial effect refers to the effect on the opposing party if the witness testifies. The diligence refers to the offending party's diligence in ascertaining the witness's name prior to trial. The timely objections refers to the opposing party's objection to the witness's testimony.

112. 459 N.E.2d 940 (Ill. 1984).

113. *Id.* at 946.

114. *Id.*

the testimony of a bartender who claimed to have had sexual intercourse with the plaintiff.[115] The trial court allowed this testimony, but the appellate court held that in light of the defendant's failure to answer the interrogatory, the trial court had erred in admitting the evidence.[116] The Illinois Supreme Court affirmed the appellate court ruling and granted a new trial.[117] The supreme court analyzed the five factors set forth above and concluded that the testimony should have been barred.[118]

Courts need to be very careful about barring evidence when the party is not to blame for the discovery violation, particularly if harm from the discovery violation can be ameliorated without affecting the trial or the merits of the case. In *Palmer v. Minor*,[119] a personal injury action, the victim of an automobile accident was barred from calling his only remaining witness, whose name he had intentionally failed to disclose to his attorney until shortly before trial.[120] The plaintiff's attorney allegedly had inadvertently failed to reveal the name of the witness until several days later, on the date trial was to begin, after the trial court had disqualified all of the plaintiff's other occurrence witnesses.[121] The appellate court affirmed the trial court's ruling and held that the plaintiff's conduct was a gross violation of Supreme Court Rule 219, given that the plaintiff and the witness lived together, the witness was present at the scene of the accident, the plaintiff knew that she would be a witness, and the plaintiff and the witness had discussed her role as such.[122]

The trial court in *Palmer* clearly had the discretion to exclude the testimony of the plaintiff's witness, but since the plaintiff's attorney was partially to blame for the delay in disclosure, a different sanction might have been more appropriate. Since the judge had already delayed the start of the trial to allow the witness to be deposed, no further delay would have resulted if the witness had been allowed to testify. Perhaps it would have been more appropriate for the court to order the plaintiff and his attorney to pay for the additional costs attributable to the delay.[123]

115. *Id.* at 944.
116. *Id.* at 947.
117. *Ashford*, 459 N.E.2d at 949.
118. *Id.* at 948-49.
119. 570 N.E.2d 774 (Ill. App. Ct. 1991).
120. *Id.* at 776-77.
121. *Id.* at 775.
122. *Id.* at 776.
123. *Cf.* United Excavating & Wrecking, Inc. v. J.L. Wroan & Sons, Inc., 356 N.E.2d 1160, 1163 (Ill. App. Ct. 1976) (award of attorney's fees was proper but dismissal was

In contrast with *Palmer*, courts have admitted evidence despite a party's failure to comply with discovery requests when prejudice and surprise to the adverse party were minimal. For example, in *In re Estate of Stuhlfauth*,[124] the appellate court held that the trial court had not abused its discretion in failing to bar the testimony of an expert witness.[125] The attorney for the party seeking to introduce the testimony of the expert had failed to mention the expert's name in response to a formal discovery request; but months before trial he had orally identified the expert to opposing counsel in an informal statement.[126] The court stated that it did not condone violations of discovery rules, but that in this case, one of the purposes of discovery rules—preventing surprise—was not undermined by permitting the expert to testify.[127]

C. *Barring Claims or Defenses*

The next sanction in order of severity is debarring claims or defenses. This sanction should be granted only when the party, rather than his or her attorney, is to blame and only when barring evidence does not provide sufficient deterrence. For example, *Campen v. Executive House Hotel, Inc.*[128] involved an action for personal injuries sustained by the plaintiff as a result of slipping and falling on the floor of a hotel lobby. The hotel tried to raise the defense that the sole cause of the injuries was the negligence of a janitorial contractor.[129] During pretrial discovery, however, the

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excessive when there was no indication that offending party had refused to, or would not, comply with discovery deposition order); Schwartz v. Moats, 277 N.E.2d 529, 531 (Ill. App. Ct. 1971) (reversing the trial court's order entering a default judgment, with directions to the trial court to determine the reasonable expenses and attorney's fees incurred by defendants' failure to answer interrogatories).

124. 410 N.E.2d 1063 (Ill. App. Ct. 1980).

125. *Id.* at 1070.

126. *Id.* at 1069.

127. *Id.* at 1070; *see also* Zimmer v. Melendez, 583 N.E.2d 1158 (Ill. App. Ct. 1991). In *Zimmer*, the trial court improperly barred evidence of future medical treatment and expenses necessary to repair an injury to plaintiff's rotator cuff. *Id.* at 1162. Plaintiff had not specified that amount in response to an interrogatory on consequential damages, but did supply defendant with a report from plaintiff's doctor that rotator cuff surgery was required. *Id.* The appellate court stated that the doctor's testimony at his evidence deposition on plaintiff's future treatment and expenses did not surprise defendant, and that defendant could have discovered this evidence through a supplemental interrogatory or a discovery deposition of the doctor. *Id.*; Blakely v. Johnson, 345 N.E.2d 814, 815 (Ill. App. Ct. 1976) (holding that the trial court abused its discretion in barring plaintiff's witness when plaintiff failed to list the witness's name in response to defendant's interrogatories, because plaintiff did not attempt to hide his witness, there was no surprise to defendant, and because defendant had an opportunity to depose plaintiff's witness).

128. 434 N.E.2d 511, 513 (Ill. App. Ct. 1982).

129. *Id.* at 515, 521.

hotel had wrongfully concealed the existence of the contractor, a potential party.[130] The appellate court held that barring the defense was proper.[131] Because a sanction of barring the evidence of the janitorial contractor's negligence might not have prevented the defendant from continuing to blame the contractor, the appellate court's decision to bar the defense was justified. Otherwise the defendant might have benefited from having concealed the information.

D. Dismissal and Default Judgments

A dismissal or a default judgment is considered a drastic sanction by the courts. Therefore, courts will impose such sanctions only as a last resort or when other enforcement powers at the court's disposal have failed to advance litigation.[132]

In *Williams v. City of Chicago*,[133] the trial court imposed sanctions of attorney's fees and a default judgment on the defendants for failure to answer interrogatories.[134] The appellate court stated that a default judgment is harsh and should not be invoked unless the offending party's conduct is deliberate and contumacious.[135] Accordingly, the appellate court reversed, adding that a default judgment should be used only as a last resort.[136] In this case, barring evidence or increasing attorney's fees might have been a more appropriate sanction.

In *Nehring v. First National Bank in DeKalb*,[137] the appellate court held that when a party's compliance with requests for production of documents was as complete as possible, a trial on the merits could be achieved.[138] Although the party's prior refusal to comply did warrant some sanctions, the belated compliance did not warrant dismissal of the case.[139] Likewise, various courts have stated that a severe sanction such as a dismissal or a default judgment should be vacated if the offending party has a legitimate excuse for noncompliance and shows a willingness to comply in the future. Thus, in one case in which a party submitted answers to

130. *Id.* at 513.
131. *Id.* at 521.
132. *E.g.* Wegman v. Pratt, 579 N.E.2d 1035, 1041 (Ill. App. Ct. 1991); Wyrick v. Time Chem., Inc., 548 N.E.2d 524, 526 (Ill. App. Ct. 1989).
133. 370 N.E.2d 119 (Ill. App. Ct. 1977).
134. *Id.* at 121.
135. *Id.* at 122.
136. *Id.* at 122-23.
137. 493 N.E.2d 1119 (Ill. App. Ct. 1986).
138. *Id.* at 1125-26.
139. *Id.* at 1125.

interrogatories thirty-five days after the court had entered a dismissal order, the court held that the plaintiff had demonstrated a willingness to comply with discovery rules and thus dismissal was no longer warranted.[140]

Because they want to have cases tried on their merits and not concluded as a result of sanctions for discovery abuse, the overwhelming majority of courts hold that to warrant dismissal or default judgments, the offending party's conduct must display a "deliberate, contumacious or unwarranted disregard for the court's authority."[141] Determining what constitutes deliberate or contumacious conduct has been a challenge for the Illinois courts. Courts have examined the questions of whether the behavior has been repeated and whether the party's deliberate conduct has made it virtually impossible to conduct a trial on the merits. In *Perimeter Exhibits, Ltd. v. Glenbard Molded Binder, Inc.*,[142] the trial court struck the defendant's answer, thereby causing a default judgment.[143] The defendant had been ordered to be available for a deposition before the discovery cutoff date.[144] The defendant's counsel had advised the plaintiff's counsel that he would get in touch with him to set a date for the defendant's deposition.[145] Subsequently, the defendant left town and did not return until two days after the date set for trial.[146] The appellate court found that

140. Cook v. Schwab Rehabilitation, 395 N.E.2d 1100, 1102 (Ill. App. Ct. 1979); *cf.* George William Hoffman & Co. v. Capital Servs. Co., 428 N.E.2d 600, 605-06 (Ill. App. Ct. 1981) (holding that defendant's claims of meritorious defenses were not a valid excuse for failure to comply with discovery demands, and refusing to set aside default judgment because defendants did not agree to comply with discovery demands in the future).

141. Perimeter Exhibits, Ltd. v. Glenbard Molded Binder, Inc., 461 N.E.2d 44, 52-53 (Ill. App. Ct. 1984); *see also* Illinois E.P.A. v. Celotex Corp., 522 N.E.2d 888, 892 (Ill. App. Ct. 1988) (affirming the trial court's decision to bar certain of plaintiff's claims because plaintiff "engaged in a pattern of dilatory response to hearing officer orders, unjustifiable cancellation of depositions, and engaged in an intentional pattern of refusal to meet deadlines"); Wilkins v. T. Enters., Inc., 532 N.E.2d 469, 471 (Ill. App. Ct. 1988) (holding that plaintiffs' conduct was not so contumacious as to warrant dismissal where attorney for all plaintiffs in nine consolidated actions delayed for well over one year in filing responses to 34 pages of discovery requests in several of the actions, because some of the plaintiffs filed responses and the others manifested a willingness to comply with discovery); John Mathes & Assocs., Inc. v. Noel, 418 N.E.2d 1104, 1107 (Ill. App. Ct. 1981) (holding that entry of default judgment was not abuse of trial court's discretion, where defendant engaged in "a continuing series of delays which totally thwarted the discovery process," despite being given "multiple opportunities over a period of nine months to fulfill his discovery responsibilities").

142. 461 N.E.2d 44 (Ill. App. Ct. 1984).

143. *Id.* at 48.

144. *Id.* at 47-48.

145. *Id.* at 48.

146. *Id.*

the sanctions imposed by the trial court were appropriate because of the defendant's deliberate disregard of the court's authority.[147]

In contrast, in *Wyrick v. Time Chemical, Inc.*,[148] the appellate court held that dismissal was improper, even though the plaintiff did not appear on eleven deposition dates. The court observed that the plaintiff had complied with written discovery and that both parties had agreed to the rescheduling of the deposition ten out of the eleven times.[149] Consequently, the court found no evidence of deliberate, willful, or contumacious behavior by the plaintiff.[150]

Likewise, in *Schaefer v. Sippel*,[151] the court held that the plaintiff's inability to provide the name of his expert at a pretrial conference did not constitute the type of deliberate misconduct that would justify a dismissal of his case pursuant to Rule 219(c).[152] The court distinguished between noncompliance and refusal to comply, holding that dismissal was proper only when a party refuses to comply.[153]

The five factors set forth by the Illinois Supreme Court in *Ashford v. Ziemann*,[154] to be used in determining whether evidence should be barred, have also been used in determining whether dismissal is appropriate. In *Vaughn v. Northwestern Memorial Hospital*,[155] a medical malpractice action was dismissed with prejudice because the plaintiff's deposition had been continued seventeen times and the plaintiff had failed to attend his deposition despite being ordered by the court to complete oral discovery.[156] Although the *Vaughn* court mentioned the standard of "deliberate and pronounced disregard for rules, orders and authority of the court" used by other courts, the court appeared to rely on the *Ash-*

147. *Perimeter*, 461 N.E.2d at 52-53; *see also* Fine Arts Distribs. v. Hilton Hotel Corp., 412 N.E.2d 608 (Ill. App. Ct. 1980). The *Fine Arts* court found dismissal with prejudice to be appropriate when plaintiff delayed in responding to defendant's discovery requests and a court order. *Id.* at 611. According to the court, these dilatory tactics, combined with plaintiff's inability to explain the delays and refusal to fully cooperate, amounted to contumacious behavior. *Id.*

148. 548 N.E.2d at 527.

149. *Id.* at 526.

150. *Id.* at 527.

151. 374 N.E.2d 1092 (Ill. App. Ct. 1978).

152. *Id.* at 1096-97.

153. *Id.*; *see also Nehring*, 493 N.E.2d at 1129 (finding dismissal not warranted, even though plaintiff failed to comply with defendant's request for production of documents for many months, during which time some of the requested documents were stolen).

154. 459 N.E.2d 940 (Ill. 1984); *see also supra* note 111 and accompanying text.

155. 569 N.E.2d 77 (Ill. App. Ct. 1991).

156. *Id.* at 78-79.

ford factors in reviewing the trial court's dismissal.[157] The court concluded that dismissal did not constitute an abuse of discretion.[158] Since the plaintiff clearly had no one but himself to blame for his repeated failure to attend his court-ordered depositions, the court's action seems justified.

A number of courts have found conduct to be deliberate and contumacious when the offense involved a violation of a court order, as opposed to failure to comply with a discovery rule.[159] In *Simmons v. Shimek*,[160] the appellate court specifically stated that the plaintiff's failure to appear on two court-ordered deposition dates was different from the situation in *Gallo v. Henke*,[161] where the plaintiff's failure to appear never occurred on a deposition date set by the court. More recently, in *Shapira v. Lutheran General Hospital*,[162] a case was dismissed with prejudice when the plaintiff failed to disclose an expert witness after he had been ordered to do so on four different occasions.[163] The court, however, focused particularly on the plaintiff's disregard of court orders rather than on his noncompliance with discovery rules.[164]

There is no inherent reason for distinguishing compliance with court orders from compliance with discovery rules. A court order, however, may be more specific, or it may be the consequence of repeated violations of discovery rules. In such circumstances, it makes sense to treat recurrent violators of clear orders more harshly than individuals who commit single violations of unclear rules or orders.

Because discovery sanctions are not intended to be punitive, violations by minor parties are treated more leniently than violations by adults. In *Brandon v. DeBusk*,[165] a father appearing for his minor children filed suit to recover damages for personal injuries.[166] The trial court dismissed the action for noncompliance with discovery.[167] The appellate court held that when minors are involved, however, a court should be even more reluctant to dismiss for failure to comply with discovery than in situations in which an adult

157. *Id.* at 81.
158. *Id.*
159. *See, e.g.*, *Perimeter Exhibits*, 461 N.E.2d at 52; *Fine Arts*, 412 N.E.2d at 610.
160. 488 N.E.2d 283, 285 (Ill. App. Ct. 1985).
161. 436 N.E.2d 1068, 1072 (Ill. App. Ct. 1982).
162. 557 N.E.2d 351 (Ill. App. Ct. 1990).
163. *Id.* at 352-53, 356.
164. *Id.* at 356.
165. 407 N.E.2d 193 (Ill. App. Ct. 1980).
166. *Id.* at 194.
167. *Id.* at 194-95.

party's conduct is deliberate and contumacious.[168] Accordingly, the appellate court held that alternative sanctions rather than dismissal were appropriate.[169] In sum, when minors are involved, alternative sanctions to dismissal should be vigorously pursued.[170]

Finally, when a court imposes the sanction of dismissal under Supreme Court Rule 219, a party cannot then refile the action, claiming an involuntary dismissal under Supreme Court Rule 273. Dismissal as a sanction under Rule 219(c) is an adjudication on the merits.[171]

E. *Unfavorable Jury Instructions*

A few courts condone giving the jury instructions that are unfavorable to the offending party. In *Buehler v. Whalen*,[172] for example, the Illinois Supreme Court held that the trial court properly instructed the jury that unfavorable inferences could be drawn from the defendant's failure to produce documents.[173] Such instructions can be particularly appropriate when one party's failure to produce relevant documents makes it difficult for the party with the burden of proof to prove his or her case.

VII. Conclusion

The judicial system would run more smoothly if discovery disputes could be avoided entirely. Judges can pursue this goal in several ways. First, judges should exercise strict control over their dockets and push counsel for early trial dates. In this way, lawyers will have less opportunity to become embroiled in discovery disputes over peripheral matters. Then, if discovery disputes arise, judges should insist that lawyers comply with the "meet and confer provisions" of Supreme Court Rule 201(k).

Judges should resolve only disputes that the attorneys cannot resolve. At a recent Illinois Judicial Conference, Judge Willard Lassers recommended that after ruling on a discovery dispute, the judge should set a time for the information to be produced and require counsel to return on a set date to advise him or her whether

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168. *Id.* at 195.
169. *Id.* at 195-96.
170. *Brandon*, 407 N.E.2d at 195.
171. Sjostrom v. McMurray, 362 N.E.2d 744, 748 (Ill. App. Ct. 1977); Heizman v. City of Chicago, 320 N.E.2d 121, 123 (Ill. App. Ct. 1974).
172. 374 N.E.2d 460 (Ill. 1977).
173. *Id.* at 468; *see also* LeMaster v. Chicago Rock Island & Pac. R.R. Co., 343 N.E.2d 65, 75 (Ill. App. Ct. 1976) (holding that the trial court did not abuse its discretion by permitting the jury to consider as evidence a party's inadequate disclosure).

the discovery order has been complied with. This requirement, Judge Lassers argued, will reduce subsequent disputes over the refusal to turn over documents that the court has previously ordered to be produced.

To determine whether sanctions are appropriate, the judge should ascertain whether the party or attorney has willfully violated the discovery rules or has shown a willingness to cooperate. Any sanctions should be imposed on the individual responsible for the noncompliance. Any sanction should be commensurate with the offense and designed not to punish but to facilitate the continuation of the trial on its merits.