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Policing Discovery Under Illinois Supreme Court Rule 219(c): A Search for Judicial Consistency

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I. INTRODUCTION

The modern system of discovery arose from the desire to make the judicial process a joint search for the truth "rather than . . . a battle of wits between counsel, where shock and surprise rule the result."[1] Although the discovery rules were designed to eliminate the "combat theory"[2] of litigation, attorneys must comply with the rules in order to achieve the goals of discovery. Many attorneys, however, ignore the rules and use discovery as a tactical game to impede the truth-seeking process by delaying litigation.[3]

The judiciary's most powerful tools for solving problems of noncompliance are sanctions for abuse of discovery.[4] The ultimate goal of such sanctions is not to punish a party for deviating from the discovery rules but to ensure compliance with the rules in order to reach a trial on the merits.[5] At the same time, it is often neces-

1. Payne v. Coates-Miller, Inc., 68 Ill. App. 3d 601, 606, 386 N.E.2d 398, 402 (1st Dist. 1979). "Modern instruments of discovery . . . make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." *Id.* (quoting United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958)); *see* Buehler v. Whalen, 70 Ill. 2d 51, 67, 374 N.E.2d 460, 467 (1975) (the ascertainment of truth and disclosure is the object of discovery).

2. *Payne*, 68 Ill. App. 3d at 606, 386 N.E.2d at 402; *see also* R. MICHAEL, CIVIL PROCEDURE BEFORE TRIAL, § 31.3 (1989) (discussion of modern discovery and the adversarial tradition).

3. Williams v. A. E. Staley Mfg. Co., 83 Ill. 2d 559, 565, 416 N.E.2d 252, 255 (1981). The court in *Williams* stated:

> When an attorney attempts to use discovery rules and sanctions as weapons in a war of inconvenience, instead of the truth-seeking purposes for which they were designed, he does a disservice not only to the court and his colleagues at the bar, but also to his client, since his pettifogging makes more difficult a realistic view of the merits of the client's claim or defense.

Id.

4. The phrase "abuse of discovery" encompasses both overdiscovery and resistance to discovery (noncompliance). Overdiscovery involves burdening an adversary with excessive discovery requests; noncompliance involves obstruction of an adversary's discovery. Discovery sanctions for noncompliance are the focus of this Comment. *See generally* Ebersole, *Discovery Problems: Is Help on the Way?*, 66 A.B.A. J. 50, 51-52 (1980) (distinguishing between noncompliance and overdiscovery problems); Johnston, *Discovery in Illinois and Federal Courts*, 15 J. MARSHALL L. REV. 1 (1982); Comment, *Recent Trends in the Enforcement of Discovery: Sanctions in the Federal Courts and in Illinois*, 11 LOY. U. CHI. L.J. 773 (1980).

5. Mueller v. Insurance Benefit Adm'rs, 175 Ill. App. 3d 587, 598, 529 N.E.2d 1126,

sary to end litigation as a sanction for noncompliance. Such a severe sanction has the effect of deciding a case on procedural grounds rather than on the substantive merits of a claim. Thus, the judiciary is continuously called upon to resolve the inherent problem of discovery sanctions, i.e., striking a balance between a rigid system of procedural rules and the disposition of cases on their merits.

The purpose of this Comment is to determine whether the Illinois system of sanctioning discovery violations strikes the proper balance between rigid procedural rules and trials on the merits and to suggest possible changes for "just"[6] and reasonable control over the discovery process. This Comment will first explore the historical background of discovery in Illinois, focusing on Illinois Supreme Court Rule 219(c), which provides sanctions for noncompliance with discovery. Second, it will discuss Illinois case law to determine what constitutes sanctionable conduct and what considerations make particular sanctions appropriate. Finally, this Comment will analyze whether the Illinois judiciary is meeting the goals of discovery in its application of sanctions and will suggest several improvements for the current system of sanctioning discovery violations.

II. BACKGROUND

Pretrial discovery was virtually unknown at common law[7] and limited to actions in equity.[8] To prepare his case, a litigant could obtain information only by filing a bill of discovery in a separate, equitable proceeding.[9] The bill of discovery did not extend to non-

1133 (1st Dist. 1988); Cedric Spring & Assocs. v. N.E.I. Corp., 81 Ill. App. 3d 1031, 1035, 402 N.E.2d 352, 356 (2d Dist. 1980) ("The purpose of imposing sanctions under [Rule] 219(c) is to compel cooperation rather than to dispose of litigation as a means of punishing the noncomplying party . . .. A court may not invoke sanctions which are designed to impose punishment rather than to achieve or effect the objects of discovery." (citations omitted)).

6. ILL. S. CT. R. 219(c), ILL. REV. STAT. ch. 110A, para. 219(c) (1987). Rule 219(c) provides that the trial court must award only sanctions that are "just." *Id.*

7. The only method at common law to obtain facts prior to trial was through the bill of particulars. The bill of particulars required certain facts to be established in a pleading. The bill apprised a party of his opponent's basic allegations but did not establish all relevant facts needed to prove his case. R. JOHNSTON & K. KANDARAS, DISCOVERY IN ILLINOIS 3 (1985); MICHAEL, *supra* note 2, § 31.1. *See, e.g.*, Colby v. Wilson, 320 Ill. 416, 420-22, 151 N.E. 269, 270-71 (1926).

8. In a proceeding in equity, depositions and sworn statements were used to support a claim for equitable relief. JOHNSTON & KANDARAS, *supra* note 7, at 2-3; *see also* Vennum v. Davis, 35 Ill. 568, 577 (1864) (discovery was used in equity only when evidence was exclusively within a party's knowledge).

9. JOHNSTON & KANDARAS, *supra* note 7, at 3; MICHAEL, *supra* note 2, § 31.1.

parties and was limited in scope to material facts relevant to the legal action.[10] Thus, the litigants proceeded without knowledge of all relevant facts. As a result, the skillful maneuvering of counsel, rather than the merits of a case, determined the outcome of a typical common law trial.[11]

The impracticability of this system prompted the legislature to enact section 58 of the Illinois Civil Practice Act,[12]presently paragraph 2-1003 of the Code of Civil Procedure.[13] The modern rules permit discovery in a single action at law and allow discovery to be initiated against nonparties.[14] To promote the free flow of information, the rules encourage informal cooperation among litigants with minimal judicial interference.[15] Accordingly, the modern rules enhance the truth-seeking process through disclosure of all relevant facts,[16] thus permitting resolution of cases on the merits rather than on technical procedural rules.[17]

Adoption of the discovery rules, however, did not secure complete disclosure of information or eliminate an adversarial disclosure process. The adversarial tradition continues to flourish in modern discovery by parties simply avoiding or delaying compliance with the discovery rules.[18] To achieve the goals of discovery and insure compliance with the discovery rules, the Illinois

10. JOHNSTON & KANDARAS, *supra* note 7, at 3; MICHAEL, *supra* note 2, § 31.1.

11. King v. American Food Equip. Co., 160 Ill. App. 3d 898, 910, 513 N.E.2d 958, 966 (1st Dist.), *appeal* denied, 117 Ill. 2d 544, 517 N.E.2d 1087 (1987); Note, *The Emerging Deterrence Orientation in the Imposition of Severe Sanctions*, 91 HARV. L. REV. 1033, 1033 n.2 (1978).

12. 1955 Ill. Laws 2264.

13. ILL. REV. STAT. ch. 110, para. 2-1003 (1987).

14. JOHNSTON & KANDARAS, *supra* note 7, at 5; *see also* Krupp v. Chicago Transit Auth., 8 Ill. 2d 37, 39-41, 132 N.E.2d 532, 535 (1956) (discussion of the broadened scope of discovery under the modern rules).

15. Spiller v. Continental Tube Co., 95 Ill. 2d 423, 431, 447 N.E.2d 834, 838 (1983). Rule 201(k) provides that each motion relating to discovery should contain a statement that "after personal consultation and reasonable attempts to resolve differences the parties have been unable to reach an accord." ILL. S. CT. R. 201(k), ILL. REV. STAT. ch. 110A, para. 201(k) (1987). Literal compliance with Rule 201(k) usually is unnecessary if the record reflects reasonable attempts to resolve the difficulties. Lavaja v. Carter, 150 Ill. App. 3d 317, 325, 505 N.E.2d 694, 699 (2d Dist.), *appeal denied*, 116 Ill.2d 560, 515 N.E.2d 110 (1987); *see, e.g*, Williams v. A. E. Staley Mfg. Co., 83 Ill. 2d 559, 566, 416 N.E.2d 252, 256 (1981) (proof of unsuccessful efforts at consultation, including numerous telephone calls or unreturned letters may suffice).

16. JOHNSTON & KANDARAS, *supra* note 7, at 5.

17. *See* Buehler v. Whalen, 70 Ill. 2d 51, 67, 374 N.E.2d 460, 467 (1978).

18. MICHAEL, *supra* note 2, § 35.3; Note, *Federal Rules of Civil Procedure: Defining a Feasible Culpability Threshold for the Imposition of Severe Sanctions*, 65 MINN. L. REV. 137 (1980).

Supreme Court adopted Supreme Court Rule 219(c),[19] modeled after its federal counterpart, Rule 37(b) of the Federal Code of Civil Procedure.[20] Rule 219(c) gives the trial court broad discretion to police discovery[21] and provides a nonexhaustive list of possible sanctions.[22] Among them, the Rule authorizes the trial court to stay proceedings,[23] debar the offending party from filing further

19. ILL. S. CT. R. 219(c), ILL. REV. STAT. ch. 110A, para. 219(c) (1987). Rule 219(c) provides:

> If a party, or any person at the 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 proceeding 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 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 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 any 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 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.

Id.

20. FED. R. CIV. P. 37(b). Unlike Federal Rule 37(b), Illinois Supreme Court Rule 219(c) distinguishes between sanctions for overuse of discovery and sanctions for noncompliance with discovery requests. Sanctions for overuse of discovery are provided in ILL. S. CT. R. 219(d), ILL. REV. STAT. ch. 110A, para. 219(d) (1987), which provides:

> 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.

See supra note 4.

21. Nehring v. First Nat'l Bank, 145 Ill. App. 3d 791, 796-97, 493 N.E.2d 1119, 1124 (2d Dist. 1986).

22. ILL. S. CT. R. 219(c), ILL. REV. STAT. ch. 110A, para. 219(c) (1987). The Rule provides, however, that the order given must be "just." *Id.*

23. *Id.* para. 219(c)(i).

pleadings,[24] debar the maintaining of a claim or defense,[25] debar a witness' testimony,[26] enter a default judgment or dismiss the suit with or without prejudice,[27] and strike any portion of the pleadings.[28] In addition, courts can award attorney's fees,[29] institute contempt proceedings[30] and, in certain circumstances, order a new trial.[31]

Rule 219(c) purports to strike a balance between enforcing dis-

24. *Id.* para. 219(c)(ii).

25. *Id.* para. 219(c)(iii); *see, e.g.*, Estate of Stevenson, 44 Ill. 2d 525, 527, 256 N.E.2d 766, 767, *cert. denied*, 400 U.S. 850 (1970) (party failed to appear for mental examination and was barred from maintaining a defense relating to her mental capacity).

26. ILL. S. CT. R. 219(c)(iv), ILL. REV. STAT. ch. 110A, para. 219(c)(iv) (1987); *see, e.g.*, Ashford v. Ziemann, 99 Ill. 2d 353, 372, 459 N.E.2d 940, 949 (1984) (trial court should have excluded witness); *In re* Henry, 175 Ill. App. 3d 778, 789-90, 530 N.E.2d 571, 578 (2d Dist. 1988) (failure to exclude witness was proper); *c.f.* Hawkins v. Wiggins, 92 Ill. App. 3d 278, 288, 415 N.E.2d 1179, 1186 (1st Dist. 1980) (excluded tax returns as evidence of damages).

27. ILL. S. CT. R. 219(c)(v), ILL. REV. STAT. ch. 110A, para. 219(c)(v) (1987); *see, e.g.*, Skees v. Growmark, Inc., 158 Ill. App. 3d 842, 847-48, 511 N.E.2d 982, 986 (3d Dist.), *appeal denied*, 117 Ill. 2d 554, 517 N.E.2d 1096 (1987) (dismissal proper sanction); King v. American Food Equip. Co., 160 Ill. App. 3d 898, 913, 513 N.E.2d 958, 967 (1st Dist.), *appeal denied*, 117 Ill. 2d 544, 517 N.E.2d 1087 (1987) (same); Lavaja v. Carter, 153 Ill. App. 3d 317, 324, 505 N.E.2d 694, 699 (2d Dist.), *appeal denied*, 116 Ill. 2d 560, 515 N.E.2d 110 (1987) (default judgment proper sanction); Estate of Soderholm, 127 Ill. App. 3d 871, 881, 469 N.E.2d 410, 417 (1st Dist. 1984) (same). *But see* Vortanz v. Elmhurst Memorial Hosp., 179 Ill. App. 3d 584, 590, 534 N.E.2d 625, 629 (2d Dist. 1989) (dismissal improper in this case).

28. ILL. S. CT. R. 219(c)(vi), ILL. REV. STAT. ch. 110A, para. 219(c)(vi) (1987); *see, e.g.*, Barnes v. Black & Decker Mfg. Co., 135 Ill. App. 3d 700, 709, 481 N.E.2d 1200, 1206 (1st Dist. 1984) (striking pleading improper sanction); Central Nat'l Bank v. Baime, 112 Ill. App. 3d 664, 668-69, 445 N.E.2d 1179, 1183 (1982) (same).

29. ILL. S. CT. R. 219(c), ILL. REV. STAT. ch. 110A, para. 219(c) (1987); *see, e.g.*, Martzaklis v. 5559 Belmont Corp., 157 Ill. App. 3d 731, 733, 510 N.E.2d 1148, 1152 (1st Dist. 1987) (attorney's fees proper sanction); Savitch v. Allman, 25 Ill. App. 3d 864, 870, 323 N.E.2d 435, 440 (3d Dist. 1975) (same). *But see* 10-Dix Bldg. Corp. v. Mc Dannel, 134 Ill. App. 3d 664, 674-75, 480 N.E.2d 1212, 1220 (1st Dist. 1985) (attorney's fees improper).

30. ILL. S. CT. R. 219(c), ILL. REV. STAT. ch. 110A, para. 219(c) (1987); *see, e.g.*, Payne v. Coates-Miller, Inc., 68 Ill. App. 3d 601, 609, 386 N.E.2d 398, 405 (1st Dist. 1979) (criminal contempt proper sanction); Bauter v. Reding, 68 Ill. App. 3d 171, 174, 385 N.E.2d 886, 889 (3d Dist. 1979) (civil contempt not proper); *see also* Ritter v. Rush Presbyterian-St. Luke's, 177 Ill. App. 3d 313, 322, 532 N.E.2d 327, 333 (1st Dist. 1988) (contempt of court finding for violation of the discovery rules may be classified as civil contempt, although it is more akin to criminal contempt).

31. Drehle v. Fleming, 49 Ill. 2d 293, 298, 274 N.E.2d 53, 56 (1971). *But see* Tinsey v. Chicago Transit Auth., 140 Ill. App. 3d 546, 549, 488 N.E.2d 1301, 1303 (1st Dist. 1986) (awarding new trial as sanction improper). Because the sanctions provided in Rule 219(c) are not exclusive, a court allowed a jury instruction regarding the party's noncompliance in LeMaster v. Chicago Rock Island & Pac. R.R. Co., 35 Ill. App. 3d 1001, 1011-12, 343 N.E.2d 65, 75 (1st Dist. 1976) (appellate court held that the instruction was within the court's discretion).

covery rules and resolving cases on the merits.[32] As with all discovery sanctions, the goal of the Rule is not to punish parties for noncompliance, but to unearth the merits of the case by compelling compliance with the rules.[33] In the recent past, however, sanctions increasingly have been viewed as an effective deterrent for future abuse of discovery. This secondary function requires the court to choose a sanction that is both a meaningful deterrent and a nonpunitive measure.[34]

The effort to strike a balance between resolving a particular case on the merits and deterring future violations has created two theories of sanctioning discovery violations. The first, the remedial theory, emphasizes the goal of achieving compliance with discovery in order to get to the merits of a case.[35] The second, the deterrent theory, stresses the use of severe sanctions to curb noncompliance in the judicial system as a whole.[36] Attaining the proper balance between these two extremes has presented the judiciary with an as yet unresolved dilemma.

III. ILLINOIS CASE LAW: THE SEARCH FOR A CONSISTENT STANDARD

The imposition of sanctions for noncompliance with discovery requires the trial court to engage in a two-step analysis.[37] First, the court determines whether a party's action constitutes sanctionable conduct. Sanctionable conduct is an "unreasonable" refusal to comply with the discovery rules or a failure to comply with a discovery order.[38] Second, if the conduct is sanctionable, the court determines the appropriate sanction, if any, to be imposed.[39] At

32. MICHAEL, *supra* note 2, § 35.4.

33. *In re* Henry, 175 Ill. App. 3d 778, 786, 530 N.E.2d 571, 576 (2d Dist. 1988) ("The court must seek to accomplish discovery rather than inflict punishment"); *see supra* note 5; *infra* note 115 (discussing sanctions as punishment).

34. *See infra* note 124 and accompanying text for a discussion of the deterrent value of sanctions.

35. *See* Note, *supra* note 11, at 1034; Note, *supra* note 18, at 141; *see also infra* notes 107-27 and accompanying text for an extended discussion of the remedial theory.

36. *See* Renfrew, *Discovery Sanctions: A Judicial Perspective*, 67 CALIF. L. REV. 264 (1979); *see also infra* notes 121-27 and accompanying text (criticism of remedial approach).

37. *See, e.g.*, Perimeter Exhibits, Ltd. v. Glenbard Molded Binder, Inc., 122 Ill. App. 3d 504, 512-14, 461 N.E.2d 44, 51-53 (2d Dist. 1984).

38. Campen v. Executive House Hotel Inc., 105 Ill. App. 3d 576, 587, 434 N.E.2d 511, 518 (1st Dist. 1982). ILL. S. CT. R. 219(c), ILL. REV. STAT. ch. 110A, para. 219(c) distinguishes between "unreasonable refusal" to comply with rules and a mere "failure" to comply with orders. *See infra* notes 145-52 and accompanying text, discussing statutory definitions of sanctionable conduct.

39. Whether a sanction will be imposed at all is discretionary, just as determining the

both stages of analysis, the trial court has vast discretion. Absent abuse of that discretion, an appellate court will not overturn the trial court's decision.[40]

A. Determining Sanctionable Conduct: "Unreasonable" Noncompliance

Prior to imposing a sanction, the trial court first must determine whether a party's conduct constitutes an "unreasonable" refusal to comply with discovery. Determining whether a party's noncompliance is "unreasonable" is a question of fact with the burden of proof on the complainant.[41] Once the court finds noncompliance, the burden shifts to the offending party to tender an excuse that justifies the noncompliance.[42] The Illinois Supreme Court has not defined "unreasonable refusal to comply" under Rule 219(c).[43] The appellate courts, however, have identified certain standards by which unreasonable noncompliance may be determined.

Under the most frequently applied standard, conduct is unreasonable if it is "characterized by deliberate and pronounced disregard for the rule or order not complied with or whether the action of the party shows a deliberate, contumacious or unwarranted disregard for the court's authority."[44] This standard was applied in *King v. American Food Equipment Co.*[45] In *King*, the trial court

appropriate sanction. Bautista v. Verson Allsteel Press Co., 152 Ill. App. 3d 524, 531, 504 N.E.2d 772, 777 (1st Dist. 1987); *see also* White v. Henrotin Hosp. Corp., 78 Ill. App. 3d 1024, 1027-28, 398 N.E.2d 24, 26 (1st Dist. 1979) (trial court, within its discretion, may impose sanctions).

40. Suttles v. Vogel, 160 Ill. App. 3d 464, 472, 513 N.E.2d 563, 570 (4th Dist. 1987), *rev'd on other grounds*, 126 Ill. 2d 186, 533 N.E.2d 901 (1988) (did not address whether trial court abused its discretion); Estate of Soderholm, 127 Ill. App. 3d 871, 879, 469 N.E.2d 410, 416 (1st Dist. 1984).

41. See Michael, *supra* note 2, § 35.3 n.16.

42. *See, e.g.*, Marriage of Kutchins, 157 Ill. App. 3d 384, 390, 510 N.E.2d 1300, 1304 (2d Dist.), *appeal denied*, 117 Ill. 2d 544, 517 N.E.2d 1087 (1987) (argument that scope of court order for mental examination was improper and justified noncompliance was refused); Hawkins v. Wiggins, 92 Ill. App. 3d 278, 282-83, 415 N.E.2d 1179, 1182 (1st Dist. 1980) (fact that tax returns were not in party's custody did not excuse failure to comply with request to produce); White v. Henrotin Hosp. Corp., 78 Ill. App. 1025, 1030, 398 N.E.2d 24, 28 (1st Dist. 1979) (claiming to have no notice of deposition date did not excuse noncompliance but was relevant to determining appropriate sanction). *But see* Vortanz v. Elmhurst Memorial Hosp., 179 Ill. App. 584, 591, 534 N.E.2d 625, 630 (2d Dist. 1989) (lack of control over expert appearing at deposition was a valid excuse).

43. Wilkens v. T. Enters., Inc., 177 Ill. App. 3d 514, 517, 532 N.E.2d 469, 471 (1st Dist. 1988).

44. King v. American Food Equip. Co., 160 Ill. App. 3d 898, 911, 513 N.E.2d 958, 966 (1st Dist.), *appeal denied*, 117 Ill. 2d 544, 517 N.E.2d 1087 (1987); *see also Wilkens*, 177 Ill. App. 3d at 517, 532 N.E.2d at 471.

45. 160 Ill. App. 3d at 911, 513 N.E.2d at 966.

explicitly inquired whether all discovery matters were complete and whether the defendant intended to use any unproduced evidence at trial.[46] The defendant informed the court that all discovery requests were complete and that no new evidence would be introduced.[47] During the trial, however, the defendant introduced a critical piece of evidence that had not been disclosed during discovery.[48] The trial court held that the defendant's conduct was a "gross violation of the discovery rules" and dismissed the case.[49] The appellate court affirmed, ruling that the defendant's conduct was deliberate and contumacious.[50]

In *Nehring v. First National Bank*,[51] the court also applied the deliberate and contumacious standard to find unreasonable conduct. There, the defendant filed a motion to dismiss the plaintiff's action because plaintiff failed to produce documents.[52] The plaintiff claimed that it was impossible to comply with the production request because the documents were stolen.[53] The appellate court determined that if the documents were stolen, then the plaintiff had complied fully with the request;[54] however, the court refused to view the plaintiff's compliance in a vacuum. Rather, in determining whether the party's conduct was unreasonable, the court considered the plaintiff's conduct throughout the entire course of the

46. *Id.* at 911-12, 513 N.E.2d at 967.

47. *Id.* at 912, 513 N.E.2d at 967.

48. *Id. King* involved a products liability action against a manufacturer of a meat mixing machine. *Id.* at 902, 513 N.E.2d 960-61. The defendant (third-party plaintiff), introduced evidence of a "fifth pin" for mounting the machine that implied that the employer (third-party defendant) had failed to mount the machine properly. *Id.* at 912, 513 N.E.2d at 967.

49. *Id.*

50. *Id.* at 911, 513 N.E.2d 966-67. The defendant also introduced a written statement of the third-party defendant that was obtained although the defendant assured the party's counsel that no statement would be taken. *Id.* at 912, 513 N.E.2d at 967. The appellate court determined that the defendant's conduct revealed a "pronounced pattern of deliberate and blatant disregard of the discovery rules." *Id.* at 911, 513 N.E.2d at 967. The *King* court mentioned in passing that factors to determine unreasonable conduct include: (1) surprise to the opposing party; (2) prejudicial effect of the testimony; (3) diligence of the opposing party; (4) timely objection; and (5) good faith of the offending party. *Id.* As discussed *infra* at notes 74 and 141, these factors usually are not considered in finding unreasonable conduct, but are considered in evaluating the propriety of an exclusionary sanction.

51. 143 Ill. App. 3d 791, 493 N.E.2d 1119 (2d Dist. 1986).

52. *Id.* at 794, 493 N.E.2d at 1122. In *Nehring*, a customer brought a conversion action against a bank for turning over a bag of coins to the sheriff pursuant to an execution and levy. *Id.* at 793, 493 N.E.2d 1121. The requested documents allegedly established the plaintiff's ownership of the coins and their amount and value. *Id.* at 800, 493 N.E.2d at 1126.

53. *Id.* at 795-96, 493 N.E.2d at 1123.

54. *Id.* at 799, 493 N.E.2d at 1125.

litigation.[55] The court concluded that the failure to produce was but another step in a course of conduct that demonstrated a deliberate and contumacious disregard for the rules of discovery.[56]

A second standard for determining unreasonableness permits a finding of sanctionable conduct if a party merely is negligent.[57] For example, in *White v. Henrotin Hospital Corp.*[58] the plaintiff failed to appear at a scheduled deposition. The plaintiff's attorney claimed his conduct was not unreasonable because he did not receive notice of the deposition date.[59] The trial court noted that the attorney was not excused from complying with the discovery rules merely because he did not receive notice of the deposition; an attorney has an affirmative duty to check the court files and to keep current with a case.[60] His conduct, although unintentional, was therefore sanctionable.[61]

Similarly, in *Wilkens v. T. Enterprises, Inc.*,[62] an attorney for nine plaintiffs in a consolidated case failed to answer interrogatories in a timely manner.[63] The appellate court determined that the attorney's careless conduct, though unintentional, was sanctionable under Rule 219(c).[64]

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55. *Id.* at 802, 493 N.E.2d at 1127.

56. *Id.* at 802-03, 493 N.E.2d at 1127-28. The continued noncompliance involved delay for over a year, a dozen unwritten requests, uncounted phone calls, and two motions to dismiss before the plaintiff finally agreed to take a deposition. *Id.* at 802, 493 N.E.2d at 1127. Although a pattern of dilatory conduct is the most common example of unreasonable behavior, a single instance of noncompliance also can be unreasonable. For example, in Marriage of Kutchins, 157 Ill. App. 3d 384, 389-90, 510 N.E.2d 1300, 1304 (2d Dist.), *appeal denied*, 117 Ill. 2d 544, 517 N.E.2d 1087 (1987), the trial court held that a party's failure to appear at a court-ordered mental examination without a reasonable excuse showed a deliberate disregard for the court's authority.

57. *See, e.g.*, Wilkens v. T. Enters., Inc., 177 Ill. App. 3d 514, 517-18, 532 N.E.2d 469, 471 (1st Dist. 1988); White v. Henrotin Hosp. Corp., 78 Ill. App. 3d 1024, 1027, 398 N.E.2d 24, 26 (1st Dist. 1979).

58. *White*, 78 Ill. App. 3d at 1026, 398 N.E.2d at 25.

59. *Id.* at 1027, 398 N.E.2d at 26.

60. *Id.*

61. *Id.* at 1029-30, 398 N.E.2d at 27-28. Although the appellate court ruled that the conduct was unreasonable, the court reversed the trial court because the sanction of dismissal was too severe and conditioned reinstatement upon the plaintiff's compliance. *Id.* at 1030-31, 398 N.E.2d at 28.

62. 177 Ill. App. 3d 514, 532 N.E.2d 469 (1st Dist. 1988).

63. *Id.* at 515, 532 N.E.2d at 470.

64. *Id.* at 517-18, 532 N.E.2d at 471. The plaintiffs in *Wilkens* sought recovery for injuries sustained by food poisoning received at a wedding reception. *Id.* at 515, 532 N.E.2d at 469. The defendant's discovery requests totalled thirty-four pages for each case. *Id.* at 518, 532 N.E.2d 471. At the time of the sanction hearing, six of the nine requests had been filed. *Id.* at 516, 532 N.E.2d at 470. *See also* O'Brien v. Stefaniak, 130 Ill. App. 2d 398, 398-405, 264 N.E.2d 781, 781, 785 (1st Dist. 1970). In *O'Brien*, the trial court found that the plaintiff's failure to name a witness in response to interrogatories

A third standard for determining unreasonable noncompliance focuses on the importance of the undisclosed information, rather than on the fault of the offending party. This standard was set forth in *Ideal Plumbing Co. v. Shevlin-Manning, Inc.*,[65] in which the trial court sanctioned a party for failing to produce, during discovery, evidence that the party later introduced at trial.[66] The party argued that its failure to disclose was inadvertent, and therefore was not unreasonable. The appellate court, however, held that "the test of whether or not a failure to disclose is unreasonable does not rest upon whether the failure was intentional or inadvertent . . . . The test is how important the undisclosed information is."[67] Under this third standard, a finding of fault, whether intentional or negligent, is not a prerequisite to a finding of sanctionable conduct.

Another approach used by the courts, although not an articulated standard, gauges the unreasonableness of an offending party's noncompliance by the conduct of the opposing party. In *Spiller v. Continental Tube Co.*,[68] the trial court dismissed the plaintiff's action for failure to produce a witness for a deposition. The Illinois Supreme Court affirmed the reversal, emphasizing the necessary cooperation between counsel to resolve disputes before seeking judicial intervention.[69] The court held that the delays and difficulties in completing discovery were the fault of both parties; thus, the

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was unintentional and due to poor investigation. *Id.* at 405, 264 N.E.2d at 785. The appellate court, however, held that the trial court properly excluded the testimony of the witness as a sanction, even though the omission was made in good faith. *Id.*

65. 96 Ill. App. 3d 207, 421 N.E.2d 562 (3d Dist. 1981).

66. *Id.* at 208-09, 421 N.E.2d at 564. *Ideal* involved a counterclaim against shopping mall owners for work done under a completed contract. *Id.* at 208-09, 421 N.E.2d 563-64. The undisclosed evidence consisted of calculations for the proposed cost of the job. *Id.* at 209, 421 N.E.2d at 564.

67. *Id.* at 210, 421 N.E.2d at 565; *see also* Nehring v. First Nat'l Bank, 145 Ill. App. 3d 791, 800-01, 493 N.E.2d 1119, 1126-27 (2d Dist. 1986) (court indicated that it might follow the *Ideal* standard, but the trial court made no findings of the undisclosed information's importance); Eisenbrandt v. Finnegan, 156 Ill. App. 3d 968, 972, 509 N.E.2d 1037, 1038 (3d Dist. 1987) (unreasonableness test is the undisclosed information's importance).

68. 95 Ill. 2d 423, 427, 447 N.E.2d 834, 836 (1983).

69. *Id.* at 431, 447 N.E.2d at 838. The court indicated that although the defendant was dilatory in responding to interrogatories, the plaintiffs moved for sanctions primarily because they were dissatisfied with the responses. *Id.* at 431, 447 N.E.2d at 837. In doing so, the plaintiffs ignored the requirements of Rule 201(k). *Id.* The court went on to say that "[c]ooperation between counsel and good faith efforts by them to resolve disputes without judicial intervention are essential to the efficient and expeditious administration of justice in this State . . . ." . ." *Id.* at 431, 447 N.E.2d at 838; *see also* Presbyterian St. Luke's Hosp. v. Feil, 75 Ill. App. 3d 438, 444, 394 N.E.2d 537, 541 (1st Dist. 1979) (failure to answer discovery requests was not unreasonable because both parties were at fault; the request was large and should have been made earlier).

plaintiff's conduct was not unreasonable.[70]

In summary, "unreasonable conduct" is an ambiguous term that in the appellate courts is judged by several standards. If a party has disobeyed a discovery rule wilfully, the conduct is probably sanctionable. In contrast, if noncompliance is merely negligent, courts differ on whether the imposition of a sanction is proper. Further, a few courts do not factor a party's fault into the analysis; instead they focus on the importance of the undisclosed information. Finally, the conduct of an adverse party may determine whether a noncomplying party has acted unreasonably. Because of the differences among the courts in defining unreasonable conduct, the type of conduct deserving sanctions is uncertain under Rule 219(c).

B. Determining the Appropriate Sanction: "Just Orders"

Because of the unique facts in each case, trial courts have difficulty determining the appropriate sanction, if any, to be imposed for unreasonable noncompliance with discovery.[71] The only limit on the trial court's discretion is Rule 219(c)'s directive that the sanction be "just."[72]

When a court bars testimony of a witness or evidence as a sanction for nondisclosure, the Illinois Supreme Court has enumerated the following factors for determining whether the exclusion is a "just" sanction: (1) surprise to the adverse party; (2) prejudicial effect; (3) diligence of the adverse party; (4) the making of a timely objection; and (5) the good faith of the offending party.[73] No sin-

70. *Spiller*, 95 Ill. 2d at 430-31, 447 N.E.2d at 837. The court also considered that the plaintiff did not commence discovery until three and one-half years after filing suit, which was only three months before the trial date. *Id.* at 431, 447 N.E.2d at 837.

71. See MICHAEL, *supra* note 2, § 35.3 (choosing the appropriate sanction creates a dilemma for the trial courts). One commentator stated that "[o]ne of the most difficult and one of the most permanent problems which a legal system must face is a combination of due regard for the claims of substantial justice with a system of procedure rigid enough to be workable." 2 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 251 (4th ed. 1936).

72. ILL. S. CT. R. 219(c), ILL. REV. STAT. ch. 110A, para. 219(c) (1987). A "just order" is one that "to the degree possible, assures both discovery and trial on the merits." White v. Henrotin Hosp., Corp., 78 Ill. App. 3d 1024, 1028, 398 N.E.2d 24, 26 (1st Dist. 1979); Hansen v. Skul, 54 Ill. App. 3d 1, 3, 369 N.E.2d 267, 269 (1st Dist. 1977). There are also certain constitutional due process limitations on awarding severe litigation-ending sanctions. *See infra* notes 159, 167 and accompanying text (related discussion of constitutional limitations on imposition of sanctions).

73. Ashford v. Ziemann, 99 Ill. 2d 353, 369, 459 N.E.2d 940, 947-48 (1984) (citing Kirkwood v. Checker Taxi Co., 12 Ill. App. 3d 129, 132, 298 N.E.2d 233, 235 (1st Dist. 1973)). In *Ashford*, a paternity action, the plaintiff requested the defendant to disclose the names of any men whom the defendant contended had intercourse with the plaintiff. *Id.* at 366, 459 N.E.2d at 946. The defendant failed to answer the interrogatory, but after the plaintiff presented the bulk of her case, he presented testimony of a bartender who

gle factor is determinative.[74]

These factors were considered in *In re Henry*.[75] In *Henry*, the State called seventeen witnesses, ten of whom were not disclosed during discovery.[76] The respondent contended that the trial court abused its discretion by failing to exclude the testimony.[77] On appeal, the court ruled that the respondent did not suffer unfair surprise or prejudice as a result of the nondisclosure, nor did she make a timely objection to the testimony.[78] Thus, the appellate court held that the trial court's failure to bar the witnesses' testimony was not an abuse of discretion.[79]

The above factors offer some guidance for imposing the lenient sanction of exclusion,[80] but they do not provide a solution for choosing between a severe litigation-ending sanction and a more lenient sanction that lets the case proceed on its merits.[81] To be

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claimed he had intercourse with the plaintiff. *Id.* at 366-67, 459 N.E.2d at 946-47. The trial court allowed the testimony. The appellate court held that the trial court had abused its discretion. *Id.* at 368, 459 N.E.2d at 947. The supreme court affirmed and granted a new trial after concluding that the plaintiff was prejudiced and surprised by the testimony, and, further, that the defendant had acted in bad faith. *Id.* at 371-71, 459 N.E.2d at 949.

74. Hawkins v. Wiggins, 92 Ill. App. 3d 278, 283, 415 N.E.2d 1179, 1182 (1st Dist. 1980). Although the *Ashford* factors are used in the second stage of the sanction analysis, *i.e.*, determining a "just" sanction, some courts have considered the factors in determining whether misconduct is unreasonable in the first instance. *See, e.g.*, King v. American Food Equip. Co., 130 Ill. App. 3d 898, 911, 513 N.E.2d 958, 967 (1st Dist. 1987), *appeal denied*, 117 Ill. 2d 544, 517 N.E.2d 1087 (1987). *See supra* note 50, *infra* note 141 (further reference to the *Ashford* factors).

75. 175 Ill. App. 3d 778, 530 N.E.2d 571 (2d Dist. 1988).

76. *Id.* at 784, 530 N.E.2d at 575. *Henry* was a parental rights proceeding. The State called the witnesses to testify that the mother was unfit. *Id.* at 784-85, 530 N.E.2d at 575.

77. *Id.* at 785, 530 N.E.2d at 576.

78. *Id.* at 787-91, 530 N.E.2d at 577-579. Plaintiff admitted at trial that she was prepared for the testimony of certain witnesses; the court held that she objected "far too late." *Id.* at 787, 530 N.E.2d at 577.

79. *Id.* at 789-90, 530 N.E.2d at 578; *see also* Perez v. Hartman, 187 Ill. App. 3d 1098, 1101-03, 543 N.E.2d 1023, 1025-27 (1st Dist. 1989) (in medical malpractice claim, exclusion of EKG strip evidencing a cardiac arrest was proper in light of surprise to the plaintiff, prejudice to the plaintiff, diligence on the part of the plaintiff, plaintiff's timely objection, and bad faith of the defendant).

80. See JOHNSTON & KANDARAS, *supra* note 7, at 238-243 (*Ashford* factors apply to exclusionary sanctions that are considered lenient sanctions).

81. Traditionally, the exclusion of testimony of a witness or evidence that has not been disclosed and the imposition of costs or attorneys fees are considered "lenient" sanctions; the litigation ending sanctions of default judgment and dismissal with prejudice are considered "severe." MICHAEL, *supra* note 2, § 35.5 n.1. *See also* Buehler v. Whalen, 70 Ill. 2d 51, 67, 374 N.E.2d 460, 467 (1978). In *Buehler*, the supreme court discussed the sanction of contempt and declared that it "is hardly a sanction in reality. The worst penalty is the payment of a nominal fine. Meanwhile, the opposing party may well have been forced to trial without the truth, and truth is the heart of all discovery." *Id.*

meaningful, however, a sanction should be proportionate to the gravity of the violation.[82]

Most courts impose severe sanctions only when a party's conduct amounts to a willful, "deliberate, contumacious or unwarranted disregard for the court's authority."[83] For example, in *Lavaja v. Carter*,[84] the appellate court upheld a default judgment against the defendant as a sanction for the defendant's noncompliance with discovery rules and orders. In that case, the plaintiff diligently sought discovery, but the defendant continually thwarted the plaintiff's efforts and flagrantly violated the court's orders to produce various documents.[85] The "defendant's dilatory tactics [with regard to the production request] demonstrate[d] a deliberate and pronounced disregard for the court's authority."[86] Consequently, the appellate court affirmed the severe sanction of default judgment against the defendant.[87]

Even if a party's conduct has reached a level of "deliberate and contumacious disregard for the court's authority," some courts impose a severe sanction only as a "last resort," or when other enforcement powers at the court's disposal have failed to advance litigation.[88] In *Kubian v. Labinsky*,[89] the appellate court reversed the trial court's dismissal of the plaintiff's action as a sanction for her dilatory conduct. The plaintiff in *Kubian* failed to disclose her expert witness and neglected to answer Rule 220 Interrogatories[90]

82. *Buehler*, 70 Ill. 2d at 67, 374 N.E.2d at 467.

83. Perimeter Exhibits, Ltd. v. Glenbard Molded Binder, Inc., 122 Ill. App. 3d 504, 514, 461 N.E.2d 44, 52 (2d Dist. 1984); *see also* Marriage of Kutchins, 157 Ill. App. 3d 384, 389-90, 510 N.E.2d 1300, 1304 (2d Dist.), *appeal denied*, 117 Ill. 2d 544, 517 N.E.2d 1087 (1987).

84. 153 Ill. App. 3d 317, 324, 505 N.E.2d 694, 699 (2d Dist.), *appeal denied*, 116 Ill. 2d 560, 515 N.E.2d 110 (1987).

85. *Id.* at 324-25, 505 N.E.2d at 699. *Lavaja* involved an action to recover on a promissory note. *Id.* at 319, 505 N.E.2d 695. The defendant received notice to produce evidence. The plaintiff made at least two visits to the defendant's office, but the defendant failed to produce the evidence. *Id.* at 523-24, 505 N.E.2d at 698. Further, the court ordered the production twice before entering the default judgment. *Id.*

86. *Id.* at 324, 505 N.E.2d at 699.

87. *Id.* at 326, 505 N.E.2d at 700.

88. Kubian v. Labinsky, 178 Ill. App. 3d 191, 196-97, 533 N.E.2d 22, 25 (1st Dist.), *appeal denied*, 123 Ill. 2d 559, 535 N.E.2d 402 (1988); *see also* Nehring v. First Nat'l Bank, 143 Ill. App. 3d 791, 805, 493 N.E.2d 1119, 1129 (2d Dist. 1986) ("The sanction of dismissal . . . was unwarranted where other 'enforcement powers' at the court's disposal remained in its arsenal and should have been utilized").

89. 178 Ill. App. 3d at 201-02, 533 N.E.2d at 28-29.

90. ILL. S. CT. R. 220, ILL. REV. STAT. ch. 110A, para. 220 (1987). Rule 220 requires a party to disclose an expert witness, the subject matter of which he intends to testify, his conclusions or opinions, and his qualifications no later than 60 days prior to trial. *Id.* Rule 219 was amended in 1985 to explicitly cover Rule 220 Interrogatories. ILL.

for more than two years.[91] The plaintiff also misrepresented certain information to the trial court and failed to comply with discovery orders.[92] The appellate court viewed the unexplained noncompliance as dilatory and uncooperative and held that sanctions were necessary and proper.[93] The appellate court concluded, however, that the trial court should have imposed progressively harsher sanctions proportionate to the gravity of the violations rather than dismiss the plaintiff's action.[94]

Because of the drastic nature of a litigation-ending sanction, courts often are inclined to consider the moving party's diligence as an important factor in determining the sanction's propriety. For example, in *Williams v. A. E. Staley Manufacturing Co.*,[95] the Illinois Supreme Court affirmed the circuit court's decision to vacate a previous order dismissing the plaintiff's action for refusing to respond to production requests and interrogatories. The supreme court concluded that the discovery problems resulted directly from the failure of both parties to comply with the rules of the court.[96] In reaching its conclusion, the court indicated that the more drastic the relief requested, the more necessary the moving party's compliance with the discovery rules.[97] The court indicated that in the case of a motion to dismiss, a movant's compliance with Rule

S. CT. R. 219, ILL. ANN. STAT. ch. 110A, para. 219 (Committee Comments) (Smith-Hurd Supp. 1989).

91. *Kubian*, 178 Ill. App. 3d at 193-95, 533 N.E.2d at 23-25.

92. *Id.* at 193-94, 533 N.E.2d at 23-24. The plaintiff in *Kubian* made several misrepresentations to obtain extensions of time. *Id.* at 193-96, 533 N.E.2d at 23-25. For example, after several orders and motions to dismiss, the plaintiff stated that she had disclosed the expert in a letter to the defendant. *Id.* at 193, 533 N.E.2d at 23. After the trial court ordered additional time to comply, the plaintiff sent a letter disclosing the expert. *Id.* at 194, 533 N.E.2d at 23-24. The court later ordered the plaintiff to produce information as to the expert's qualifications and the plaintiff then claimed that the expert would not testify. *Id.* at 194, 533 N.E.2d at 24. Finally, after various additional orders and extensions, the trial court dismissed the plaintiff's claim. *Id.* at 195, 533 N.E.2d at 25.

93. *Id.* at 201, 533 N.E.2d at 28.

94. *Id.* at 201-02, 533 N.E.2d at 28-29. The appellate court indicated that the trial court should have "fashion[ed] an order fair to defendant but also designed to expeditiously accomplish discovery, such as—but not limited to—one imposing additional sanctions and/or conditioning vacatur of the dismissal order . . . on plaintiff's full compliance . . . ." *Id.* at 202, 533 N.E.2d at 29.

95. 83 Ill. 2d 559, 567, 416 N.E.2d 252, 256 (1981).

96. *Id.* at 562, 416 N.E.2d at 254. The supreme court held that the plaintiff was dilatory in supplying the requested documents and that the defendant ignored the requirements of Rule 201(k), which required that every discovery motion set forth a statement that reasonable attempts have been made to resolve the dispute prior to requesting the court to intervene. *Id.* at 562-64, 416 N.E.2d at 254-55.

97. *Id.* at 565, 416 N.E.2d 255.

201(k) is particularly important.[98]

Correspondingly, in *Bautista v. Verson Allsteel Press Co.*,[99] the appellate court affirmed the lower court's denial of sanctions against a defendant for failing to answer interrogatories, appear at depositions, or produce evidence. The appellate court stressed that before moving for sanctions, the plaintiff never sought a hearing or ruling from the trial court.[100] Consequently, the appellate court determined that in light of the moving party's lack of diligence, among other factors, the trial court did not abuse its discretion by refusing to impose sanctions for the defendant's similarly dilatory behavior.[101]

Reviewing courts generally are reluctant to approve stringent sanctions. The trial court's imposition of sanctions will not be disturbed on appeal absent a clear abuse of discretion.[102] Trial courts have broad decisionmaking power to determine which sanctions are appropriate; this vast discretion is justified on the ground that the trial court is in the best position to evaluate a party's conduct.[103] When a dismissal or default judgment is involved, however, some reviewing courts implicitly give less deference to the

98. *Id.* The court clarified an earlier confusion that motions requesting drastic relief were "nonroutine" and not within the purview of Rule 201(k). *Id. See* Hawkins v. Wiggins, 92 Ill. App. 3d 278, 287, 415 N.E.2d 1179, 1185 (1st Dist. 1980). In *Hawkins*, the court inferred that Rule 201(k) did not apply to motions for sanctions because such motions were not routine. *Id.* This confusion stemmed, in part, from the Committee Commentary to Rule 201(k), which states that the Rule "was designed to curtail undue delay in the administration of justice and discourage motions of a routine nature." ILL. S. CT. R. 201(k), ILL. ANN. STAT. ch. 110A, para. 201(k) (Committee Comments) (Smith-Hurd 1985).

99. 152 Ill. App. 3d 524, 531-32, 504 N.E.2d 772, 777 (1st Dist. 1987) (no evidence in the record for failing to appear at deposition).

100. *Id.* at 532, 504 N.E.2d at 777. *But see* Hawkins v. Wiggins, 92 Ill. App. 3d 278, 286, 415 N.E.2d 1179, 1184 (1st Dist. 1980) (not prerequisite to sanction that moving party seek order, wait until opponent does not comply, and then bring motion for sanctions).

101. *Bautista*, 152 Ill. App. 3d at 532, 504 N.E.2d at 777.

102. Leeson v. State Farm Mut. Auto Ins. Co., 190 Ill. App. 3d 359, 366, 546 N.E.2d 782, 787 (1st Dist. 1989); *see* Ashford v. Ziemann, 99 Ill. 2d 353, 369, 459 N.E.2d 940, 948 (1984) ("only a clear abuse of discretion or an application of an impermissible legal criteria justifies a reversal of the trial court" (quoting McCabe v. Burgess, 75 Ill. 2d 457, 464, 389 N.E.2d 565, 568 (1979)); *see also* King v. American Food Equip. Co., 160 Ill. App. 3d 898, 912-13, 513 N.E.2d 958, 967 (1st Dist.), *appeal denied*, 117 Ill. 2d 544, 517 N.E.2d 1087 (1987) ("no reasonable man would take the view adopted by the trial court").

103. Lavaja v. Carter, 153 Ill. App. 3d 317, 324, 505 N.E.2d 694, 699 (2d Dist.), *appeal denied*, 116 Ill. 2d 560, 515 N.E.2d 110 (1987) (trial court in best position to determine whether a party's conduct amounts to "deliberate or contumacious flouting of judicial authority").

trial court's discretion. For example, in *Kubian v. Labinsky*,[104] the appellate court determined that a sanction of dismissal may be set aside if a trial on the merits could be had without hardship or prejudice. The same standard was applied in *Nehring v. First National Bank*.[105] In *Nehring*, the appellate court held that although dismissal for noncompliance may be appropriate at times, it is too harsh a remedy after a party has complied with discovery.[106]

IV. Analysis and Recommendations

Illinois courts sanction discovery rule violators on a case-by-case basis under a remedial theory that focuses on encouraging discovery on the same basis.[107] This remedial approach is both ineffective and inefficient. The imposition of severe sanctions with a view toward deterring violations in the system as a whole is needed. To deter noncompliance fairly and effectively, however, there must be consistency among the Illinois courts so that litigants' duties and expectations regarding discovery are clearly defined.

A. The Need to Deter Noncompliance with Discovery Rules

The primary goal of the discovery rules[108] — to effectuate resolution of disputes on the substantive merits of claims rather than on procedural grounds — is reflected in the traditional remedial approach of awarding sanctions.[109] Under the remedial theory, a sanction should serve to restore parties to equal positions after a discovery violation has occurred, either by eliminating any advantage a party has obtained by failing to comply or by compensating an innocent party for any injury sustained from the noncompliance.[110] Accordingly, if a case can be tried on the merits, a sanc-

104. 178 Ill. App. 3d 191, 197, 533 N.E.2d 22, 25 (1st Dist.), *appeal denied*, 123 Ill. 2d 559, 535 N.E.2d 402 (1988).

105. 143 Ill. App. 3d 791, 493 N.E.2d 1119 (2d Dist. 1986).

106. *Id.* at 800, 493 N.E.2d at 1126 ("once discovery has been fully complied with, albeit belatedly, a trial on the merits can be had with other sanctions applied").

107. *See* Note, *supra* note 11, at 1034 (the approach is lenient and seeks to dispose of a particular case on substantive grounds); Note, *supra* note 18, at 150 n.64 (the remedial purpose rationale focuses on narrow balancing of the parties' interests to the instant lawsuit).

108. *See, e.g., In re* Henry, 175 Ill. App. 3d 778, 785-86, 530 N.E.2d 571, 576 (2d Dist. 1988); *see supra* text accompanying notes 16 and 17 for further reference to the truth-seeking process.

109. Note, *supra* note 11, at 1034; Comment, *supra* note 4, at 787.

110. *See* Note, *supra* note 11, at 1034 (traditionally two theories behind discovery sanctions: compliance and compensation); Note, *supra* note 18, at 150 (ultimate sanctions could be imposed only if lesser sanctions could not return litigants in the instant case to equal positions).

tion that would end litigation on a procedural technicality never should be imposed. Such a sanction is not remedial and is inherently at odds with the purpose of discovery.[111]

A review of case law reveals that Illinois courts continue to adhere to the remedial theory.[112] Most courts probably will not impose a severe litigation-ending sanction unless a party's conduct is characterized by a willful, "deliberate, contumacious or unwarranted disregard for the court's authority."[113] Negligent conduct, no matter how damaging or prejudicial, rarely will be censured with a severe sanction of dismissal or default judgment.[114] Apparently, this relatively high culpability threshold stems from courts viewing severe sanctions as drastic punishments rather than remedial measures.[115] In addition, a number of appellate courts still might vacate a severe litigation-ending sanction if "a trial on the merits could be had without hardship or prejudice."[116] The re-

111. *See* Peoples Gas, Light & Coke Co. v. Chicago Black Improvement Ass'n, 148 Ill. App. 3d 1093, 1096, 502 N.E.2d 8, 10 (1st Dist. 1986) (sanctions should be least drastic available to obtain the goal of discovery in that case; litigation-ending sanctions are drastic).

112. *See supra* notes 83-106 and accompanying text for an extended discussion of the conditions under which a court will impose sanctions.

113. Perimeter Exhibits, Ltd. v. Glenbard Molded Binder, Inc., 122 Ill. App. 3d 504, 514, 461 N.E.2d 44, 52 (2d Dist. 1984); *see supra* notes 83-87 and accompanying text (discussing conduct warranting sanctions).

114. *See* MICHAEL, *supra* note 2, § 35 (lenient sanctions for unintentional misconduct; harsh sanctions for intentional or willful violations). *But see* Bailey v. Twin City Barge & Towing Co., 70 Ill. App. 3d 763, 765-66, 388 N.E.2d 789, 791-92 (5th Dist. 1979) (dismissal sanction held proper although conduct was merely characterized as unreasonable). The *Bailey* facts, however, suggest that the conduct would have warranted dismissal under the "deliberate contumacious standard." Comment, *supra* note 4, at 799 n.142.

115. White v. Henrotin Hosp. Corp., 78 Ill. App. 3d 1024, 398 N.E.2d 24 (1st Dist. 1979). In *White*, the appellate court commented that:

> The entry of a default judgment against a party litigant is a harsh and drastic sanction. Frequently, the default is visited upon the litigant, as a *vicarious punishment*, for the acts or omissions of his counsel. While we recognize that rules of court must be observed if dockets are to be kept current, yet courts must, in a proper case, yield the procedural exactitudes to more basic rules of fundamental fairness.

Id. at 1029, 398 N.E.2d at 27 (quoting Mieszkowski v. Norville, 61 Ill. App. 2d 289, 297, 209 N.E.2d 358, 362 (1965) (emphasis added)). Some courts disfavor stringent sanctions because they do not want to penalize clients for the actions of their attorneys. *See* Stevens v. International Farm Sys., 56 Ill. App. 3d 717, 720-21, 372 N.E.2d 424, 427 (1978). The majority of Illinois and federal courts, however, hold the client responsible for his attorney's actions. *See* Link v. Wabash R.R., 370 U.S. 626, 633-34 (1962); Savitch v. Allman, 25 Ill. App. 3d 864, 867, 323 N.E.2d 435, 437-38 (3d Dist. 1975).

116. *Kubian*, 178 Ill. App. 3d at 197, 533 N.E.2d at 25; *Nehring*, 143 Ill. App. 3d at 803, 493 N.E.2d at 1128; *see supra* notes 104-106 and accompanying text (*Kubian* discussed).

quirement that a severe sanction be imposed only as a "last resort"[117] is further evidence that Illinois wholeheartedly has accepted the remedial theory.

The remedial approach tends to create serious problems of ineffectiveness and inefficiency in the Illinois judicial system.[118] The practice of awarding severe sanctions only after repeated violations or cases of willful or contumacious misconduct is ineffective. Litigants may be less diligent in conducting discovery knowing that they may be given "one more chance" to comply with the discovery rules.[119] Inefficiency also results because of the courts' willingness to tolerate repeated violations by making numerous warnings before invoking a severe sanction.[120]

In recent years, these concerns have prompted both judges and commentators to question the wisdom of the remedial approach to discovery.[121] These critics suggest that judicial tolerance of noncompliance with discovery and reluctance to impose harsh sanctions adversely affects the entire litigation system.[122] They suggest that courts use sanctions, not only to remedy specific instances of noncompliance but also to deter all litigants from exploiting the rules of discovery.[123]

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117. Kubian v. Labinsky, 178 Ill. App. 3d 191, 197, 533 N.E.2d 22, 25 (1st Dist. 1988); Nehring v. First Nat'l Bank in DeKalb, 143 Ill. App. 3d 791, 803, 493 N.E.2d 1119, 1128 (2d Dist 1986); *see supra* notes 88-94 and accompanying text.

118. Comment, *supra* note 4, at 804-05. Similar problems in the federal courts caused by the remedial approach led one commentator to note:

> The typical pattern of sanctioning that emerges from the reported cases is one in which delay, obfuscation, contumacy, and lame excuses on the part of litigants and their attorneys are tolerated . . . . Attorneys are well aware that sanctions will be imposed only in the most flagrant situations.

R. RODES, K. RIPPLE, & C. MOONEY, SANCTIONS IMPOSABLE FOR VIOLATIONS OF THE FEDERAL RULES OF CIVIL PROCEDURE 85 (Federal Judicial Center 1981).

119. *See* Note, *supra* note 18, at 143 (remedial theory based on "traditional wisdom" that parties will comply in the future if given one more chance).

120. The delay caused by noncompliance has become a significant factor in creating a backlog of cases and congestion of trial calendars. Monier v. Chamberlain, 35 Ill. 2d 351, 357, 221 N.E.2d 410, 415 (1965) (noncompliance and judicial intervention in discovery "serve[s] only to inhibit pretrial settlements, increase the burden of already crowded court calendars, and thwart the expeditious administration of justice."); Kubian v. Labinsky, 178 Ill. App. 3d 191, 200, 533 N.E.2d 22, 27 (1st Dist. 1988) ("dilatory and uncooperative conduct of . . . counsel-by whose actions [parties] are bound-[is] the very type which places significant burdens on courts struggling to handle the backlog of pending litigation").

121. Note, *supra* note 18, at 137; Note, *supra* note 11, at 1033; Comment, *supra* note 4, at 773; Renfrew, *supra* note 36, at 264.

122. *See, e.g.*, Note, *supra* note 18, at 149.

123. *Id.* "[T]he overall efficiency of federal administration of civil justice demands a reduction in the delay caused by discovery noncompliance, and that some litigants must suffer a severe sanction in order to increase this overall efficiency." *Id.* The United States

A minority of Illinois courts have recognized the deterrent value of sanctions.[124] The deterrent theory, however, has not gained the acceptance needed to solve the problems discovery violations create.[125] Proponents of the remedial theory argue that any societal interest in deterring future violations should be subordinate to effectuating a decision on the merits in a particular case.[126] Although commendable, this argument ignores the fact that the merits can be reached only by strict adherence to the rules;[127] thus, the remedial and deterrent theories are not mutually exclusive. Stricter enforcement of the discovery rules would not only dissipate delay but would discourage a cavalier attitude toward the rules and satisfy the remedial concerns of a speedy resolution on the merits.

Supreme Court first voiced acceptance of the deterrent approach in Nat'l Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643 (1976):

> [T]he most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.

Id. In *Nat'l Hockey League*, the Court upheld a district court's dismissal with prejudice of an antitrust action due to the plaintiff's bad faith failure to answer interrogatories. *Id.* at 639. For a complete discussion of *Nat'l Hockey League* see Note, *supra* note 11, at 1046-53.

124. *See, e.g.*, Lavaja v. Carter 150 Ill. App. 3d 317, 323, 505 N.E.2d 694, 698 (2d Dist. 1987). The court in *Lavaja* stated:

> While it is true that the trial court is to seek a means to have discovery accomplished rather than merely to inflict punishment, it 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 and accurately comply with discovery rules.

Id. (quoting Perimeter Exhibits Ltd. v. Glenbard Molded Binder Inc., 122 Ill. App. 3d 504, 514, 461 N.E.2d 44, 52-53 (2d Dist. 1984) (citations omitted) (emphasis in original)); *see also* Buehler v. Whalen, 70 Ill. 2d 51, 67, 374 N.E.2d 460, 467 (1978) (sanctions will not be effective unless unhesitatingly imposed); Payne v. Coates-Miller, Inc., 68 Ill. App. 3d 601, 607, 386 N.E.2d 398, 403 (1st Dist. 1979) (same).

125. *See, e.g.*, Nehring v. First Nat'l Bank, 143 Ill. App. 3d 791, 804, 493 N.E.2d 1119, 1129 (2d Dist. 1986). In *Nehring*, the defendant argued that dismissal as a sanction would act as a deterrent for all litigants, but the court believed dismissal was proper only in cases of "refusals" to comply and the court did not believe the noncompliance qualified as a "refusal." *Id. See supra* notes 51-56 and accompanying text (complete discussion of *Nehring*).

126. Note, *supra* note 18, at 144 (Proponents of the remedial theory argue that its focus on intentional misconduct achieves the fundamental goal of discovery: a decision on the merits).

127. Without adherence to the rules, a resolution on the merits cannot be achieved. This was the purpose for enacting the discovery rules, discussed *supra* notes 7-17 and accompanying text.

B. The Need for Consistency Among the Courts

Deterrence is effective only if a party is aware of what actions constitute wrongdoing and if he expects to suffer severe consequences.[128] In Illinois, however, the standards for determining sanctionable conduct and when a severe sanction is warranted are plagued with inconsistencies.[129] Duties and expectations are not clearly defined. Before the deterrent value of sanctions can be fully realized, the Illinois courts must establish a clear standard.

1. Defining Duties: "Unreasonable" Noncompliance

Most of the various approaches highlighted by this Comment fail to promote the goals of discovery effectively. In order to curb noncompliance with discovery, litigants must be made aware of what constitutes sanctionable conduct.[130] Guided by the language of Rule 219(c), the Illinois appellate courts have determined that noncompliance must be "unreasonable" before sanctions may be imposed.[131] The courts, however, disagree over the definition of "unreasonable" misconduct.[132] The most frequently used definition is "deliberate and contumacious disregard for the court's authority,"[133] suggesting that a party's conduct must be willful or intentional in order to warrant the imposition of a sanction.

The minority approach, the so-called negligence standard, is preferable.[134] According to this theory, a finding of willful or in-

128. Note, *supra* note 18, at 151. The author states: "Certainty that a particular form of behavior will result in the imposition of a severe sanction is both the essence of general deterrence and a prerequisite to a perception of fairness." *Id.*

129. *See supra* text accompanying notes 37-106 for a discussion of Illinois case law in this area; *see also* Johnston, *supra* note 4, at 62-63 ("Judicial control over discovery abuse is not consistently exercised").

130. Note, *supra* note 18, at 151 nn.67-68. This is also one of the basic premises underlying Anglo-American criminal law. *See* W. LAFAVE & A. SCOTT, CRIMINAL LAW § 1.2(b) (2d ed. 1986) ("there must be some advance warning to the public as to what conduct is criminal and how it is punishable"). *But see* Note, *supra* note 18, at 151 n.67 (predictions about the deterrent effect of criminal penalties may not correspond to predictions of the deterrent effect of civil discovery penalties).

131. *See supra* text accompanying note 38 for another reference to the "unreasonable" standard.

132. *See supra* notes 41-70 and accompanying text (Some courts define unreasonable conduct as willful, others as negligent. A few courts judge unreasonableness by considering both parties' conduct during the course of the lawsuit. Still other courts determine unreasonable conduct by the importance of undisclosed information.)

133. *See, e.g.*, King v. American Food Equip. Co., 160 Ill. App. 3d 898, 911, 513 N.E.2d 958, 966 (1st Dist. 1987); Nehring v. First Nat'l Bank, 143 Ill. App. 3d 791, 805, 493 N.E.2d 1119, 1129 (2d Dist. 1986); *see supra* notes 44-56 and accompanying text (*King* and *Nehring* discussed).

134. *See, e.g.*, Wilkens v. T. Enterprises, Inc., 177 Ill. App. 3d 514, 517-18, 537

tentional conduct is unnecessary; a party may be sanctioned for mere negligence that impedes the discovery process. Once a court finds that a party has not complied with a rule or order, the burden shifts to the offending party to tender a defense to excuse the noncompliance.[135] The only excuse that will justify non-compliance will be complete inability to comply with the request; mere inadvertence or oversight is not a satisfactory excuse.[136] This approach is consistent with the application of Federal Rule 37(b), after which the Illinois Rule is modeled.[137] Clarification of the culpability standard for sanctionable conduct along these lines would eliminate any confusion with respect to a party's duty regarding discovery.

Some courts gauge "unreasonable" conduct by the conduct of the opposing party.[138] The rationale behind this standard is to determine responsibility for noncompliance.[139] The majority of the courts have concluded, however, that an opposing party's conduct should not factor into the analysis of determining "unreasonable" noncompliance; rather, it should be considered only for purposes of choosing an appropriate sanction.[140] This conclusion is correct

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N.E.2d 469, 471 (1st Dist. 1988); White v. Henrotin Hosp. Corp., 78 Ill. App. 3d 1024, 1027, 398 N.E.2d 24, 26 (1st Dist. 1979); O'Brien v. Stefaniak, 130 Ill. App. 2d 398, 405, 264 N.E.2d 781, 785 (1st Dist. 1970); *see supra* notes 58-64 and accompanying text (*Wilkens* and *White* discussed).

135. *See supra* text accompanying note 42 for further reference to the shifting burden.

136. *See* Note, *supra* note 18, at 146 (inability to comply with discovery cannot be deterred with sanctions, yet "[n]egligent, no less than intentional, wrongs are fit subjects for general deterrence") (quoting Cine Forty-Second Street Theater Corp. v. Allied Artists Pictures Corp., 602 F.2d 1064, 1062 (2d Cir. 1979)); *see also* Payne v. Coates-Miller, Inc., 68 Ill. App. 3d 601, 606-07, 386 N.E.2d 398, 403 (1st Dist. 1979) (if party fails to comply because he claims the request is improper, he must seek protective order; he cannot merely fail to comply); *see also supra* note 42 (excuses for noncompliance listed).

137. *See* 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2281 (1970). FED. R. CIV. P. 37(b) was amended in 1970 to change the phrase "refusal to comply" to "failure to comply" with orders. *Id.* This was the result of lower courts interpreting the rule to mean that innocent failures were not subject to sanctions. *Id. See, e.g.*, Hinson v. Michigan Mut. Liab. Co., 275 F.2d 537, 539 (5th Cir. 1960) (nonsanctionable conduct when party failed to appear at physical examination; not "refusal" where party sick in bed).

138. Spiller v. Continental Tube Co., 95 Ill. 2d 423, 430-31, 447 N.E.2d 834, 837 (1983); *see supra* notes 68-70 and accompanying text (*Spiller* discussed).

139. *See supra* text accompanying note 70 (conduct not unreasonable when delay attributable to both parties).

140. Wilkens v. T. Enters., Inc., 177 Ill. App. 3d 514, 517-18, 532 N.E.2d 469, 471 (1st Dist. 1988) (movant's conduct does not factor in determining whether conduct is unreasonable; it is relevant only to determining the appropriate sanction). *But see* Fine Arts Distribs. v. Hilton Hotel Corp., 89 Ill. App. 3d 881, 885, 412 N.E.2d 608, 611 (1st Dist. 1980) (discovering party's conduct should not be considered in the sanction analysis; a sanction is not a punishment for the offending party nor a reward for the opponent's

for several reasons.

An opposing party's conduct is only one of the factors enumerated by the Illinois Supreme Court for determining the appropriateness of an exclusionary sanction; it is not an enumerated factor for determining whether the conduct is sanctionable.[141] In addition, it appears that the only adequate excuse for failing to comply with a discovery rule is inability to comply.[142] Because the dilatory conduct of an opposing party does not satisfy the burden of proving inability or impossibility of compliance, it should not factor into the determination of the unreasonableness of noncompliance.

Finally, courts have applied another standard for determining unreasonable noncompliance that is completely inconsistent with the other standards. This standard judges unreasonableness, not by the "fault" of the offending party, but by the importance of information withheld by noncompliance.[143] This standard is flawed because it is outcome determinative.[144] For example, an offending party must argue that undisclosed evidence is unimportant in order to convince the court not to exclude the evidence. If the evidence is not important, however, the exclusion does not result in prejudice.

This standard also is unsatisfactory because it places a burden on litigants and courts to determine the weight given certain evidence. Such a standard is unworkable and only adds confusion regarding a party's duty under the rules. The importance of the undisclosed information would be better considered in the court's decision of an appropriate sanction.

Another problem with determining sanctionable conduct is that the courts have not clarified the language of Rule 219(c).[145] Rule

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diligence); *see also supra* notes 95-101 and accompanying text (discussing lack of diligence as a factor in imposing sanctions).

141. Ashford v. Ziemann, 99 Ill. 2d 353, 369, 459 N.E.2d 940, 947-48 (1984) (factors include diligence of adverse party, surprise to the adverse party, and timely objection by the adverse party); *see supra* notes 73-82 and accompanying text. *But see* King v. American Food Equip. Co., 160 Ill. App. 3d 898, 911, 513 N.E.2d 958, 967 (1st Dist. 1987) (the court considered the *Ashford* factors in determining unreasonable noncompliance; the factors, however, did not weigh heavily in the court's analysis); *see supra* notes 45-50 and accompanying text (*King* discussed).

142. *See supra* notes 42 and 136 (complete inability may be only valid excuse).

143. Ideal Plumbing Co. v. Shevlin-Manning, Inc., 96 Ill. App. 3d 207, 210, 421 N.E.2d 562, 565 (3d Dist. 1981); *see supra* notes 65-67 and accompanying text (*Ideal Plumbing* discussed).

144. In *Ideal Plumbing*, the court stated that the "[defendant] is caught on the horns of a dilemma. If the barred exhibits were as important to [its] case as it claims they were, then the failure to disclose was unreasonable and there was no error in imposing the sanction. If, on the other hand, it was not so important . . . then its exclusion was not prejudicial." *Id.* at 210, 421 N.E.2d at 565.

145. ILL. S. CT. R. 219(c), ILL. REV. STAT. ch. 110A, para. 219(c) (1987).

219(c) is modeled after Federal Rule 37(b).[146] Unlike Federal Rule 37(b), however, the Illinois rule makes a distinction between when a party "unreasonably refuses to comply with [the discovery rules]"[147] and when it merely "fails to comply with any order."[148] This distinction suggests that there should be two standards for determining sanctionable conduct under Rule 219(c) because the term "unreasonably refuses" suggests that a higher degree of culpability is necessary for sanctioning noncompliance with a rule.[149]

According to the language of Rule 219(c), when a party does not comply with a discovery rule, the noncompliance is not sanctionable unless it is "unreasonable." If a party merely "fails to comply" with an order, however, a sanction may be imposed without a showing of intent.[150] Such a distinction between noncompliance with rules and orders is logical. Although a party is assumed to have constructive knowledge of a rule's requirements, it is possible that a failure to comply with a rule is innocent. A showing of "unreasonable" noncompliance, therefore, seems appropriate. When a court orders compliance with discovery, however, a party has *actual* knowledge of required conduct; therefore, a failure to comply with an order is presumptively intentional.[151] Accordingly, awarding a sanction merely for failing to comply with an order seems proper.[152]

The Illinois courts have not recognized this distinction in Rule

146. FED. R. CIV. P. 37(b). *See also* ILL. S. CT. R. 219(c), ILL. ANN. STAT. ch. 110A, para. 219(c) (Historical and Practice Notes) (Smith-Hurd 1985).

147. ILL. S. CT. R. 219(c), ILL. REV. STAT. ch. 110A, para. 219(c) (1987).

148. *Id.*

149. Prior to the 1970 Amendment to FED. R. CIV. P. 37(b), however, the Supreme Court refused to make a distinction between "refusals" and "failures" because it was "too fine a literalism." 8 WRIGHT & MILLER, *supra* note 137, § 2281 (1970); *see* Societe Internationale Pour Participants Industrielles et Commerciales, S.A. v. Roger, 357 U.S. 197, 207 (1958).

150. Comment, *supra* note 4, at 795-96. "After an order has been entered, the trial court need only find a 'failure' to comply before imposing a sanction as long as the sanction is not severe. If there has been no previous court order, the court must find that a party's refusal to comply with a discovery provision is 'unreasonable.' " *Id.* (footnotes omitted); *see also* Johnston, *supra* note 4, at 63 (suggesting different standards for "failure" to comply with orders and "unreasonable refusal" to comply with rules).

151. The importance of judicial orders was recognized in Payne v. Coates-Miller, Inc., 68 Ill. App. 3d 601, 607, 386 N.E.2d 398, 403 (1st Dist. 1979), in which the court stated that "[a] refusal to obey a . . . discovery order strikes at the very life-line of the court. . . . 'Judicial orders are the most solemn acts of the court, and if they are not obeyed, they cease to be judicial.' " *Id.* (quoting Estate of Atwood v. DeDella, 97 Ill. App. 2d 311, 324, 240 N.E.2d 451, 457 (1st Dist. 1968)).

152. In fashioning the appropriate remedy for noncompliance, however, any extenuating circumstances suggesting that the failure to comply with the order is unintentional should be considered by the court.

219(c) and instead require a finding of "unreasonableness" for noncompliance of *both* rules and orders before imposing a sanction.[153] Although consistent standards are favored, this consistent treatment of noncompliance with rules and orders does not comport with common sense.

2. Defining Expectations: "Just Orders"

The foregoing discussion highlights the need for elucidation from the Illinois Supreme Court. The discovery system relies primarily on attorneys to resolve discovery disputes with minimal judicial interference.[154] To encourage cooperation and compliance with the rules, however, attorneys must anticipate sanctions.[155] It is particularly important to a just administration of the discovery system to clarify litigants' expectations regarding the severity and certainty of sanctions.

Litigants must expect sanctions to be severe if the sanctions are to satisfy their purpose.[156] To deter violations, a sanction must send a message to the legal system as a whole, not just the immediate parties, that noncompliance will not be tolerated.[157] An increased use of severe sanctions as a deterrent, however, raises serious constitutional issues.[158] Certainly, severe litigation-ending

153. *See supra* notes 41-70 and accompanying text, wherein "unreasonableness" is discussed.

154. *But see* Renfrew, *supra* note 36, at 264 (Judge Renfrew's article suggests that the earliest possible and direct involvement of the court is an important factor in curbing discovery abuse.)

155. Williams v. A. E. Staley, Mfg. Co., 83 Ill. 2d 559, 563, 416 N.E.2d 252, 254 (1981). In *Williams*, the court stated that the smooth functioning of the judicial system relies on "the control exercised *by the attorneys themselves*, animated by a spirit of cooperation, a fear of reprisal, [and] an appreciation of judicial sanctions available if recalcitrance persists." *Id.* at 564, 416 N.E.2d at 255 (quoting Kaufman, *Judicial Control Over Discovery, Proceedings of the Seminar on Practice and Procedure Under the Federal Rules of Civil Procedure*, 28 F.R.D. 111, 116 (emphasis added)); *see also supra* notes 128 and 130 (referring to the deterrent value of sanctions).

156. *See* Note, *supra* note 18, at 151 (certainty and severity of sanctions is the essence of a deterrent theory). United States District Judge Charles B. Renfrew stated:

> Abuse of the judicial process is difficult to detect and prove, and that difficulty means that abuse that is detected and proven must be dealt with severely. The lower the probability of detection and proof, the more severe the sanction must be to deter misconduct effectively

Renfrew, *supra* note 36, at 275; *see supra* notes 128 and 130 (sanctions must be certain). *But see* Comment, *supra* note 4, at 784 (unclear as to whether the imposition of severe and stringent sanctions actually deters litigants).

157. *See supra* notes 123-24 and accompanying text, discussing the deterrent value of sanctions.

158. Note, Johnston, *supra* note 4, at 64. The fourteenth amendment's due process clause must be read in conjunction with Rule 219(c). Comment, *supra* note 4, at 778. The

sanctions, such as the exclusion of a key witness, are not proper in all circumstances.[159] Adequate notice of the standards to be used by the courts for the imposition of severe sanctions is essential.

Most courts consistently require that a party's noncompliance amount to a "willful, contumacious or deliberate disregard for the court's authority" before awarding a litigation-ending sanction.[160] Some courts also apply the same requirement for finding whether conduct is "unreasonable."[161] As noted in this Comment's discussion of the *Ashford* factors, this stricter standard should not be used to determine whether conduct is sanctionable, but rather should determine whether a sanction of dismissal or default judgment is appropriate.[162] However a standard is used, it should be with clarity and consistency.

Although "unreasonable" conduct that is merely negligent is sanctionable,[163] the "willful, contumacious or deliberate" standard strongly suggests that misconduct must be intentional to warrant a severe sanction.[164] Commentators have expressed concern that deterrence cannot be achieved with such a high culpability requirement and suggest that negligent or inadvertent conduct should be sanctioned similarly.[165] One author has suggested that a negligence standard is appropriate because it is the standard for attorney malpractice.[166] Denying a party a day in court because of a procedural technicality, however, offends both the concept of due process and the purpose of the discovery rules, unless the party's

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due process clause may limit the courts' authority to impose litigation-ending sanctions unless the conduct is intentional. Societe Internationale Pour Participants Industrielles et Commerciales, S.A. v. Roger, 357 U.S. 197, 209 (1958).

159. *See, e.g.*, Brandon v. DeBusk, 85 Ill. App. 3d 645, 648, 407 N.E.2d 193, 195-96 (2d Dist. 1980) (drastic sanction of dismissal for failure to comply with discovery should not be awarded when minors are involved; alternative sanctions should be more extensively pursued).

160. Lavaja v. Carter, 153 Ill. App. 3d 317, 324, 505 N.E.2d 694, 699 (2d Dist. 1987); *see supra* notes 83-87 and accompanying text.

161. *See* King v. American Food Equip. Co., 160 Ill. App. 3d 898, 911, 513 N.E.2d 958, 966 (1st Dist. 1987); Nehring v. First Nat'l Bank, 143 Ill. App. 3d 791, 802-03, 493 N.E.2d 1119, 1127-28 (2d Dist. 1986); *see also supra* notes 44-56 and accompanying text (*Lavaja* discussed).

162. *See supra* text accompanying notes 50 and 141, noting that Illinois courts look to certain factors for determining the appropriateness of the sanction, not for determining whether the conduct is sanctionable.

163. *See supra* note 134 for mention of courts that have imposed sanctions for negligent conduct.

164. *See supra* note 113 and accompanying text (most courts will not impose drastic sanctions unless conduct is intentional).

165. Note, *supra* note 18, at 156-57; Note, *supra* note 11, at 1035 (lowering the culpability standard may be the only way to justify an increased use of harsh sanctions).

166. Note, *supra* note 18, at 156-57.

misconduct is intentional.[167] A requirement of intentional or willful noncompliance thus seems to be both an appropriate and reasonable standard.

A successful deterrent approach must foster, not only the expectation of severe sanctions, but also the expectation of certain and unconditional sanctions. A litigant must expect an immediate, severe sanction for intentional noncompliance and not feel that there will be "one more chance" to comply.[168] A number of Illinois appellate courts impose severe sanctions only as a last resort, even if a party's conduct is "willful, contumacious or deliberate."[169] This policy is both ineffective and inefficient.[170]

Although arguably one can understand the "last resort" approach when there is noncompliance with a rule, there is no justification for such a weak position when a party has violated a court order. Once a litigant is ordered to comply with a rule, the court has already given a second chance to comply. If the litigant wilfully or deliberately fails to comply with the order, an additional opportunity to comply is unjustified. For deterrence to be successful, the "last resort" policy of awarding litigation-ending sanctions should be abandoned.

Inconsistency among the appellate courts must be resolved to bring home to litigants that they will suffer swift and certain sanctions for noncompliance with discovery orders. Some courts will vacate a dismissal or default judgment if trial on the merits can be had without hardship or prejudice.[171] This procedure is so broad that it encompasses almost every type of sanction and essentially

167. *See supra* notes 17, 156 and accompanying text; *see also* People *ex rel.* General Motors v. Bua 37 Ill. 2d 180, 190, 226 N.E.2d 6, 12 (1967) (when party fails to comply with discovery, noncompliance permits an inference that the conduct admits to a meritless claim; however, due process requires that the sanction be limited to that which the noncompliance relates).

168. *See* Note, *supra* note 18, at 143 (the remedial approach is based on the concept that given one more chance, a party will comply with a discovery request); *see also supra* notes 118-19 and accompanying text (remedial approach discussed).

169. Marriage of Kutchins, 157 Ill. App. 3d 384, 389-90, 510 N.E.2d 1300, 1304 (2d Dist. 1987); *see supra* notes 88-94 and accompanying text for further discussion of egregious conduct warranting severe penalties).

170. *See* Comment, *supra* note 4, at 785-88, 804-05 (discussion of the ineffectiveness and inefficiency of the remedial application of Federal Rule 37 and Illinois Rule 219). Not only does the remedial approach of awarding sanctions as a last resort ineffectively deter future noncompliance, but it adds to congestion and delay in the entire judicial system. *See supra* notes 15, 17 and accompanying text (purpose of modern rules is to make process more, not less, efficient).

171. Kubian v. Labinsky, 178 Ill. App. 3d 191, 197, 533 N.E.2d 22, 25 (1st Dist. 1988); Nehring v. First Nat'l Bank, 143 Ill. App. 3d 791, 805, 493 N.E.2d 1119, 1129 (2d Dist. 1986).

allows the appellate court to replace the trial court's judgment with its own. As with the "last resort" policy, the continued use of such a standard will impede any deterrent value of severe sanctions by the trial courts.[172] The practice encourages delay in compliance because the imposition of an immediate sanction is uncertain.

Most appellate courts, however, agree that a trial court's determination of a severe sanction should not be disturbed absent abuse of discretion.[173] This standard is consistent with the broad authority given trial courts to impose sanctions. Further, this deferrence bolsters the deterrent value of sanctions by depriving litigants of the expectation that the trial court's sanction will be set aside by a reviewing court.[174]

Deterrence encourages *all* litigants to comply with the rules of discovery; therefore, duties and expectations must be defined, not only for noncomplying parties, but also for parties moving to sanction an opponent. This is necessary because some courts consider the diligence of the moving party when choosing to impose a severe sanction.[175] Of primary significance is the moving party's compliance with Rule 201(k).[176] The Illinois Supreme Court has stressed the need to adhere to the Rule's requirements when requesting a court to impose a severe sanction.[177] Literal compliance with Rule 201(k), however, is not required if the record reflects a genuine attempt to solve a discovery dispute before requesting the court to intervene.[178] Such a requirement advances the deterrent policy by encouraging all parties to comply with the discovery rules, and it adds an element of evenhandedness to the entire procedure.

In sum, the inconsistency of the Illinois courts needs to be re-

172. Renfrew, *supra* note 36, at 276. "Trial judges cannot effectively deal with abuse of the judicial process unless appellate tribunals are willing to back them up." *Id.*

173. Leeson v. State Farm Mut. Auto Ins. Co., 190 Ill. App. 3d 359, 366, 546 N.E.2d 782, 787 (1st Dist. 1989); *see* Ashford v. Ziemann, 99 Ill. 2d 353, 369, 459 N.E.2d 940, 948 (1984) ("only a clear abuse of discretion or an application of an impermissible legal criteria justifies reversal of the trial court"); King v. American Food Equip. Co., 160 Ill. App. 3d 898, 912-13, 513 N.E.2d 958, 967 (1st Dist. 1987) ("no reasonable man would take the view adopted by the trial court").

174. *See* Note, *supra* note 18, at 151 (to be an effective deterrent a sanction must be certain and severe).

175. Williams v. A. E. Staley, Mfg. Co., 83 Ill. 2d 559, 562, 416 N.E.2d 252, 254 (1981); Bautista v. Verson Allsteel Press Co., 152 Ill. App. 3d 524, 532, 504 N.E.2d 772, 777 (1st Dist. 1987); *see supra* notes 95-101 and accompanying text (case discussed).

176. ILL. S. CT. R. 201(k), ILL. REV. STAT. ch. 110A, para. 201(k) (1987); *see supra* notes 96-98 and accompanying text, discussing failure to comply as a factor in imposing sanctions.

177. *Williams*, 83 Ill. 2d at 565, 416 N.E.2d at 255.

178. *See* Lavaja v. Carter, 153 Ill. App. 3d 317, 325, 505 N.E.2d 694, 699 (2d Dist. 1987).

solved in order for deterrence to become effective. This Comment recommends that first, litigants' duties with respect to discovery would be clarified if there were a single standard for determining "unreasonable" misconduct and if the supreme court interpreted Rule 219(c) to resolve ambiguity. Second, fairness to litigants would be achieved by demanding compliance with the requirements of Rule 201(k) upon every motion for severe sanctions. Finally, litigants would know when to expect severe and certain sanctions if the requisite level of intent for imposition of a severe sanction were defined, and if the practice of awarding sanctions only as a "last resort" were abandoned. For a trial court's sanction to have any "bite," appellate courts should defer, setting aside a severe sanction only when there has been an abuse of discretion.

V. CONCLUSION

The Illinois courts sanction noncompliance with discovery rules under a remedial theory that focuses on encouraging discovery on a case-by-case basis. This approach is ineffective because it allows courts to give litigants a second chance to comply with the discovery rules before imposing a sanction, thereby creating delay and inefficiency in the system as a whole. The courts, therefore, need to recognize the value of sanctions as a deterrent, and they ought to impose severe sanctions unhesitatingly whenever they are warranted.

To deter violations both fairly and effectively, however, litigants must be aware of their duties with respect to discovery, and they must anticipate severe sanctions for breaches of those duties. The *ad hoc* imposition of sanctions means that parties have no expectations and do not know what is required of them. Moreover, the "one more chance" and excuse for negligence approaches have resulted in abuse, delay, and lack of respect for the system. This Comment argues that inconsistency and ambiguity would be eliminated by recognizing that deterrence, although harsh, is critical for "just" and reasonable control over the discovery process.

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