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Enforcement of the discovery procedures in the federal courts and in Illinois is provided by sanctions. Federal Rule of Civil Procedure 37 and Illinois Supreme Court Rule 219 confer authority on the respective courts to impose the full grant of sanctions in appropriate circumstances. Behavior that warrants sanctioning is often characterized as “abuse of discovery.” The phrase is overinclusive, however, because it subsumes two distinct types of discovery misconduct—resistance to discovery and overdiscovery. Thus, to avoid the ambiguity implicit in the phrase, sanctionable behavior will be specified as either over-discovery or resistance to discovery, whenever possible.

This article will consider the range of sanctions available under Federal Rule of Civil Procedure 37 and Illinois Supreme Court Rule 219. The findings and recommendations of recent studies conducted to explore the effectiveness of federal discovery sanctions also will be discussed. Areas of significant difference between the federal and Illinois rules will be highlighted. Finally, proposals for change are suggested.

FEDERAL SANCTIONS

Federal Rules of Civil Procedure

The scope of pretrial discovery was greatly expanded by the adoption of the Federal Rules of Civil Procedure in the mid-1930’s. These rules were designed to dispose promptly of contro-
versies on the merits, to eliminate the sporting theory of justice, and to simplify procedure. Rule 37 is the principle enforcement


6. FED. R. CIV. P. 37 reads:

   Failure to Make or Cooperate in Discovery: Sanctions
   (a) Motion for Order Compelling Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:
      
      (1) Appropriate Court. An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.
      
      (2) Motion. If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b) (6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

      If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

      (3) Evasive or Incomplete Answer. For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

      (4) Award of Expenses of Motion. If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

      If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

      If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.
power behind the federal discovery procedures. The Rule provides

(b) Failure to Comply with Order.

(1) Sanctions by Court in District where Deposition is Taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) Sanctions by Court in Which Action is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) Expenses on Failure to Admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the
for sanctions against parties or persons who unjustifiably resist discovery. Under Rule 37, a party may make a motion asking the court to order a resisting party to comply with a request for discovery. If the court finds that there was no justification for the party's refusal to comply with a request for discovery, it may

court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b) (2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

(e) Subpoena of Person in Foreign Country. (Abrogated April 29, 1980, effective August 1, 1980).

(f) Expenses Against United States. Except to the extent permitted by statute, expenses and fees may not be awarded against the United States under this rule.

(g) Failure to Participate in the Framing of a Discovery Plan. If a party or his attorney fails to participate in good faith in the framing of a discovery plan by agreement as is required by Rule 26 (f), the court may, after opportunity for hearing, require such party or his attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

As amended; eff. Aug. 1, 1980.

7. The discovery devices which are set forth in Rules 26 through 36 include: deposition rights (Rules 26 through 32); interrogatories to parties (Rule 33); discovery and production of documents and things for inspection, copying or photographing (Rule 34); physical and mental examinations of persons (Rule 35); and the admission of facts and the genuineness of documents (Rule 36). Fed. R. Civ. P. 26 to 36.

8. Rule 37 distinguishes between parties and persons. Parties may be compelled to make more discovery than "persons" under Rule 31(a)(2). For instance, the discovering party may move for a compelling order if a deponent, including both parties and persons, fails to answer questions submitted under rules 30 and 31. A compelling order may also be sought if a party fails to answer an interrogatory, or fails to respond to a request for inspection, or fails to respond that inspection will be permitted. Persons who are not parties cannot be so compelled.


See Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, The Advisory Committee Notes, 48 F.R.D. 487, 539 (1969) [hereinafter cited as Advisory Committee Notes]. This language was intended "to encourage judges to be more alert to abuses occurring in the discovery process."

award attorney's fees to the moving party.\textsuperscript{11} If, on the other hand, the court does not grant the motion because it finds that the party was justified in refusing to comply with the discovery request, the court may award attorney's fees to the non-complying party.\textsuperscript{12}

When a party fails to obey a court's discovery order, the court may impose any sanction that is just,\textsuperscript{13} including establishing certain facts as true,\textsuperscript{14} striking claims, defenses, testimony, and exhibits,\textsuperscript{15} dismissing the action or rendering a default judgment,\textsuperscript{16} and holding the party in contempt.\textsuperscript{17} Finally, courts have inherent power to impose sanctions to achieve an orderly and expeditious disposition of cases.\textsuperscript{18}

\begin{enumerate}
\item FED. R. Civ. P. 37(a)(4).
\item Id.
\item FED. R. Civ. P. 37(b)(2).
\item FED. R. Civ. P. 37(b)(2)(A).
\item FED. R. Civ. P. 37(b)(2)(B), (b)(2)(C).
\item FED. R. Civ. P. 37(b)(2)(C).
\item FED. R. Civ. P. 37(b)(2)(D).
\item See Roadway Express, Inc. v. Piper, 100 S. Ct. 2455 (1980). The Court held that under a court's inherent powers, it may assess expenses against counsel who wilfully abuse judicial processes, after a specific finding that counsel's conduct constituted bad faith. Id. at 2465. The Court in Roadway Express relied on Link v. Wabash R. Co. 370 U.S. 626 (1962). In Link, the Court rejected this interpretation of rule 41(b) stating that "[t]he authority of a court to dismiss \textit{sua sponte} for lack of prosecution has generally been considered an inherent power governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." Id. at 630-31.

For recent cases discussing this "inherent power" in the context of a Rule 41(b) involuntary dismissal, see Silas v. Sears, Roebuck & Co., Inc., 586 F.2d 329, 385 (5th Cir. 1978); Lopez v. Arkansas County Independent School Dist., 570 F.2d 541, 544 (5th Cir. 1978); REA Express v. United States of America & Int'l Commerce Comm'n, 568 F.2d 940, 949 (2d Cir. 1977), M.S. v. Wermers, 557 F.2d 170, 175 (8th Cir. 1977); Cherry v. Brown—Frazier—Whitney, 548 F.2d 955, 968 (D.C. Cir. 1976); McCargo v. Hedrick, 545 F.2d 393, 396 (4th Cir. 1977), Boazman v. Economics Lab., Inc., 537 F.2d 210, 212 (5th Cir. 1976); Stanley v. Continental Oil Co., 536 F.2d 914, 917 (10th Cir. 1976); Luis C. Forteza e Hilox, Inc. v. Mills, 534 F.2d 415, 418 (1st Cir. 1976).

Although the Court's reliance on its inherent power was stated in reference to a dismissal pursuant to Rule 41(b), it is generally felt that the same reasoning should apply to sanctions under Rule 37. See Renfrew, Discovery Sanctions: A Judicial Perspective, 67 CALIF. L. REV. 264, 269 (1979) [hereinafter cited as Renfrew]; Note, \textit{The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions}, 91 HARV. L. REV. 1033, 1054 (1978) [hereinafter cited as Deterrence].

In addition to the court's "inherent power," there is an explicit grant of power to the district courts to make their own rules. Link v. Wabash R. Co. 370 U.S. 626, 633 n.8 (1962). FED. R. Civ. P. 83 reads in part:

\begin{quote}
Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules . . . In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.
\end{quote}
Rule 37 provides sanctions for resistance to or failure to comply with discovery. Although Rule 37 was recently amended to provide sanctions for failure to make or cooperate in discovery, the problem of overdiscovery is not specifically addressed in the sanction provision. New subdivision (g) of Rule 37 authorizes the court to award to parties who participate in good faith in an attempt to frame a discovery plan under new Rule 26(f) the expenses incurred in the attempt if any party or his attorney fails to participate in good faith. However, the only remedy for overdiscovery under the federal rules is the possibility of applying for a protective order. A party claiming that the discovery sought is objectionable may apply for such an order under Rule 26(c).

One important limitation on the court’s authority to impose sanctions under Rule 37 is the due process requirement of the fifth amendment; a sanction cannot deny a litigant due process. The


22. This concern was recently reiterated by the United States Supreme Court in Roadway Express, Inc. v. Piper, 100 S. Ct. 2455 (1980). See also Societe Internationale v. Rogers, 357 U.S. 197 (1958) (bad faith or wilfulness must accompany the failure to comply with discovery order before the drastic sanction of dismissal under Rule 37(b)(2)); Hammond Packing Co. v. Ark., 212 U.S. 322 (1909) (no denial of due process where decree pro confesso was entered pursuant to a statute providing that a defendant who failed to produce material evidence would be presumed to admit his claim); Hovey v. Elliott, 167 U.S. 409 (1897) (due process denied to party punished for failure to comply with order by striking his answers and entering a decree pro confesso). See generally 4A Moore’s Federal Practice ¶ 37.03(2) (2d ed. 1978); Brown, Proposed Changes to Rule 33 Interrogatories and Rule 37 Sanctions, 11 Ariz. L. Rev. 443, 451-54 (1969); Deterrence, supra note 18, at 1044-45; Note, Standards for Imposition of Discovery Sanctions, 27 Me. L. Rev. 247, 250-73 (1975); Note, Sanctions for Enforcement of Discovery—Constitutionality of Rule 37, 37 Wash. L. Rev.
constitutional limits on the sanction power, though, are normally satisfied if the sanction imposed affects only those matters that relate to discovery.23 Similarly, a judgment by default or dismissal is within the constitutional boundaries if a party has wilfully and substantially impeded the discovery process.24 Another sanction limitation is the permissable bounds of a court's discretion.25 This issue was addressed by the Supreme Court in a major decision four years ago.

National Hockey League and Its Aftermath

The scope of the trial court's discretion in imposing sanctions was expanded by the Supreme Court in National Hockey League v. Metropolitan Hockey Club, Inc.26 The Supreme Court there upheld the trial court's dismissal of the plaintiff's action for failure to comply with a deadline imposed by the court concerning a portion of interrogatories.27 The trial judge, who dismissed the action, found "flagrant bad faith" on the part of the litigants and "callous disregard" of their responsibilities by counsel.28


   There has traditionally been an over-emphasis on this [due process] limitation to discovery sanctions. It is fairly clear today that a sanction is within constitutional limits if it affects only those matters that relate to the discovery order. Thus, a sanction prohibiting certain matters from being introduced into evidence would be valid if these materials were the subject matter of a previous order. It seems equally clear that a default judgment would be within constitutional boundaries where one party was willfully and substantially impeding the discovery process.

Id. at 642 n.126.


But see Deterrence, supra note 18, suggesting that due process may require criminal process when punitive sanctions other than dismissal or default are employed purely for the purpose of deterrence.

25. See, e.g., Anderson v. Air West, Inc., 542 F.2d 522, 524 (9th Cir. 1976) (trial court's exercise of discretion should not be disturbed unless there is a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors); Díaz v. S. Drilling Corp., 427 F.2d 1118, 1126 (5th Cir. 1970) (sanctions imposed should be no more drastic than those actually required to protect the rights of other parties).


27. The decision was 6-2, with Justice Stevens not participating. Justices Brennan and White dissented without filing opinions.

The Supreme Court stressed the importance of the district court's memorandum in support of its order of dismissal.\textsuperscript{29} The Court indicated that the trial judge had considered the full record in determining whether to dismiss for failure to comply with discovery.\textsuperscript{30} Noting that the proper standard of review of a trial judge's choice of discovery sanction is whether he abused his discretion,\textsuperscript{31} the Court held that the district judge had not abused his discretion in dismissing the case. The majority concluded that the extreme sanction of dismissal was appropriate because of the findings of respondents' "flagrant bad faith" and their counsel's "callous disregard" of responsibilities.\textsuperscript{32}

The Supreme Court reasoned that severe sanctions must be available in order to "deter those who might be tempted to such conduct in the absence of such a deterrent."\textsuperscript{33} The Court also noted that although the respondents probably would have complied with future discovery orders, other parties might feel freer to flaunt discovery orders if the dismissal had been reversed.\textsuperscript{34} This language clearly established that deterrence of future abuse of the judicial process is a legitimate goal of Rule 37 sanctions.\textsuperscript{35} Consequently, \textit{National Hockey League} not only broadened the scope of the district court's discretion in imposing sanctions, but, more significantly, established that eventual compliance with discovery should not preclude the imposition of sanctions. This decision has been lauded as responsive to the increasing concern that discovery abuse is the prime cause of delay and expense in civil litigation.\textsuperscript{36}

Although \textit{National Hockey League} addressed only the specific sanctions of dismissal and default, the Supreme Court's enforcement of these severe discovery sanctions has been extended by the

\textsuperscript{29} 427 U.S. at 640-42.
\textsuperscript{30} \textit{Id.}
\textsuperscript{31} \textit{Id.} at 642. The Court stated that the question is not whether it, or whether the court of appeals, would as an original matter have dismissed the action.
\textsuperscript{32} \textit{Id.} at 643.
\textsuperscript{33} \textit{Id.}
\textsuperscript{34} \textit{Id.}
\textsuperscript{35} The deterrent function of sanctions was recently reiterated by Chief Justice Warren E. Burger in his "State of the Judiciary" speech on February 3, 1980, when he stated that "[s]anctions must be used to prevent or penalize abuses." Chicago Sun-Times, Mon., Feb. 4, 1980 at 28, col. 2. See Renfrew, supra note 18, at 275, Deterrence, supra note 18, at 1044-55. See generally Update, supra note 19.
\textsuperscript{36} See generally Renfrew, supra note 18, at 275, Deterrence, supra note 18, at 1044-55.
federal courts to the entire range of discovery sanctions. Orders refusing to allow the disobedient party to support or oppose designated claims or defenses or prohibiting the party from introducing designated matters into evidence pursuant to Rule 37(b) have been imposed and affirmed in accordance with the standard of "callous disregard" and "flagrant bad faith" enunciated in the Supreme Court decision. Relying on the deference given by the Supreme Court to the trial court's discretion in imposing sanctions, recent decisions have imposed attorney's fees incurred as a result of a party's failure to comply with discovery. Additionally, one

37. See Roadway Express, Inc. v. Piper, 100 S. Ct. 2455 (1980). For example, recent decisions have affirmed dismissals with prejudice for failure to prosecute pursuant to Rule 41(b), which authorizes involuntary dismissals and is distinct from the discovery sanctions. Fed. R. Civ. P. 41, Dismissal of Actions, provides in part: "(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him." Fed. R. Civ. R. 41(b).

See, e.g., Santiago v. Rivera, 553 F.2d 710, 713 (1st Cir. 1977). The court noted that although dismissal is an extreme sanction, "the district court's action was also justified as a means of deterring others from frustrating the district court's well justified efforts of docket management and at ensuring the orderly progress of litigation," citing National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639 (1976). Accord, Davis v. Williams, 588 F.2d 69 (4th Cir. 1978); Pease v. Peters, 550 F.2d 698 (1st Cir. 1977); Association de Empleados v. Morales, 538 F.2d 915 (1st Cir. 1976).

38. See note 6 supra.

39. Ohio v. Anderson, 570 F.2d 1370 (10th Cir. 1978) (affirming preclusionary sanctions despite party's explanation of failure to produce concededly producible documents by saying that it had failed to "focus" on the problem of delay); Emerick v. Fenick Indus., Inc., 539 F.2d 1379 (5th Cir. 1976) (no abuse of discretion in ordering defendant's pleadings stricken and entering judgment for plaintiffs where defendant only partially complied with order to compel discovery, and had not completely complied up to eleven months after initial discovery request); Riverside Memorial Mausoleum, Inc. v. Sonnenblick-Goldman Corp., 80 F.R.D. 433 (E.D. Pa. 1978) (granting defendant's motion to strike plaintiff's answers to interrogatories where plaintiffs were on notice that judge would not let disregard of orders go unnoticed, defendant's motion gave fair and explicit notice that sanction of preclusion would be sought, and plaintiff's failure to answer motion for sanction did not stand alone as a single circumstance of dilatoriness or neglect); E.E.O.C. v. Carter Carburetor, Div. of ACF Ind., 76 F.R.D. 143 (E.D. Mo. 1977) (party's repeated refusal to respond to interrogatories warranted the sanction of limiting the issues pursuant to Rule 37(b)(2) and awarding attorney's fees to the moving party).

court has rendered a contempt citation invoking the Supreme Court's directive in National Hockey League.\footnote{41}

Yet the courts only impose the draconian sanction of dismissal with prejudice in exceptional circumstances.\footnote{42} One example of the type of behavior which has led to dismissal is found in Jones v. Louisiana State Bar Association.\footnote{43} In Jones, the Fifth Circuit affirmed the district court's dismissal with prejudice of the plaintiff's claim even though dismissal is "a sanction of last resort."\footnote{44} In the case, a long series of attempts to depose the plaintiff followed an extension of time during which the plaintiff was allowed to file an answer. The plaintiff's deposition was rescheduled five times due to the plaintiff's motion to quash, her illness, and her failure to appear on two occasions. The district court finally ordered the plaintiff to produce a recording and notes, explicitly warning her that sanctions would be imposed if she failed to comply with the order.

The plaintiff then filed a second motion to quash the production order. A magistrate declined to rule on the motion after learning that the district court had previously ordered production. When the plaintiff again refused to comply with the production order, she was warned that her suit would be dismissed and she would be held in contempt if she failed to comply. After hearing arguments on the plaintiff's claim that the items were privileged and protected under the fourth amendment, the district court dismissed the suit. The Eighth Circuit affirmed the dismissal of the lawsuit.

\footnote{41} The court there commented, "[Trial judges need not float like a cork on the bubbling sea without any capacity to guide the course of litigation." \textit{Id.} at 547. \textit{But see Schleper v. Ford Motor Co.}, 585 F.2d 1367 (8th Cir. 1978) (contempt order reversed).

\footnote{42} These dismissals have been upheld when the record discloses unwarranted or contumacious behavior. See, e.g., Bonaventure v. Butler, 593 F.2d 626 (5th Cir. 1979) (dismissal appropriate in light of plaintiff's repeated deliberate refusals to appear for a deposition); \textit{In re Carbonic Truck Drivers Chemical Poisoning Litigation M.D.L. Docket No. 252 Strain v. Turner}, 580 F. 2d 819 (5th Cir. 1978) (dismissal of plaintiff's suit not an abuse of discretion when for a protracted period of time, and up to ten days before trial, plaintiffs refused to respond to discovery orders and showed callous disregard of the court orders); Denton v. Mr. Swiss of Mo., 564 F. 2d 236 (8th Cir. 1977) (dismissal of plaintiff's antitrust action for failure to make discovery not an abuse of discretion where plaintiff's course of conduct amounted to flagrant noncompliance with court orders and where plaintiffs and their counsel were given numerous warnings of the potentially serious consequences of continued noncompliance).

\footnote{43} 602 F. 2d 94 (5th Cir. 1979).

\footnote{44} \textit{Id.} at 96.
pursuant to Federal Rule 37(b)(2)(c), noting the appellant’s “deliberately obstructive conduct.”

The policy considerations enunciated by the Supreme Court in *National Hockey League* have been held equally applicable to defaults under Rule 37 (b)(2)(c). In *Affanto v. Merrill Brothers*, the First Circuit held that the district court did not abuse its discretion in defaulting the defendant after the court had repeatedly requested answers to interrogatories and other discovery. The court noted that the conduct of the defendant’s counsel consisted of a series of episodes of nonfeasance amounting to a “near total dereliction” of his professional responsibility. Since the conduct went well beyond ordinary negligence, the default order was appropriate.

Notwithstanding this recognition of a trial court’s wide latitude to penalize a party for failure to comply with discovery, several recent decisions have attempted to define limits on this discretion. One criterion is whether the district court could have fash-

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45. Id. at 97. The district court had also imposed costs and attorney’s fees of one hundred and fifty dollars and a criminal contempt fine of one hundred dollars. The contempt citation was affirmed pursuant to *Fed. R. Civ. P.* 37(b)(1) and 37(b)(2)(D), in light of the plaintiff’s “obstreperous behavior” which affronted the honor and dignity of the court. Id. at 97.

46. See, e.g., *Paine, Webber, Jackson & Curtis, Inc. v. Inmobiliaria Melia, Inc.*, 543 F.2d 3 (2d Cir. 1976), cert. denied, 430 U.S. 907 (1977) (judgment by default affirmed where defendant failed to produce certain documents for over two years and wilfully failed to appear for a deposition for more than seven months); *Anderson v. Air West*, 542 F.2d 1090 (9th Cir. 1976) (default judgment affirmed where cross-defendant’s failure to appear for his deposition was due to bad faith and wilful disregard of judicial process when corporate entities had been notified of the possibility that sanctions, including default judgment, would be imposed against them if the cross-defendant failed to appear for his deposition).

47. 547 F.2d 138 (1st Cir. 1977).

48. Id. at 141.

49. See, e.g., *ACF Industries, Inc. v. EEOC*, 577 F.2d 43 (8th Cir. 1978), cert. denied, 439 U.S. 1081 (1979). The Supreme Court recently denied certiorari after the Eighth Circuit had reversed the lower court’s award of attorney’s fees as a sanction for the EEOC’s failure to answer interrogatories following an order denying the EEOC’s request for a stay in responding to those questions. Justice Powell, joined by Justices Stewart and Rehnquist, filed a strong dissent stating that the Eighth Circuit’s opinion was difficult to reconcile with *National Hockey League*. Justice Stewart stated that neither the EEOC nor the court of appeals had convincingly demonstrated that the trial court had abused its discretion in finding that the EEOC had wilfully disregarded the court’s order. Id. at 1085-86. But most importantly, Justice Powell stated that the decision “could discourage efforts to curb the widespread abuse of discovery that is a prime cause of delay and expense in civil litigation.” *Id.* But see *Independent Inv. Protective League v. Touche Ross & Co.*, 607 F.2d 530 (2d Cir. 1979), cert. denied, 439 U.S. 895 (1978); *Ohio v. Arthur Anderson*, 570 F.2d 1370 (10th Cir. 1978), cert. denied, 430 U.S. 833 (1978), where the Supreme Court denied certiorari in cases which upheld the trial court’s granting of severe sanctions for abuses of discovery. See also,
ioned an equally effective but less drastic remedy. Another consideration is the public policy of deciding cases on their merits. A party's seventh amendment right to trial by jury is implicit in this consideration. In addition, the Eight Circuit has held that fundamental fairness requires a trial court to enter an order to show cause and to hold a hearing to determine whether a lesser sanction would be more appropriate than dismissal or entry of a default judgment. Finally, a dismissal or a default judgment has been held not warranted if there is no evidence of bad faith or where the original order to compel is inappropriate.

Despite the Supreme Court's approval and subsequent lower court use of severe sanctions for failure to comply with the discovery rules, several unanswered questions remain regarding the administration of sanctions under Rule 37. Although it is clear that the deterrence goal set forth in National Hockey League has had an impact on the federal courts, it is difficult to determine whether the imposition of repeated and stringent sanctions actually deters litigants who might otherwise violate the discovery rules. Furthermore, the standard for determining sanctionable con-


50. See Griffin v. Aluminum Co. of America, 564 F.2d 1171 (5th Cir. 1977). The Fifth Circuit held that the district court abused its discretion in dismissing the employee's complaint after a single, unexcused failure to appear. In addition to the fact that there was no evidence of bad faith or callous disregard of obligations, the district court abused its discretion in dismissing plaintiff's complaint in light of the fact that a less severe sanction might have been invoked. The Fifth Circuit distinguished National Hockey League, stating that its deterrence aim would be little served by imposing a sanction of last resort on a party appearing pro se who did not understand the impact of the defendant's efforts to depose him.

51. See, e.g., Wilson v. Volkswagon of America, Inc., 561 F.2d 494, 504 (4th Cir. 1977) (reversing a default judgment order where parties' failure to produce documents after a court order did not constitute flagrant bad faith or callous disregard of parties' obligations); Israel Aircraft Industries, Ltd. v. Standard Precision, 559 F.2d 203, 207 (2d Cir. 1977) (dismissal of plaintiff's complaint reversed where plaintiffs were entitled to have a hearing on the merits before the court vacated a judgment and dismissed the complaint). See notes 68-69 infra and accompanying text.

52. U.S. Const. amend. VII.

53. See, e.g., Edgar v. Slaughter, 548 F.2d 770, 773 (8th Cir. 1977); Kropp v. Ziebarth, 557 F.2d 142, 147 (8th Cir. 1977).

54. See, e.g., Kropp v. Ziebarth, 557 F.2d 142 (8th Cir. 1977); Dudley v. South Jersey Metal, 555 F.2d 96 (3rd Cir. 1977); Edgar v. Slaughter, 548 F.2d 770 (8th Cir. 1977); Thomas v. United States, 531 F.2d 746 (5th Cir. 1976). This was also one of the requirements set forth in National Hockey League. See notes 26-36 supra and accompanying text.

55. See, e.g., Families Unidas v. Briscoe, 544 F.2d 182, 191 n.16 (5th Cir. 1976).

56. See notes 26-36 supra and accompanying text.

57. See Update, supra note 19, for a circuit by circuit analysis of the impact of National Hockey League in the federal courts.
duct remains unclear. One court has gone so far as to indicate that mere negligence may be sanctionable. In another court, a conscious intent to be dilatory in addition to disregard of a specific order to compel must be shown before the court finds that a party’s noncompliance can be subject to sanctions. Finally, even if the deterrent effect of sanctions under Rule 37 were realized, it is doubtful that those sanctions now available under Rule 37 would be effective in controlling excessive, as opposed to merely delayed or incomplete, discovery. These criticisms and others have inspired proposed changes in the rules.

**Rule 37 Is Ineffective**

Despite the avowed goal of the framers of the federal rules to achieve a “just, speedy, and inexpensive determination of every action,” there has been substantial criticism of the failure of the discovery rules to expedite litigation and provide a forum for the financially weak litigant. In particular, Rule 37, designed to be the principle enforcement provision behind the federal discovery scheme, has been condemned as ineffective. Although Rule 37 was recently amended to provide sanctions against parties who do

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58. See, e.g., Marquis v. Chrysler Corp. 577 F.2d 624 (9th Cir. 1978).
60. See note 19 supra and accompanying text.
63. See note 62 supra.
not “cooperate” in discovery, many argue that the amendment falls short of changes needed to accomplish reforms in civil litigation that are long overdue.

In addition to the criticism which has been leveled at the rules of discovery themselves, the ineffectiveness of the current sanction provisions has been attributed to judicial reluctance to impose sanctions. A recent study conducted for the United States Justice

64. It is noteworthy that when new federal Rule 37(e) was proposed in the 1978 Proposed Draft it would have authorized the court to “impose upon any party or counsel such sanctions as may be just, including the payment of reasonable expense and attorney’s fees [when a party] (1) fails without good cause to cooperate in the framing of an appropriate discovery plan by agreement under Rule 27(f), or (2) otherwise abuses the discovery process in seeking, making or resisting discovery.” The proposed rule would also have referred to 28 U.S.C. § 1927, which authorizes the imposition of costs on attorneys who unreasonably increase costs by multiplying proceedings. 1978 PROPOSED DRAFT, supra note 19, at 652-53.

In the 1979 Revised Draft, however, the Advisory Committee deleted subsection (2) of proposed Rule 37(e) and omitted the reference to 28 U.S.C. § 1927. The Revised Draft was issued by the Advisory Committee in February, 1979, reprinted in 80 F.R.D. 323, 344-48 (1979) [hereinafter cited as 1979 Revised Draft]. Proposed Rule 37(e), as revised in 1979, now provides for the imposition of costs only when a party or attorney fails to participate in framing a discovery plan. By negative implication, this would appear to provide no remedy for those abuses of discovery arising outside the context of the discovery planning conference.

65. See dissenting statement of Justice Powell, joined by Justices Stewart and Rehnquist, to the amendments to the Federal Rules of Civil Procedure effective on August 1, 1980. Justice Powell states that the amendments will not have an appreciable effect on the acute problems associated with discovery and that the adoption of the inadequate changes could postpone effective reform for another decade. 48 U.S.L.W. 4497, 4500 (May 6, 1980). See also Umin, supra note 62. The author criticizes the Revised Draft for its omission of the proposed amendment to Rule 37 which would have authorized sanctions for abuses in the seeking, making, or resistance to discovery. He attributes these rejections of salutory proposals to “the theme of relative contentment with the status quo that emerges from the advisory committee’s work product.” Id. at 1052. His major criticism of the Revised Draft is its failure to narrow the scope of discovery under Rule 26(b)(1) as set forth in the Proposed Draft. He contends that the expansive language of Rule 26(b)(1) naturally gives rise to overuse of discovery.

66. See Antitrust Commission Report, supra note 62, where it is stated:

The Commission believes that the failure of some judges to manage and control complex antitrust litigation adequately is a major component of unreasonable delay in such cases. We recognize that the root of this part of the problem may lie in the adversary system itself. Traditional notions of the judicial role presuppose a largely passive, mediating status for the court, with critical decisions greatly affecting the scope and management of the case left primarily to the tactical initiatives and responses of the parties and their attorneys. In major antitrust suits where potential for protraction is acute, however, an uninvolved, unaggressive judicial posture is a prescription for directionless litigation and excessive delay. Id. at 522.

In his 1980 “State of the Judiciary” speech, Chief Justice Warren E. Burger criticized lawyers’ “misuse and abuse” of pretrial motions as one of the factors contributing to the high cost of legal services. He stated that “[W]ithin reason, trial judges must take a more
Discovery Sanctions

Department found that judges prefer to give parties a second chance to comply rather than to punish them for past refusal. The most important factor contributing to the courts' unwillingness to impose sanctions is the policy of reaching the merits of disputes. This preference is consistent with the modern reform of the federal rules, which was motivated by the drafter's desire to have cases decided on their merits rather than on procedural flaws. Although this is certainly a praiseworthy objective, it has been suggested that one party's right to have an action decided on its merits must be balanced against the opposing party's right to have a prompt settlement of the case.

Another explanation for the ineffectiveness of the sanction provisions is that judges do not impose sanctions because lawyers do not seek them. Even where a party's conduct is clearly sanction-active role in the management of litigation by enforcing schedules and by limiting freewheeling pretrial activities." Chicago Sun-Times, Mon., Feb. 4, 1980, at 28, col. 2. See also Ellington, supra note 62, at 7; Glaser, supra note 4, at 154-56; Brazil, supra note 62, at 52-53; Renfrew, supra note 18, at 271-78; Deterrence, supra note 18, at 1040-44; Recent Innovations, supra note 22, at 291; 1970 Amendments, supra note 23, at 641.

67. Ellington, supra note 62, at 7, 103-04, 119. Professor Ellington concluded from his study that it is not true that judges do not grant sanctions because lawyers do not request them. Rather, his study confirmed what many lawyers had believed all along; "judges generally are not inclined to impose sanctions for most discovery abuses where there is some prospect that a second chance will result in compliance." Id. at 7. For Ellington's explanation of judicial unwillingness to impose sanctions, see id. at 10, 111-17.

68. See Glaser, supra note 4, at 154-55; Brazil, supra note 62, at 1343; Ellington, supra note 62, at 10, 111-17; Renfrew, supra note 18, at 271-78; Rosenberg, supra note 4, at 480-97; Developments in the Law, supra note 5, at 985-91, Recent Innovations, supra note 22, at 287-91; 1970 Amendments, supra note 23, at 622-25, 641-43.

69. See note 4 supra.

70. See Renfrew, supra note 18, at 277-78; Rosenberg, supra note 4, at 480; 1970 Amendments, supra note 23, at 642; Deterrence, supra note 18, at 1043 ("[E]xaggeration of the importance of reaching the merits has undermined the effectiveness of rule 37 sanctions.").

71. A recent study of discovery in six selected district courts conducted by the Federal Judicial Center found that attorneys move for the imposition of sanctions in less than one percent of the total requests for discovery. The study analyzed 717 requests for discovery. Motions for sanctions were made in 67 instances, or 0.9% of the instances in which discovery was requested. The study further found that less than half of these motions (52.2%) resulted in rulings by the courts. Of the motions ruled upon, however, 74.3% were granted. While this study admitted that its sample was too small to justify generalization of its finding to all federal district courts, the data indicated that because lawyers do not often move for sanctions, reliance on court control initiated by the attorneys under any or all of the provisions of Rule 37 will be unavailing. P. Connolly, E. Holleman & M. Kuhlman, Judicial Controls and the Civil Litigative Process: Discovery (1978), at 24-25 (hereinafter cited as Federal Judicial Center Study). But see Ellington, supra note 62, at 24-25, 62-64, which found a much lower rate of success for granting of sanction motions; 37.8% in Atlanta and 36.8% in Chicago, compared to 74.3% in the Federal Judicial Center Study.
able, judges may wait for lawyers and litigants to initiate proceedings and avoid imposing sanctions on their own. The hesitancy of judges to impose sanctions and the corresponding lack of attorney initiative in seeking sanctions may be attributable to the adversary character of civil discovery. A lawyer’s duty to protect zealously the interests of his client often overshadows his responsibility as an officer of the court to comply with the law and seek the truth. For example, lawyers may not seek sanctions against an opponent because they, in turn, may have occasion to use excessive discovery tactics or prolong discovery when it would be to their client’s advantage. Because judges appreciate the primacy of the advocate’s loyalty to his client in the adversarial system, there is a tacit understanding between the bar and bench that only the most egregious behavior will warrant sanctioning.

72. See Brazil, supra note 62, at 1343; Cohn, supra note 19, at 255; Renfrew, supra note 18, at 272. 278-79.

73. See Brazil, supra note 62. Professor Brazil’s article focuses on the theme that “adversary pressures and competitive economic impulses inevitably work to impair significantly, if not to frustrate completely, the attainment of the discovery system’s primary objectives.” Id. at 1303. Consequently, the fundamental source of the problematic sanctioning machinery is the structure of the adversary system itself, rather than Rule 37 or deficiencies in judicial power. This explains the lack of attorney initiative in seeking sanctions against fellow attorneys:

The academic and judicial proponents of the modern rules of discovery apparently failed to appreciate how tenaciously litigators would hold to their adversarial ways and the magnitude of the antagonism between the principle purpose of discovery (the ascertainment of truth through disclosure) and the protective and competitive instincts that dominate adversary litigation.

Id. at 1303. See also Frankel, The Search for Truth: An Umpireal View, 123 U. Pa. L. Rev. 1031, 1054 (1975).

74. See ABA CODE OF PROFESSIONAL RESPONSIBILITY, Cannon 7.

75. Id. An attorney must not “knowingly” use “fraudulent, false, or perjured testimony,” id., EC 7-26; DR 7-102(A)(4)(5), or “[k]nowingly engage in other illegal conduct. . . .” Id., DR 7-102(A)(8). The heading to EC7 is “Duty of the Lawyer to the Adversary System of Justice”. Id.

See Frankel, supra note 73. Judge Frankel criticizes the adversary model and states that “[t]he rules of professional responsibility should compel disclosure of material facts and forbid material omission rather than merely proscribe positive frauds.” Id. at 1057. See also Brazil, supra note 62, at 1303; Renfrew, supra note 18, at 272.

76. See Renfrew, supra note 18, at 272-73.

77. See Brazil, supra note 62. Brazil states that a fundamental source of the judiciary’s underutilization of its sanctioning power is “the judge’s understanding of how counsel must respond to the obligation and pressures of adversarial advocacy.” Id. at 1343. Because judges are acculturated professionally under the adversary system, they appreciate lawyers’ loyalty to the client, even when this loyalty is demonstrated through resisting disclosure of damaging evidence and using discovery devices to gain tactical advantages. Consequently, judges tend to be lenient when confronted with sanctionable conduct by attorneys. See also Renfrew, supra note 18, at 272.
Proposals for More Effective Use of Sanctions

The Committee on Rule of Practice and Procedure of the Judicial Conference of the United States has responded to this widespread criticism by proposing several amendments to the discovery rules. The amendments, effective August 1, 1980, provide for a discovery conference upon request by the attorney for either party. Reasonable expenses, including attorney's fees, caused by the failure of a party or his attorney to cooperate in the framing of a discovery plan, as required at the discovery conference, are also authorized under new subdivision (g) of Rule 37.

The recent amendments to the federal discovery rules have been criticized by many as unresponsive to the need for fundamental changes in the discovery rules. Critics contend that the proposed discovery planning conference would involve too much judicial control. It may also place too great a burden on the already over-

78. See generally 1978 PROPOSED DRAFT, supra note 19; 1979 REVISED DRAFT, supra note 65.
79. Rule 26 reads in part:
(f) Discovery Conference. At any time after commencement of an action the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon request by the attorney for any party if the request includes:
(1) A statement of the issues as they then appear;
(2) A proposed plan and schedule of discovery;
(3) Any limitations proposed to be placed on discovery;
(4) Any other proposed orders with respect to discovery; and
(5) A statement showing that the attorney making the request has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the request. Each party and his attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party. Notice of the request shall be served on all parties. Objections or additions to matters set forth in the request shall be served not later than 10 days after service of the request.

Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any; and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.

Subject to the right of a party who properly requests a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by Rule 16.

80. See note 6, supra. 1979 REVISED DRAFT, supra note 65, at 346.
81. See note 65, supra.
82. Ebersole, supra note 3, at 52; Umin, supra note 62, at 1051 ("In the contemplations of both the advisory committee and the A.B.A. group, the primary burden of developing an
worked judiciary. Furthermore, the conference might go unused since nothing in the proposed rule mandates such a conference or empowers a court to initiate a conference. Finally, the conference might actually increase the cost of pretrial litigation.

Nevertheless, most would concede that judicial intervention would be beneficial. It would aid in determining at the outset which cases require control over pretrial discovery procedures. The conference might also be a practical necessity due to the apparent inability of lawyers to control excessive discovery due to the inherent structure of the adversary system.

Local Rules and Practices

The promulgation and enforcement of local rules and practices regulating discovery may also alleviate pretrial discovery problems. Rule 83 confers on the courts the discretion to promulgate rules that are consistent with the federal rules. A recent survey of the local rules and practices in the federal district courts indicates that there has been a considerable amount of experimentation in the district courts in an attempt to find a more effective way to regulate pretrial discovery.

Another study has found significant differences in the frequency with which sanctions are requested and employed in different federal districts. For instance, more motions for sanctions are filed in the Northern District Court of Illinois than in the Northern District Court of Georgia. This statistic may result from different court procedures, because in Chicago, status hearings are routine and rulings on discovery motions often come down within a few days, while in Atlanta, status hearings are rarely scheduled and several months may pass between the filing of a discovery motion.
and its disposition.\textsuperscript{93} Differences in local practice may, therefore, have an effect on the efficiency with which the federal discovery rules are employed.

Also mentioned in this study is the fact that both the Northern District of Illinois and the Northern District of Georgia have adopted a local rule requiring the parties to submit a statement to the court that they have consulted and have been unable to resolve differences before the court will consider a discovery motion.\textsuperscript{94} Many courts have adopted similar rules for discovery disputes to be resolved extra-judicially.\textsuperscript{95} It should be noted that the frequency with which sanctions are requested in Illinois does not necessarily show that this rule is ineffective.\textsuperscript{96}

Although divergent local rules and practices may unduly complicate procedure if attorneys practicing before different federal courts are unfamiliar with the particular local rules,\textsuperscript{97} local rules and practices might reveal those areas where the federal rules have proven inadequate in addressing pretrial discovery problems. They may be particularly helpful in determining the effectiveness of proposals for change in the federal rules where the proposals mirror local rules already tested in the district courts. Compliance with local rules and practices regulating pretrial discovery and compli-

\textsuperscript{93.} \textit{Id.}

\textsuperscript{94.} \textit{Id.} at 20-22. N.D. ILL. GEN. R. 12(d) reads:

\begin{quote}
To curtail undue delay in the administration of justice this Court shall hereinafter refuse to hear any and all motions for discovery and production of documents under Rule 27 through 37 of the Federal Rules of Civil Procedure, unless moving counsel shall first advise the Court in writing that after personal consultation and sincere attempts to resolve differences they are unable to reach an accord. This statement shall recite, in addition, the date, time, and place of such conference, and the names of all parties participating therein.
\end{quote}

In the Northern District Court of Georgia, Rule 91.62 provides:

\begin{quote}
Counsel for the moving party shall confer with counsel for the opposing party and file with the Court at the time of filing the motion, a statement certifying that he has conferred with counsel for the opposing party in a good faith effort to resolve by agreement the issues raised and that counsel have not been able to do so. If certain of the issues have been resolved by agreement, the statement shall specify the issues remaining unresolved.
\end{quote}

\textsuperscript{95.} See Ellington, supra note 62, at 20. See generally Cohn, supra note 19.

\textsuperscript{96.} The fact that more sanctions are filed in Chicago than in Atlanta does not necessarily indicate that more discovery abuse is occurring in the Northern District Court of Illinois. On the contrary, I have spoken with many attorneys who practice in the Northern District Court of Illinois who feel that Rule 12(d) has been effective in eliminating any need for sanctions at all.

\textsuperscript{97.} See Cohn, supra note 49, at 295, where the author states that the welter of local rules may create "a kind of procedural Tower of Babel." (\textit{quoting} 12 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 229 (1969)).
ance with the new amendments to the federal discovery rules may ultimately obviate the need for sanctions.

SANCTIONS FOR DISCOVERY ABUSE IN ILLINOIS

Supreme Court Rules

The Illinois Supreme Court has adopted rules which authorize and provide broad sanctions\(^8\) to assist trial courts in enforcing discovery rules and discovery orders.\(^9\) Rule 219, the most comprehen-

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98. ILL. REV. STAT. ch. 110A, § 219 (1977), Historical and Practice Notes.
99. ILL. REV. STAT. ch. 110A, § 219 (1977) reads:

Consequences of Refusal to Comply with Rules or Order Relating to Discovery or Pretrial Conferences.

(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 instance of or in collusion with a party, unreasonably refuses to comply with any provision of rules 201 through 218, 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;
sive of the Illinois Supreme Court Rules, prescribes the consequences for refusal to make proper discovery. Like Federal Rule of Civil Procedure 37,\(^{100}\) it confers broad discretion upon the trial court to impose a wide spectrum of sanctions.

The structure and language of Illinois Rule 219, unlike federal Rule 37, distinguishes between sanctions for overuse of discovery and sanctions for noncompliance with discovery.\(^{101}\) According to this rule, a party overuses, or "abuses", discovery when it willfully attempts to obtain information by an improper discovery method, or attempts to obtain information to which he is not entitled. In such instances, the court may enter any of the orders that sanction failure to comply with an order or the discovery rules.\(^{102}\)

The sanctions available to the trial court at both the state and federal level are virtually identical. Rule 219 provides for such sanctions as staying the proceedings,\(^{103}\) debarring the offending party from filing further pleadings,\(^{104}\) debarring the maintaining of a claim or defense,\(^{105}\) debarring a witness’s testimony,\(^{106}\) entering

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\begin{align*}
(iii) & \text{ that he be debarred from maintaining any particular claim, counterclaim, third-party complaint, or defense relating to that issue;} \\
(iv) & \text{ that a witness be barred from testifying concerning that issue;} \\
(v) & \text{ 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 suit be dismissed with or without prejudice;} \\
& \text{or} \\
(vi) & \text{ that any portion of his pleadings relating to that issue be stricken and, if thereby made appropriate, judgment be entered as to that issue.}
\end{align*}
\]

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 said rules.

(d) Abuse of Discovery Procedures. The court may order that information obtained through abuse of discovery procedures be suppressed. If a party willfully obtains or attempts to obtain information by an improper discovery method, willfully 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.

\(^{100}\) See note 6 supra.

\(^{101}\) See note 99 supra. Section (d) of Illinois Rule 219 allows the court to suppress information obtained through "abuse" of discovery procedures and, if necessary, to enter any order provided for in Rule 219(c) where "abuse" of discovery has occurred. Clearly, in this context, the term "abuse" is intended to mean abuse of the discovery process involving overdiscovery. See also notes 1-3 supra and accompanying text.

\(^{102}\) Id.


default judgment or dismissing the suit with or without prejudice,\textsuperscript{107} and striking any portion of the pleadings.\textsuperscript{108} In addition to the sanctions specifically authorized, the rules provide for the imposition of any other orders "as are just."\textsuperscript{109}

Other Illinois rules apply to more specific instances of failure to comply with discovery rules or orders.\textsuperscript{110} For example, Rule 209\textsuperscript{111} permits the court to impose expenses for failure of the party who has served notice of the taking of a deposition to attend or to serve a subpoena or notice upon the deponent. Upon a showing that an oral deposition is being conducted in bad faith, the court may grant a party's or a deponent's motion to limit or terminate the examination pursuant to Rule 206(d).\textsuperscript{112} The rule also allows the

\textsuperscript{107} ILL. REV. STAT. ch. 110A, § 219(c)(v) (1977).

\textsuperscript{108} ILL. REV. STAT. ch. 110A, § 219(c)(vi) (1977).

\textsuperscript{109} ILL. REV. STAT. ch. 110A, § 219(e) (1977).

\textsuperscript{110} In addition to their authority under the Illinois Supreme Court Rules, courts have imposed sanctions pursuant to their "inherent power" which exists independent of statute. See, e.g., Bejda v. SGL Indus., Inc., 73 Ill. App. 3d 484, 392 N.E. 2d 38 (1979); Van Tiegem v. Sushenka, 254 Ill. App. 409 (1929); McClay v. Williamson, 247 Ill. App. 141 (1929).

The federal courts are also authorized to impose sanctions pursuant to their "inherent" power. See note 18 supra.

\textsuperscript{111} ILL. REV. STAT. ch. 110A, § 209 (1977) reads:

(a) \textbf{Failure To Attend or To Proceed; Expenses.} If the party serving notice of the taking of a deposition fails to attend or to proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party serving the notice to pay to the other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

(b) \textbf{Failure to Serve Subpoena or Notice; Expenses.} If the party serving notice of the taking of a deposition fails to serve a subpoena or notice, as may be appropriate, requiring the attendance of the deponent and because of that failure the deponent does not attend, and if another party attends in person or by attorney because he expects the deposition of that deponent to be taken, the court may order the party serving the notice to pay to the other party the amount of the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

\textsuperscript{112} ILL. REV. STAT. ch. 110A, § 206 (1977) reads in part:

(d) \textbf{Motion to Terminate or Limit Examination.} At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in any manner that unreasonably annoys, embarrasses, or oppresses the deponent or party, the court may order that the examination cease forthwith or may limit the scope and manner of taking the examination as provided by these rules. An examination terminated by the order shall be resumed only upon further order of the court. Upon the demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to present a motion for an order. The court may require either party or the deponent to pay costs or expenses, including reasonable attorney's fees, or both as the court may deem reasonable.
court to assess costs or reasonable attorney’s fees.

**Scope of Trial Court’s Discretion**

In Illinois, trial courts have broad discretion in entering and enforcing discovery orders. A decision will not be disturbed by a court of review unless there has been an abuse of discretion. Sanctions are to be used only to promote the goals of discovery and to coerce cooperation and not as a form of punishment. The exercise of the trial court’s discretion to impose sanctions entails a balancing test. The goal of discovery, which is an early, expeditious ascertainment of the truth, must be weighed against the burden which the discovery process may impose on the parties. The courts are instructed to impose sanctions commensurate with the violation which they are intended to remedy.

Rule 219 distinguishes between violations of discovery provisions and violation of court orders under the discovery rules. After an order has been entered, the trial court need only find a “failure” to

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This restriction on the use of sanctions as a form of punishment should be distinguished from the “deterrent” function articulated in National Hockey League. See notes 26-36 supra and accompanying text; notes 181-183 infra and accompanying text.

116. See General Motors Corp. v. Bua, 37 Ill. 2d 180, 226 N.E.2d 6 (1967). After noting the breadth of the trial court’s power to make any just order relating to the production of documents, the court stated that “such breadth of power requires a careful exercise of discretion in order to balance the needs of truth and excessive burden to the litigants.” Id. at 193, 226 N.E.2d at 14.

117. Id.

118. In Buehler v. Whalen, 70 Ill. 2d 51, 67, 374 N.E.2d 460, 467 (1978), the late Justice Dooley of the Illinois Supreme Court articulated the need for sanctions commensurate to the violation: “Our discovery procedures are meaningless unless a violation entails a penalty proportionate to the gravity of the violation. Discovery for all parties will not be effective unless trial courts do not countenance violations, and unhesitatingly impose sanctions proportionate to the circumstances.”

comply with the order before imposing a sanction120 as long as the sanction is not severe.121 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" before imposing sanctions.122

Where the terminal sanctions of default and dismissal are involved, the courts must also consider the due process issue.123 This issue may also be considered when less severe sanctions are being imposed. For example, where the sanctions are not final, the consideration of whether a party is being deprived of property without an opportunity to be heard becomes an additional element in the balancing process.124

The Illinois Supreme Court addressed the due process issue in General Motors Corp. v. Bua.125 In Bua, the court held that pleadings may be stricken only when the stricken pleadings bear some reasonable relation to the information withheld by the party resisting discovery.126 Consequently, the striking of the defendant's pleadings because of the defendant's failure to comply with the discovery order was improper since the pleadings which related to

120. The order must be "just." A just order is one which, to the degree possible, assures both discovery and trial on the merits. See, e.g., Hansen v. Skul, 54 Ill. App. 3d 1, 369 N.E. 2d 267 (1977); Serpe v. Yellow Cab, 10 Ill. App. 3d 1, 293 N.E. 2d 742 (1973); Gillespie v. Norfolk and W. Ry. Co., 103 Ill. App. 2d 449, 243 N.E.2d 27 (1968); cf. 612 N. Michigan Ave. Bldg. Corp. v. Factosystem Inc., 34 Ill. App. 3d 922, 928, 340 N.E.2d 678, 682 (1975) (order entered was just since defendants were attempting to delay trial as much as possible and would have continued to thwart discovery unless sanctions were entered).

121. See note 99 supra.

122. See notes 132-33 infra and accompanying text.

123. See General Motors Corp. v. Bua, 37 Ill. 2d 180, 195, 226 N.E.2d 6, 16 (1967). See text accompanying note 22 supra for a discussion of the due process considerations in imposing sanctions in the federal courts.

124. See text accompanying notes 116-17 supra.

125. 37 Ill. 2d 180, 226 N.E.2d 6 (1967).

126. Id. at 197, 226 N.E.2d at 16. The Illinois Supreme Court takes the position (which was expressed by the United States Supreme Court in Hovey v. Elliot, 167 U.S. 409 (1897)) that the court's power to punish for contempt does not entitle it to summarily deprive a party of all right to defend an action. General Motors Corp. v. Bua, 37 Ill. 2d 180, 226 N.E.2d 6 (1967). The Bua court found that the source of this power is the legislature. The legislature authorized the court to adopt rules governing discovery pursuant to section 3 of the Civil Practice Act, ILL. REV. STAT. ch 110, § 3 (1977). This grant of power, which permitted the imposition of severe sanctions for failure to comply with discovery procedures, created a presumption that the documents withheld would reveal information showing the liability of the disobedient party. Id. at 190, 226 N.E.2d at 12. According to this presumption, a party establishes his own liability by withholding discovery. This legislatively created presumption is therefore sufficient to overcome the due process argument, at least where the pleadings which have been stricken bear some reasonable relation to the information withheld. Id. at 196-97, 226 N.E.2d at 16.
damages or contributory negligence did not relate to discovery. Although Bua was decided under the predecessor to Rule 219(c)(vi), the rule of law established therein remains valid.

Standards for the Imposition of Harsh Sanctions

The most extreme sanctions available under Rule 219 are the striking of pleadings and defaulting or dismissing the offending party. The majority of Illinois cases indicate a reluctance to impose or uphold the imposition of such extreme sanctions. The courts consider these as "drastic sanctions" to be employed only as a "last resort". Rule 219 expressly requires a showing of "unreasonable refusal" to comply with a discovery provision before a default judgment or a dismissal order may be entered. The standards for "unreasonable refusal" are whether the party showed a deliberate contumacious or unwarranted disregard of the court's authority.

A recent Illinois Appellate Court decision illustrates the unwillingness of the courts to uphold a default order. In Stevens v. Inter-

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127. *Id.* at 196-97, 226 N.E.2d at 16.
129. ILL. REV. STAT. ch. 110A, § 219(c)(v) and (vi) (1977). Parties can also be prevented from filing other pleadings. ILL. REV. STAT. ch. 110A, § 219(c)(ii) (1977).
132. The standard for "failure" to comply with a discovery order is different from the standard for failure to comply with a discovery rule. See note 99 supra.
national Farm Systems, the trial court imposed sanctions, including a default order as to one count, when the defendant refused to answer interrogatories after the court had ordered the defendant to answer within twenty-eight days. Furthermore, the defendant’s attorney had shown a definite intention to prolong litigation by failing to request a hearing on his request to vacate the default order. Nonetheless, the appellate court vacated the default order and remanded the case for reconsideration of motions leading to sanctions.

Although the appellate court acknowledged that the defendant’s actions constituted noncompliance with a court order, the default order was vacated on the ground that it was unjust. The court reasoned that a trial on the merits could have been held without hardship or prejudice. Moreover, the extreme sanction would unduly penalize the defendant since it was not his conduct but that of his attorney which had prompted the imposition of sanctions.

Notwithstanding this hesitancy to impose harsh sanctions, the Illinois Supreme Court has recently stated that although dismissal pursuant to Rule 219(c) is harsh, it may be justified when court orders are repeatedly ignored. The recent case of Bailey v. Twin City Barge & Towing illustrates a more receptive approach to the dismissal sanction.

In Bailey, the appellate court affirmed the trial court’s dismissal.

135. Id. at 719, 372 N.E.2d at 424.
136. Id. at 721, 372 N.E.2d at 427. The court stated that at the new hearing, proper sanctions might include an order debarring the defendant as to certain defenses, a default order, or an order requiring payment of plaintiff’s attorney fees and costs including the appeal necessitated by the defendant’s failure to comply with the trial court’s discovery orders.
137. See note 120 supra.
140. 70 III. App. 3d 763, 388 N.E.2d 789 (1979).
of the plaintiff's case based on actions which were characterized as merely unreasonable. In so doing, the court first relied on the plain meaning of Rule 219(c)(v), which provides that a judgment by default may be entered if a party unreasonably refuses to comply with discovery rules. This plain meaning was used even though many decisions have imposed the requirement of deliberate and contumacious behavior before ordering a dismissal. The court in Bailey then determined whether the trial court's sanction constituted an abuse of discretion. Using guidelines set forth by the Illinois Supreme Court, the court held that since the order was neither punitive nor too severe, the trial court acted within its discretion in dismissing the case.

In another case, a default judgment was upheld where the overall record gave evidence of repeated refusal to comply with discovery procedures. In North Michigan Avenue Building Corp. v. Factosystem, Inc., the court held that the trial court had acted within its sound discretion in utilizing the sanction of default judgment where the defendants had deliberately failed fully to comply with the court's prior discovery orders. The trial court had ordered the defendants to produce certain documents and to respond

141. Id. at 765, 388 N.E.2d at 791.
142. Although the standard of "unreasonableness" applied in Bailey appears to be less stringent than the traditional "deliberate contumacious" standard, the facts of Bailey may well have warranted affirmation of dismissal even under the stricter "deliberate contumacious or unwarranted disregard" standard. First, there was an immediate need for compliance with the discovery rules in Bailey since the case was approaching trial date. Furthermore, the plaintiff had had three opportunities to comply with the defendant's request to produce. Finally, the court had given the plaintiff another chance by providing in its order that if the plaintiff complied with discovery within seven days, the dismissal was to be automatically waived. In light of these factors, plaintiff's recalcitrance may well have constituted "unreasonable refusal" to comply despite the court's avoidance of this stricter standard. Most significantly, the court's failure to apply the "deliberate contumacious" standard may suggest a greater willingness to impose sanctions, despite the fact that the noncomplying party's behavior may in fact have constituted "deliberate contumacious" disregard of the court's authority.

143. See General Motors Corp. v. Bua, 37 Ill. 2d 180, 226 N.E. 2d 6 (1967). The court stated that sanctions must be necessary to enable the party seeking discovery to obtain the objects of discovery, but may not be imposed for punishment. Id. at 196, 226 N.E.2d at 16, citing Caryl Richard, Inc. v. Superior Court, 188 Cal. App. 300, 10 Cal. Reptr. 377, 380 (1961).
144. 70 Ill. App. 3d 763, 766, 388 N.E.2d 789, 792.
146. Id.
147. Id. at 928, 340 N.E.2d at 683.
to interrogatories within a specified period. The defendants answered the interrogatories five days late. Although recognizing that the five day delay did not itself constitute a deliberate disregard of the court’s authority, the court found that the entire course of the defendant’s conduct, including its previous refusal to deliver documents over a two year period, did indeed constitute a pronounced disregard of the court’s orders.

**Lesser Sanctions**

Because of the general unwillingness of the Illinois courts to impose litigation-ending sanctions, the less severe sanctions are more often invoked. Courts frequently sanction a recalcitrant litigant by ordering payment of expenses or attorney’s fees against the noncomplying party or his attorney. In addition to the authority conferred by Rule 219, the award of reasonable expenses and fees is expressly made available for particular misconduct relating to discovery. Courts generally scrutinize the misconduct to determine whether a refusal to answer, or a motion, was made “without substantial justification.” If the court finds an absence of justification, the sanction is proper.

Courts have also assessed costs or attorney’s fees absent a specific finding of lack of substantial justification for refusal to comply or for making a motion. The authority to do so is derived

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148. Id.
149. Id.
150. Id.
151. See text accompanying notes 130-32 supra.
152. See cases cited in notes 155-159 infra.
153. See note 99 supra.
154. See text accompanying notes 111-12 supra.
155. Ambassador Ins. Co. v. Wilson, 65 Ill. App. 3d 418, 382 N.E. 2d 605 (1978) (no justification for plaintiff’s failure to answer interrogatories despite plaintiff’s assertion that “the press of other matters” prevented plaintiff from answering interrogatories); Lynch v. Mullenix, 48 Ill. App. 3d 963, 363 N.E.2d 645 (1977) (no substantial justification where defendant refused to look at documents on the basis that her attorney had not seen the documents where no contention had been made that the documents were privileged from discovery).
156. Alswang v. Claybon, 53 Ill. App. 3d 961, 369 N.E.2d 104 (1977) (trial court acted properly in awarding costs and attorney fees incurred as a result of defendant’s failure to file answers to supplemental interrogatories under Rule 219(a)); Savitch v. Allman, 25 Ill. App. 3d 864, 323 N.E.2d 435 (1975) (no abuse of discretion when trial court required that $160 in attorney’s fees be paid by attorney for plaintiff); North Park Bus Serv., Inc. v. Pastor, 39 Ill. App. 3d 406, 349 N.E.2d 664 (1976) (allowing defendant attorney’s fees incurred as a result of plaintiff’s failure to comply clearly not an abuse of discretion when Rule 219(c) specifically provides that the court may impose sanction when a party “fails to comply with
from Rule 219(c) and from the court’s "broad discretion."\textsuperscript{157} In other cases, the courts have justified the imposition of attorney's fees as a restitutionary measure.\textsuperscript{158} Restitution of reasonable attorney's fees occasioned by a party's delay is clearly a reasonable sanction and has been approved for even minor discovery violations.\textsuperscript{159}

Another sanction available to Illinois courts, although rarely used, is the contempt adjudication. In addition to the court's inherent power to punish for contempt as incident to the maintenance of its authority,\textsuperscript{160} Rule 219(c) authorizes civil contempt proceedings to compel obedience by any person to any order entered under the discovery rules.\textsuperscript{161} Civil contempt usually involves imprisonment or the imposition of a daily fine until compliance is rendered.\textsuperscript{162} In contrast, all other sanctions evidence the court's authority, but do not actually compel compliance.

Finally, Rule 219(c)(iv)\textsuperscript{163} grants the trial court authority in appropriate circumstances to bar a witness from testifying. Upon motion by the opposing party, the court may prevent the witness from testifying concerning an issue to which the refusal or failure to

\textsuperscript{157} See note 110 supra.


\textsuperscript{160} Stevens v. Lake County, 24 Ill. App.3d 51, 320 N.E.2d 263 (1974).


\textsuperscript{162} For example, it is civil contempt for a party to refuse to produce documents which have been ordered produced by the court. See, e.g., City Sav. Ass'n v. Mensik, 124 Ill. App. 2d 110 (1970); People v. Parker, 396 Ill. 583, 72 N.E.2d 848 (1947). For a recent case in which an attorney was held guilty of criminal contempt in impeding the pre-trial discovery process, see Payne v. Coates-Miller, Inc., 68 Ill. App. 3d 601, 386 N.E.2d 398 (1979).

\textsuperscript{163} See note 99 supra.
comply relates. Courts often employ this sanction when a party fails to disclose to another party, either carelessly or intentionally, the existence of a witness after proper request has been made. Factors normally weighed by a court in deciding whether to exclude a witness are: surprise to the opposing party; the prejudicial effect of the testimony; diligence in seeking discovery; timely objection; and good faith of the party calling the witness.

Despite the extensive discovery rules promulgated in Illinois, there are two areas of uncertainty regarding the court's power to impose sanctions. One of these unsettled questions is whether courts may impose sanctions for failure to comply with discovery procedures absent a prior court order. Although the plain language of Rule 219(c) permits the imposition of sanctions without a preliminary court order, some courts have held that preliminary motions must be filed and orders compelling discovery entered and violated before sanctions may be imposed.

164. See, e.g., Dept of Transp. v. Prombo, 63 Ill. App. 3d 407, 379 N.E.2d 953 (1978) (no error in striking testimony of appraiser who testified that he considered certain sales of commercial property which, although subject to discovery order requiring disclosure of comparable sales relative to appraisal, were not disclosed to condemnee); Mason v. Village of Bellwood, 37 Ill. App. 3d 543, 346 N.E.2d 175 (1976) (refusal to permit defendant, which failed to disclose statements taken from witnesses, to use witness, was not an abuse of discretion when defendant knew or should have known at time answers to interrogatories were filed and responses given that statements had been taken of witnesses); O'Brien v. Stefanik, 130 Ill. App. 2d 398, 264 N.E.2d 781 (1970) (refusal to permit testimony of witness was not an abuse of discretion where witness had not been named in response to defendant's interrogatories because of poor investigation); Dempski v. Dempski, 27 Ill. 2d 69, 187 N.E.2d 734 (1963) (refusal to permit three of defendants' witnesses to testify was not an abuse of discretion when their names had not been listed by defendants in answer to plaintiff's written interrogatory asking for names and addresses of persons having any information touching on defense).

165. See note 116 supra.


167. See note 99 supra.

168. This rule provides for sanctions where a party unreasonably refuses to comply with any order or any of the discovery provisions of Rules 201 through 218.

169. See, e.g., Gillespie v. Norfolk & W. Ry. Co. 103 Ill. App. 2d 449, 243 N.E.2d 27 (1968). Although the court did not hold that a complaint may be dismissed only after failure to obey a specific court order, the fact that the defendants had not obtained a court order for compliance with discovery prior to the dismissal was a significant factor in the appellate court's reversal of the dismissal against the plaintiff. Id. at 455-56, 243 N.E.2d at 31. The court noted that nearly all of the cases cited by the defendant where a complaint was dis-
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hold that it is not necessary to have a preliminary order sought, obtained and ignored by the offending party as a prerequisite to an action seeking sanctions.\textsuperscript{170} This position is not only supported by the language of Rule 219(c), but it also encourages conformity with the rules of discovery.\textsuperscript{171} To hold otherwise would permit an attorney to ignore requests for discovery and be immune from sanctions until an actual court order is issued.\textsuperscript{172}

Another area of uncertainty in the Illinois courts is the impact of Supreme Court Rule 201(k)\textsuperscript{173} on a court's authority to impose sanctions. Rule 201(k) provides that every motion concerning discovery must incorporate a statement that the parties have been unable to reach an accord after personal consultation and reasonable attempts to resolve differences.\textsuperscript{174} Accordingly, one commentator has stated that courts should not impose sanctions when the differences between the parties have been resolved prior to a hearing on the motion for sanctions.\textsuperscript{175} Pursuant to this view, Rule 201(k) requires an ongoing disagreement between the parties in order for the court to hear any motion regarding discovery, presumably including a motion for sanctions.


\textsuperscript{171} See notes 119-122 and accompanying text.

\textsuperscript{172} See Savitch v. Allman, 25 Ill. App. 3d 864, 323 N.E.2d 435 (1975). The court noted that "[i]f a specific order was required in all cases before sanction could be imposed, a dilatory attorney could simply delay as long as he wished with consequent inconvenience to the court and other litigants, until he is commanded by order to perform an act which is required by the rules." Id. at 869-70, 323 N.E.2d at 439. See also Ellington, supra note 62, at 4-5. Ellington's study revealed that judges are more likely to punish violations of prior court orders than abuses of the discovery rules alone. He states that the practice of sanctioning only after a prior court order is a "cumbersome business" since it requires a litigant to make two trips to the courthouse, one to secure an order and again to seek sanctions. Id.

\textsuperscript{173} ILL. REV. STAT. ch. 110A, § 201 reads in part:

(k) Reasonable Attempt to Resolve Differences Required. 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.

\textsuperscript{174} The Committee Comments to Rule 201(k) state that the rule is patterned after the practice in the United States District Courts for the Eastern and Northern Districts of Illinois. See N.D. ILL. GEN. RULE 12(d), supra note 94. Rule 201(k) is designed to curtail undue delay in the administration of justice and to discourage motions of a routine nature. ILL. REV. STAT. ch. 110A, § 201(k) Committee Comments. See also Federal Rule 26(f), supra note 79.

\textsuperscript{175} Dewey, Remedies for Noncompliance, ILLINOIS CIVIL DISCOVERY PRACTICE 11-28 (III. Inst. for Continuing Legal Educ. (1979)).
This issue was directly addressed in Sanchez v. Phillips. In Sanchez, the appellate court recognized the parties' duty to comply with the requirements of the statute. Yet the court held that plaintiff's failure to incorporate the statutory language of Rule 201(k) was harmless because the motion to hold the defendants in default was “far from routine.” The court’s opinion suggests that a failure to comply with the requirements of Rule 201(k) prior to a motion of a “routine nature” for a lesser sanction may constitute reversible error. The vague guidelines thus far provided by the courts make it difficult to determine the precise function of Rule 201(k) as a prerequisite to the imposition of sanctions.

**Suggested Change**

The Illinois Supreme Court Rules confer broad powers on the trial courts to impose sanctions. In fact, the Illinois Supreme Court has recently called upon the courts to unhesitatingly impose sanctions proportionate to the gravity of a discovery violation. Despite this broad grant of discretion, Illinois courts have exercised considerable restraint in imposing sanctions. This may be due, in part, to the mandate that sanctions may not be imposed as a form of punishment. Consequently, sanctions have thus far served only the remedial function of compensating an injured party or compelling specific performance by the dilatory party. The use of sanctions to deter resistance to discovery, as proposed by the United States Supreme Court in National Hockey League, therefore, seems impermissible in Illinois. Because the employment of sanctions to promote litigation efficiency through deterrence of would-be offenders may necessarily entail “punitive” sanctions, it is unlikely that the Illinois courts will adopt a tougher stance in imposing sanctions under Rule 219. In light of the growing concern that pretrial discovery has become too burdensome

177. Id. at 433, 361 N.E.2d at 39.
178. This interpretation of Rule 201(k) might lead to the anomalous result that failure to comply with the requirements of Rule 201(k) prior to moving for an extreme sanction such as default or dismissal would be harmless error while failure to do so before moving for a lesser sanction would be error. Such a result would seem to be contrary to the notion that “drastic” sanctions are to be employed only as a “last resort.” See note 131 supra.
179. See text accompanying notes 98-114 supra.
180. See note 118 supra.
181. See text accompanying notes 130-33 supra.
182. See note 115 supra.
183. See text accompanying notes 26-36 supra.
and expensive, it would be advisable for the Illinois courts to abandon the restriction on the use of sanctions for punitive purposes.

CONCLUSION

There appears to be a trend toward willing imposition of sanctions in the federal courts in accordance with the deterrence approach outlined in National Hockey League. Although there is some support for the more stringent application of sanctions in Illinois courts, the Illinois policy prohibiting use of sanctions as a penalty is likely to prevent complete endorsement of the deterrence model. There remains, however, a perceived need in both federal and Illinois courts for some course of action to cope with the problems of overdiscovery and resistance to discovery.

The adoption of Rule 201(k) in Illinois and Rule 26(f) and similar local rules in the federal courts may provide some relief from discovery misconduct. These rules may reduce the need for sanctions by preventing discovery problems from arising. It is clear, however, that a revision of the rules alone will not prevent discovery abuse. The effectiveness of the available provisions for enforcement of discovery is ultimately dependent upon proper utilization of these provisions. Furthermore, the burden of curtailting noncompliance with discovery and excessive discovery does not lie solely with the courts. Although judicial intervention is desirable, it is no panacea to pretrial discovery problems. Courts must be willing to implement sanctions, but attorneys must also recognize their role as officers of the courts by complying with discovery procedures and readily seeking judicial intervention or sanctions when warranted.

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184. One judge observed in response to the Ellington questionnaire that “[p]rior management is more salutary than sanctions after the fact, when the damage has already been done.” Ellington, supra note 62, at 120. Ellington states that “whether any system of after-the-fact sanctions can prevent discovery abuses efficiently and effectively (especially that of excessive discovery) warrants careful re-examination.” Id. at 2. “Strengthening sanctions is again to approach the virus with the wrong antidote. Sanctions should be available as auxiliary relief, not primary means of control.” Pollack, Discovery, Its Abuse and Correction, 80 F.R.D. 219, 226 (1978).

185. See Ellington, supra note 62, at 8. “Judges interviewed felt strongly that judicial involvement in the discovery phase of the case was very effective in deterring discovery abuses.” See also Cohn, supra note 19, at 295; Renfrew, supra note 18, at 267.