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# Notes

## DISCOVERY SANCTIONS UNDER THE FEDERAL RULES OF CIVIL PROCEDURE: A GOAL-ORIENTED MISSION FOR RULE 37

*While approaches to increase the efficiency of judicial administration touch upon many aspects of litigation, particular emphasis has been placed on a perceived inability of discovery sanctions to deal adequately with breakdowns in the discovery process. Historically, courts have assumed a posture of lenity in addressing sanctioning choices, but recently a trend has developed that advocates harsher penalties for disruption of discovery both as a means of removing the delay caused by such conduct and as a deterrent to similar conduct in the future. After outlining the role and purposes of discovery, the author examines the analytical approaches used by courts in applying discovery sanctions. He criticizes the Supreme Court-favored deterrence theory because it focuses primarily on future recalcitrant parties. Instead, he suggests a multitude of factors that courts should consider in determining the appropriate discovery sanction and concludes that such an approach would be more in keeping with the goals of the federal rules.*

### INTRODUCTION

THE CRITICAL REACTION to the discovery provisions of the Federal Rules of Civil Procedure has been a cyclic phenomenon. Upon their debut in 1938, the new discovery rules were cordially received as an important and prominent step forward.<sup>1</sup> The passage of time, however, led to a loss of favor among those who study the rules and eventually to calls for revision.<sup>2</sup> Ambiguities inherent in the wording of rule 37 were of particular concern to those attempting to achieve a more effective discovery procedure since that rule provides the sanctions for a litigant's failure to

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1. *E.g.*, Clark, *The Bar and the Recent Reform of Federal Procedure*, 25 A.B.A.J. 22, 23 (1939).

2. Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 COLUM. L. REV. 480 (1958) was the seminal article in the reform movement that culminated in the 1970 amendments. Also greatly influential was the COLUMBIA UNIVERSITY PROJECT FOR EFFECTIVE JUSTICE, FIELD SURVEY OF FEDERAL PRETRIAL DISCOVERY (1965), which was directed by Professor Rosenberg. "The input from the Columbia Survey allowed the Advisory Committee to make vital changes throughout the Rules in places where they suffered from ambiguity or less than efficient procedures in practice." *Federal Discovery Rules: Effects of the 1970 Amendments*, 8 COLUM. J.L. & SOC. PROB. 623, 644 (1972). One of the participants in the Columbia project was William Glaser, whose subsequent book on discovery, *PRETRIAL DISCOVERY AND THE ADVERSARIAL SYSTEM* (1968), is cited at various points throughout this Note. *See generally Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 990-91 (1961).

comply with all other discovery rules.<sup>3</sup> Reform was slow in coming, but twelve years after the amendment movement began in earnest, an ambitious series of revisions was promulgated and adopted.<sup>4</sup>

Since the adoption of those amendments in 1970, a similar pattern of criticism has emerged with regard to the new discovery provisions. The general applause<sup>5</sup> that greeted the amended rules has since been eclipsed by a growing call for further reform.<sup>6</sup> The new discovery rules are now viewed as ineffective.<sup>7</sup> In particular rule 37 has been criticized as a less than adequate sanctioning tool and as one of the fundamental weaknesses in the current scheme of discovery.<sup>8</sup>

Critical analyses of the discovery provisions have appeared in the literature and a series of amendments to the discovery rules have been proposed.<sup>9</sup> The courts have also begun to express more concern over the perceived failure of the discovery rules to function effectively.<sup>10</sup> As the pressure for reform mounts, another sub-

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3. Rosenberg, *supra* note 2, at 486, 489-92.

4. *Amendments to Rules of Civil Procedure for the United States District Courts*, 398 U.S. 977 (1970).

5. *E.g.*, *Federal Discovery Rules: Effects of the 1970 Amendments*, *supra* note 2, at 644. While generally laudatory of the discovery rules and their capacity for increasing pretrial efficiency, this survey did not project success for the revised rule 37.

6. The reform movement has been especially concerned with the reluctance of many courts to apply the rule 37 sanctions in an aggressive manner. A critical analysis of this trend is found in the text accompanying notes 147-72 *infra*.

7. For a recent expression by the Supreme Court of dissatisfaction with the discovery rules, see *Herbert v. Lando*, 99 S. Ct. 1635 (1979).

8. *E.g.*, *Federal Discovery Rules: Effects of the 1970 Amendments*, *supra* note 2, at 644. ("The single aspect of discovery that the 1970 amendments failed to improve relates to the effectiveness of the sanctions which may be imposed for violation of the discovery rules.")

9. For an in-depth analysis of discovery as it currently functions, some proposals for reform, and a discussion of other proposals, see Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295 (1978). Both the American Bar Association and the Advisory Committee on Civil Rules are considering measures to reform the discovery rules. The Bar Association's Board of Governors has approved the recommendations of its special panel investigating discovery reform and has submitted them to the Advisory Committee. The result of the Advisory Committee's work is the *Preliminary Draft of Proposed Amendments*, 77 F.R.D. 613 (1978). Further action upon this preliminary draft by both the Advisory Committee and the Standing Committee on Rules of Practice and Procedure of the Judicial Conference is pending and, if history is any indication, the proposals will undergo considerable changes before a final product is complete.

10. *E.g.*, *National Hockey League, Inc. v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, *rehearing denied*, 429 U.S. 874 (1976); *Cine Forty-Second St. Theatre Corp. v. Allied Artist Pictures Corp.*, No. 79-7121 (2d Cir. June 28, 1979); *Affanato v. Merrill Bros.*, 547 F.2d 138 (1st Cir. 1977); *Paine, Webber v. Inmobiliaria Melia de Puerto Rico, Inc.*, 543

stantial revision may well result. When and if that occurs, only time will tell whether the new discovery rules will experience the same boom-bust cycle of acceptance and rejection as did their predecessors.

Meanwhile, as efforts to amend continue, the current rule 37 stands as the primary judicial mechanism for expediting the discovery process once that process has been disrupted.<sup>11</sup> This Note analyzes rule 37 in an attempt to develop a pattern for its application that will increase efficiency in the discovery process. The exercise is not critical commentary or speculation upon any phase of the proposed amendments, but rather a pragmatic view of the rule as it is now formulated. Particular emphasis is given to the factors considered by the judiciary in its discretionary choice of an appropriate rule 37 sanction and the deterrence theory of sanctioning disruptions in the discovery process.

## I. THE HISTORICAL CONTEXT OF CIVIL DISCOVERY

Immediately upon the adoption of the Federal Rules of Civil Procedure,<sup>12</sup> it was clear that federal practice and procedure had undergone major surgery.<sup>13</sup> From that moment on, it became manifest that if the new rules were to function with the desired efficacy both bench and bar would be required to take steps to insure that the character of that surgery would be remedial rather than cosmetic. The new discovery rules in particular were innovative in terms of newly available methods<sup>14</sup> as well as new policy directions in both pleading and pretrial practice.<sup>15</sup> Gone was the

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F.2d 3 (2d Cir. 1976), *cert. denied*, 430 U.S. 907 (1977); *Emerick v. Fenick Indus., Inc.*, 539 F.2d 1379 (5th Cir. 1976).

11. *E.g.*, *Société Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 207 (1958). Courts have, at times, looked to other provisions of the Federal Rules for power to deal with disruptions in discovery. In particular, courts have focused on rule 41(b) (involuntary dismissal of an action) and even rule 45(f) (contempt as the result of failure to obey a subpoena). However, in the wake of *Société Internationale* courts have come to recognize that "Rule 37 was unmistakably designed to generate the principal enforcement power behind the array of discovery procedures and was doubtless intended to be the exclusive source of authority to punish evasion." Rosenberg, *supra* note 2, at 483.

12. *Rules of Procedure for the District Courts of the United States*, 308 U.S. 645 (1937).

13. C. WRIGHT, *FEDERAL COURTS* § 62 (3d ed. 1976); P. CONNOLLY, E. HOLLEMAN & M. KUHLMAN, *JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY 5* (1978).

14. *FED. R. CIV. P.* 30-31, 33-36.

15. *See* P. CONNOLLY, E. HOLLEMAN & M. KUHLMAN, *supra* note 13, at 5-10; C. WRIGHT, *supra* note 13, § 81; 8 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2001 (1970).

era of fact and issue pleading. Notice pleading emerged rejecting the notion that "pleading is a game of skill in which one misstep by counsel may be decisive to the outcome."<sup>16</sup> Gone too was the era when surprise was a legitimate trial tactic.<sup>17</sup> Instead, pretrial discovery devices were established to ensure full disclosure of facts and issues before trial in order to help obtain the "just, speedy, and inexpensive determination of every action."<sup>18</sup> The new discovery rules harbingered a transition from the procedural dark ages of common law pleading to a more enlightened era of pragmatic pretrial and trial practice,<sup>19</sup> and reflected the evolutionary refinements of existing procedures in law and equity systematically distilled into a functional package.<sup>20</sup> To understand the role of the discovery process it is necessary to examine its common law antecedents and the history of reform which produced the Federal Rules of Civil Procedure.<sup>21</sup>

Common law pleading may be regarded as having six functions: (1) to distill the controversy to one concise issue of fact or law; (2) to reduce the issues of fact through the elimination of immaterial and incidental details; (3) to give notice of the controversy to the parties and to the court; (4) to catalogue matter to be proved at trial and to apportion the burden of proof between the parties; (5) to provide a formal basis for judgment; and (6) to preserve a record of the litigation.<sup>22</sup> The primary function of the process was the reduction of the case to its ultimate issues, but the technicalities of common law pleading often enabled counsel to subvert this aim.<sup>23</sup> Pressure for reform mounted in the eighteenth and nineteenth centuries until the first waves of change surfaced

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16. *Conley v. Gibson*, 355 U.S. 41, 98 (1957).

17. C. WRIGHT, *supra* note 13, § 81; Holtzoff, *The Elimination of Surprise in Federal Practice*, 7 VAND. L. REV. 576 (1954). To some commentators, the attempts to eliminate or minimize surprise were not necessarily a laudable aim. *E.g.*, Hawkins, *Discovery and Rule 34: What's So Wrong About Surprise?*, 39 A.B.A.J. 1075 (1953). It has even been suggested that discovery has failed in its effort to eliminate the use of surprise and that it may, in fact, have had an opposite effect. W. GLASER, *PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM* 105-09 (1968).

18. FED. R. CIV. P. 1.

19. C. WRIGHT, *supra* note 13, § 81.

20. *See* P. CONNOLLY, E. HOLLEMAN & M. KUHLMAN, *supra* note 13, at 5-9; M. GREEN, *BASIC CIVIL PROCEDURE* 120-22 (1972); J. KOFFLER & A. REPPY, *COMMON LAW PLEADING* §§ 1-7 (1969); C. WRIGHT, *supra* note 13, §§ 61-62; C. WRIGHT & A. MILLER, *supra* note 15, § 2002.

21. J. KOFFLER & A. REPPY, *supra* note 20, § 3.

22. *Id.*

23. *Id.*

in both England and the United States.<sup>24</sup>

The first procedural reform to attain a lasting influence was The Code of Procedure of New York, or Field Code, of 1848.<sup>25</sup> In its basic provisions, the Field Code abolished the distinction between actions at law and suits in equity,<sup>26</sup> specifically delineated the matter that was to appear in the pleadings,<sup>27</sup> and broadened the number of available discovery devices.<sup>28</sup> In the century that followed twenty-eight states used the Field Code as a model for procedural reform,<sup>29</sup> but in many jurisdictions—including New York—the courts engaged in a gradual process of adulterating these innovations by reading into the code provisions policies of common law.<sup>30</sup>

While more than half the states were at least nodding in the direction of procedural reform, procedure in the United States District Courts remained entrenched in a quagmire of conflicting systems. Law and equity were compartmentalized on their respective "sides" of the court, and procedure was different for each. Discovery was in a primitive state, finding its clearest expression in the very limited role granted it in the Federal Equity Rules.<sup>31</sup>

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24. For a lucid history of this reform movement, see R. FIELD, B. KAPLAN & K. CLERMONT, *MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE* 356-62 (4th ed. 1978). It is interesting to note that in both England and the United States the greater impetus toward reform came from the public and not the legal profession. *Id.* at 356. See generally Sunderland, *The English Struggle for Procedural Reform*, 39 HARV. L. REV. 725 (1926).

25. 1848 N.Y. Laws ch. 379. For copious commentary on both the man and his code, see DAVID DUDLEY FIELD CENTENARY ESSAYS: CELEBRATING ONE HUNDRED YEARS OF LEGAL REFORM (A. Reppy ed. 1949).

26. R. FIELD, B. KAPLAN & K. CLERMONT, *supra* note 24, at 357.

27. *Id.* at 358.

28. *Id.* at 359. Other provisions mandated verification of most pleadings, limited the number of permissible pleadings, restricted the use of demurrers, revised the rules of joinder of causes of action, and liberalized rules concerning joinder of parties, amended pleadings, and variances between pleadings and proof. *Id.*

29. C. CLARK, *HANDBOOK OF THE LAW OF CODE PLEADING* § 8 (2d ed. 1947).

30. J. KOFFLER & A. REPPY, *supra* note 20, at § 7.

31. Rules of Practice for the Courts of Equity of the United States, 226 U.S. 627 (1912). The sole provision in the Equity Rules that dealt with discovery was rule 58 which allowed for a very restricted form of discovery practice. It read:

*Discovery-Interrogatories-Inspection and Production of Documents-Admission of Execution or Genuineness.*

The plaintiff at any time after filing the bill and not later than twenty-one days after the joinder of issue, and the defendant at any time after filing his answer and not later than twenty-one days after the joinder of issue, and either party at any time thereafter by leave of the court or judge, may file interrogatories in writing for the discovery by the opposite party or parties of facts and documents material to the support of defense of the cause, with a note at the foot thereof stating which of the interrogatories each of the parties is required to answer. But no party shall file more than one set of interrogatories to the same party without leave of the court or judge.

Under the Conformity Act,<sup>32</sup> the procedural rules of actions at law were derived from the procedural rules of the state in which the court sat, subject to a few federal statutes. The result was a host of divergent procedural systems that became a lawyer's nightmare.<sup>33</sup>

Unlike previous reforms, the struggle for a more manageable procedural scheme in the federal courts arose from the ranks of lawyers.<sup>34</sup> The first salvo came in 1911 when the American Bar Association adopted a resolution favoring rules of civil procedure

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If any party to the cause is a public or private corporation, any opposite party may apply to the court or judge for an order allowing him to file interrogatories to be answered by any officer of the corporation, and an order may be made accordingly for the examination of such officer as may appear to be proper upon such interrogatories as the court or judge shall think fit.

Copies shall be filed for the use of the interrogated party and shall be sent by the clerk to the respective solicitors of record, or to the last known address of the opposite party if there be no record solicitor.

Interrogatories shall be answered, and the answers filed in the clerk's office, within fifteen days after they have been served, unless the time be enlarged by the court or judge. Each interrogatory shall be answered separately and fully and the answers shall be in writing, under oath, and signed by the party or corporate officer interrogated. Within ten days after the service of interrogatories, objections to them, or any of them, may be presented to the court or judge, with proof of notice of the purpose so to do, and answers shall be deferred until the objections are determined, which shall be at as early a time as is practicable. In so far as the objections are sustained, answers shall not be required.

The court or judge, upon motion and reasonable notice, may make all such orders as may be appropriate to enforce answers to interrogatories or to effect the inspection or production of documents in the possession of either party and containing evidence material to the cause of action or defense of his adversary. Any party failing or refusing to comply with such an order shall be liable to attachment, and shall also be liable, if a plaintiff, to have his bill dismissed, and, if a defendant, to have his answer stricken out and be placed in the same situation as if he had failed to answer.

By a demand served ten days before the trial, either party may call on the other to admit in writing the execution or genuineness of any document, letter or other writing, saving all just exceptions; and if such admission be not made within five days after such service, the cost of proving the document, letter or writing shall be paid by the party refusing or neglecting to make such admission, unless at the trial the court shall find that the refusal or neglect was reasonable.

For commentary on equity rule 58 in the context of the 1938 Federal Rules of Civil Procedure, see Sunderland, *The New Federal Rules*, 45 W. VA. L.Q. 5, 19-22 (1938).

32. Ch. 255, § 5, 17 Stat. 196 (1872) (current version at 28 U.S.C. § 1652 (1976)).

33. R. FIELD, B. KAPLAN & K. CLERMONT, *supra* note 24, at 361, described the situation:

A lawyer practicing in the state courts and United States District Courts of a particular locality must thus have mastered three systems of procedure: the state procedure (which might be unmerged, and therefore constitute two procedures); the federal law-procedure (which was the state procedure in law actions but with a federal overlay); and the federal equity-procedure. A lawyer practicing in federal courts throughout the country (as a government lawyer, for example, might well do) must beware of the state procedures at law (as modified by the federal overlay), for each state in which he appeared.

34. C. WRIGHT, *supra* note 13, § 62, at 291.

prescribed by the Supreme Court.<sup>35</sup> Blocking the path of such reform was the Conformity Act<sup>36</sup> which, *inter alia*, repealed the Supreme Court's dormant rulemaking authority in actions at common law. Over the next twenty-three years, the profession battled a recalcitrant Congress<sup>37</sup> until the passage of the Enabling Act<sup>38</sup> cleared the path for Court-made procedural reform. That reform came when the Supreme Court adopted, with some modifications, the third draft propounded by its Advisory Committee.<sup>39</sup>

Among the myriad of changes in practice and procedure ushered in by the new federal rules, the discovery rules<sup>40</sup> assumed particular significance. They were premised on the belief that "prior to trial every party to a civil action is entitled to the disclosure of all relevant information in the possession of any person unless the information is privileged."<sup>41</sup> The discovery process became the primary means of accomplishing that which historically had been the function of the pleadings—that is, achieving "the fullest possible knowledge of the issues and facts before trial."<sup>42</sup> Thus, the discovery mechanism has three primary functions:

- (1) to narrow the issues, in order that at the trial it may be necessary to produce evidence only on a residue of matters that are found to be actually disputed and controverted.
- (2) to obtain evidence for use at the trial.
- (3) to secure information about the existence of evidence that may be used at trial . . . .<sup>43</sup>

The failure to produce information validly sought within the discovery process is an aberration which subverts the efforts to fulfill the objectives of that process. In order to eliminate the ill-effect of such aberrations—and the sidetracking that results from them—rule 37 provides the court with an array of sanctions that may be imposed on the transgressing party. But unless a pragmatic policy foundation supports the application of these sanctions, they will not facilitate the smooth operation of discovery.

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35. *Id.*

36. Ch. 255, § 5, 17 Stat. 196 (1872) (current version at 28 U.S.C. § 1652 (1976)).

37. C. WRIGHT, *supra* note 13, § 62, at 291.

38. Ch. 651, 48 Stat. 1064 (codified at 28 U.S.C. § 2072 (1976)).

39. *Rules of Procedure for the District Courts of the United States*, 308 U.S. 645 (1937). Following the dictates of the Enabling Act, the rules were then submitted to Congress and became law on September 16, 1938.

40. FED. R. CIV. P. 26-37.

41. C. WRIGHT, *supra* note 13, § 81, at 398.

42. *Hickman v. Taylor*, 329 U.S. 495, 500 (1947). As a consequence of the expanded role of discovery in civil practice, the pleadings assumed the subordinate role of a notice-giving function. See FED. R. CIV. P. 8.

43. 8 C. WRIGHT & A. MILLER, *supra* note 15, § 2001, at 15.



This is because the sanctioning process is jeopardized by its nebulous constitutional underpinnings<sup>44</sup> and by the discretion invested in the judiciary.<sup>45</sup> Notwithstanding these obstacles, constant vigilance toward the fundamental aim of the discovery process and the role of discovery within the larger scheme of the Federal Rules of Civil Procedure should provide standards for the application of these discretionary sanctions under the current rule. Because the sanctions are intended to remedy problems arising from discovery, other problems in pretrial and trial practice must assume a secondary position in the sanctioning process. Therefore, after an examination of rule 37 and the constitutional confines of the discovery sanctions, this Note will analyze policies and standards in the application of those sanctions in an attempt to discern a pattern in the exercise of discretion to achieve efficient sanctioning under the current wording of the rule.

## II. FEDERAL RULE OF CIVIL PROCEDURE 37

In its original formulation, rule 37 contained an enumeration of consequences that could befall a party for refusing to produce validly sought discovery information.<sup>46</sup> The rule as originally

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44. See text accompanying notes 62-75 *infra*.

45. See text accompanying notes 99-110 *infra*.

46. After a technical adjustment in 1948, FED. R. CIV. P. 37 provided:

*Refusal to Make Discovery: Consequences*

(a) *Refusal to Answer.* 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 reasonable notice to all persons affected thereby, he may apply to the court in the district where the deposition is taken for an order compelling an answer. Upon the refusal of a deponent to answer any interrogatory submitted under Rule 31 or upon the refusal of a party to answer any interrogatory submitted under Rule 33, the proponent of the question may on like notice make like application for such an order. If the motion is granted and the court finds that the refusal was without substantial justification the court shall require the refusing party or deponent and the party or attorney advising the refusal or either of them to pay to the examining party the amount of the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees. If the motion is denied and if the court finds that the motion was made without substantial justification, the court shall require the examining party or the attorney advising the motion or both of them to pay to the refusing party or witness the amount of the reasonable expenses incurred in opposing the motion, including reasonable attorney's fees.

(b) *Failure to Comply With Order.*

(1) *Contempt.* If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the court in the district in which the deposition is being taken, the refusal may be considered a contempt of that court.

(2) *Other Consequences.* If any party or an officer or managing agent of a party refuses to obey an order made under subdivision (a) of this rule requiring him to answer designated questions, or an order made under Rule 34 to produce any document or other thing for inspection, copying, or photographing or to per-

drafted, however, proved to be an inadequate means of effectuating the discovery devices.<sup>47</sup> As difficulties arose and problems in the administration of the discovery process snowballed, it became evident to the legal community that a restructuring of rule 37 (as well as the other discovery rules) was in order. As a result, rules 26 to 37 received an extensive facelift in 1970.<sup>48</sup>

In its revised form, rule 37<sup>49</sup> gained a posture designed not

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mit it to be done, or to permit entry upon land or other property, or an order made under Rule 35 requiring him to submit to a physical or mental examination. the court may make such orders in regard to the refusal as are just, and among others the following:

(i) An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party, 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;

(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony, or from introducing evidence of physical or mental condition;

(iii) 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;

(iv) In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for disobeying any of such orders except an order to submit to a physical or mental examination.

(c) *Expenses on Refusal To Admit.* If a party, after being served with a request under Rule 36 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 any such document or the truth of any such 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 such 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.

(d) *Failure of Party To Attend or Serve Answers.* If a party or an officer or managing agent of a party wilfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under Rule 33, after proper service of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party.

(e) *Failure To Respond to Letters Rogatory.* A subpoena may be issued as provided in Title 28 U.S.C. § 1783, under the circumstances and conditions therein stated.

(f) *Expenses Against United States.* Expenses and attorney's fees are not to be imposed upon the United States under this rule.

47. See W. GLASER, *supra* note 17, at 156; Rosenberg, *supra* note 2, at 486; *Developments in the Law—Discovery*, *supra* note 2, at 990-91.

48. *Amendments to Rules of Civil Procedure for the United States District Courts*, 398 U.S. 977 (1970).

49. FED. R. CIV. P. 37 currently provides:

*Failure To Make 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:

only to react to the changes made simultaneously in the discovery

(a) *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 Rule 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 the 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 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 the 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.

(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, 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

rules, but also to rectify administrative bottlenecks.<sup>50</sup> The first major alteration was made in the caption of rule 37 which was changed from "Refusal to Make Discovery: Consequences" to "Failure to Make Discovery: Sanctions." In fact, throughout the entire revised rule, "failure" was substituted for "refusal" and "sanctions" for "consequences." The former substitution is explained in the Advisory Committee Notes which accompany the 1970 amendments;<sup>51</sup> the latter is more or less left to the imagination.<sup>52</sup>

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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 an 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 has 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 Answer 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 Rules 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 interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among other 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.* A subpoena may be issued as provided in Title 28 U.S.C. § 1783, under the circumstances and conditions therein stated.

(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.

50. *Advisory Committee's Explanatory Statement Concerning Amendments of the Discovery Rules*, 48 F.R.D. 487, 538 (1970) [hereinafter cited as *Advisory Committee Notes*].

51. *Id.* at 538-39.

52. There is no express reference to this alteration in the Advisory Committee Notes. The word "sanction," however, is used throughout the seminal article of the reform move-

The failure-refusal substitution was addressed to a difference perceived by courts in the connotations of the two words, both of which appeared in the 1938 language.<sup>53</sup> Courts attached a measure of wilfulness to "refusal" and thus created a dichotomy in the application of the rule based on the state of mind of the transgressor. This bifurcated analysis of breakdowns in the discovery process persisted even after the Supreme Court declared that "refusal" as used in old rule 37(b)(2) was merely a failure to comply and that the state of mind of the party who failed to make discovery was relevant only with regard to the penalty, if any, to be assessed.<sup>54</sup> Thus, the word "refusal" was excised from rule 37 to dispel past confusion and to comport with the dictates of the Supreme Court.<sup>55</sup>

The replacement of the word "consequences" with "sanctions" was apparently an effort by the rulemakers to replace the passive connotations of a mere consequence with the more active and authoritative aura associated with a sanction. If such a shift in emphasis were intended, it would comport with the purpose of the revisions—to assert rule 37 as the primary weapon of courts to thwart recalcitrance within the discovery process.<sup>56</sup>

The 1970 revision of rule 37 went well beyond nuances, semantics, and emphasis. It represented a comprehensive effort by the rulemakers to energize court responses to noncompliance during discovery and to bolster provisions in the original rule that were perceived to have a dilatory effect upon the information-gathering procedures.<sup>57</sup> For example, the old rule allowed assessment of costs if the recusant party acted without substantial justification.<sup>58</sup> The new rule *requires* an assessment unless such a failure to comply can be substantially justified.<sup>59</sup> Thus, the burden of avoiding an assessment rests squarely on the party whose conduct led to the breakdown in discovery. Another manifesta-

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ment that lead to the 1970 amendments. Rosenberg, *supra* note 2. Similarly, *Société Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958), speaks in terms of sanctions.

53. *Advisory Committee Notes*, *supra* note 50, at 538-39.

54. *Société Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 208 (1958).

55. *Advisory Committee Notes*, *supra* note 50, at 539.

56. *Société Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 207 (1958); *Advisory Committee Notes*, *supra* note 50, at 539.

57. *Id.* at 538-39.

58. FED. R. CIV. P. 37(a), (c), 308 U.S. 645, 710 (1939).

59. *Société Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 208 (1958).

tion of the new rule's more aggressive attitude toward failure to make discovery is found in the consideration given the recusant party's state of mind. Rule 37 no longer permits consideration of whether the failure to comply was willful when the court is faced with the decision whether or not to impose a sanction.<sup>60</sup> Thus, the revised rule permits sanctions for even negligent failures and shifts the inquiry from subjective to objective considerations.<sup>61</sup> Nevertheless, the court's perception of the transgressing party's frame of mind remains a pertinent element in its selection of the appropriate sanction.

### III. THE CONSTITUTIONAL BOUNDS OF DISCOVERY SANCTIONS

Despite its broad provisions and purely discretionary character, rule 37 remains a limited tool because of restraints on its discovery sanctions imposed by the due process clause of the fifth amendment.<sup>62</sup> These due process limitations find their expression in three Supreme Court opinions, only one of which was decided after rule 37 was promulgated. In order to sketch the constitutional framework of the sanctioning process, each case is considered separately.

*Hovey v. Elliott*,<sup>63</sup> although it did not involve a discovery issue, stands as the Supreme Court's first in-depth analysis of the discretionary power of a court when faced with a party's refusal to obey a court order. In *Hovey*, the defendant disobeyed an order to deposit a sum of money with the court.<sup>64</sup> In response, the judge struck the defendant's answer and entered a decree *pro confesso* against him.<sup>65</sup> The decree was collaterally attacked on the theory that due process had been violated by the entry of the decree.<sup>66</sup> That argument reached a sympathetic Supreme Court which held that a complete denial of an opportunity for a trial on the merits was a constitutionally inappropriate response to a contempt of

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60. FED. R. CIV. P. 37(b)(2).

61. This shift in emphasis was indicated by the Supreme Court in *Société Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 208 (1958).

62. This is not to suggest that the selection of discovery sanctions is in any great measure constrained by the fifth amendment; indeed, the constitutional framework embraces a formidably flexible scheme.

63. 167 U.S. 409 (1897).

64. *Id.* at 411.

65. *Id.* at 411-12.

66. *Id.* at 413.

court.<sup>67</sup>

Twelve years later in *Hammond Packing Co. v. Arkansas*,<sup>68</sup> the Supreme Court substantially modified the rule set forth in *Hovey* and in so doing crafted the constitutional basis for the original formulation of rule 37.<sup>69</sup> In *Hammond Packing*, the defendant company refused to comply with a court order made pursuant to an Arkansas statute that required defendants in state antitrust actions to produce certain specified documents and witnesses.<sup>70</sup> In response, the Arkansas court struck the defendant's answer and entered a default judgment.<sup>71</sup> Affirming that judgment, the Supreme Court rejected the defendant's argument that the entry of a default judgment was contrary to the doctrine announced in *Hovey*. The Court noted that in *Hovey* due process was denied because the trial court had refused to hear the merits. In the present case, however, due process was preserved by the lower court's "presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense."<sup>72</sup>

Rule 37 was originally drafted to conform to the due process boundaries set forth in *Hovey* and *Hammond Packing*.<sup>73</sup> Unfortunately, neither the rule nor the Advisory Committee's comments provided a thoroughly satisfactory set of limits for the exercise of the discretionary sanctioning power accorded district courts under rule 37.<sup>74</sup> Further interpretation and elucidation of *Hovey* and *Hammond Packing*—and a construction of rule 37—were in order when the Supreme Court again addressed the issue in *Société Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*.<sup>75</sup>

In *Société Internationale*, the district court dismissed the action brought by the plaintiff, a Swiss corporation, for failure to comply

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67. *Id.* at 446.

68. 212 U.S. 322 (1909).

69. 8 C. WRIGHT & A. MILLER, *supra* note 15, § 2283.

70. 212 U.S. at 338-40.

71. *Id.* at 340.

72. *Id.* at 350-51.

73. 8 C. WRIGHT & A. MILLER, *supra* note 15, § 2283.

74. The Advisory Committee explained its position regarding the constitutional limits by stating that "[t]he provisions of this Rule . . . are in accord with *Hammond Packing v. Arkansas* . . . which distinguishes between the justifiable use of such measures as a means of compelling the production of evidence, and their unjustifiable use, as in *Hovey v. Elliot* . . . for the mere purpose of punishing for contempt." *Id.* § 2283, at 760 n.45 (quoting the comments of the Advisory Committee which drafted the 1938 Rules).

75. 357 U.S. 197 (1958).

with a court order to produce documents requested pursuant to rule 34.<sup>76</sup> In refusing to comply, the plaintiff advanced the justification that if it were to comply with the court order, its action would constitute a criminal violation of Swiss law.<sup>77</sup> The Supreme Court was thereby faced with a situation not unlike the refusal in *Hammond Packing*, but colored by an arguably meritorious justification.

In resolving the quandary presented by *Société Internationale*, the Court referred to *Hovey* and *Hammond Packing* as having delineated a constitutional limit on a court's capacity to deny a party the opportunity for trial on the merits even when the court seeks to advance its own processes.<sup>78</sup> Yet, the Court viewed those decisions as having left "open the question whether Fifth Amendment due process is violated by the striking of a complaint because of a plaintiff's inability, despite good-faith efforts, to comply with a pretrial production order."<sup>79</sup> The Court noted that the dismissal by the district court raised "substantial constitutional questions,"<sup>80</sup> but promptly sidestepped those questions by resolving the matter with an interpretation of rule 37.<sup>81</sup> The Court held that "Rule 37 should not be construed to authorize dismissal of this complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner."<sup>82</sup> Although the Court asserted that even a good faith failure to respond to a court order constituted noncompliance, it recognized that the party's good faith should be considered in determining the severity of the sanction to be imposed under rule 37.<sup>83</sup>

*Societe Internationale* provided an impetus for the movement to reform rule 37.<sup>84</sup> In revising the rule, however, the Advisory Committee chose not to incorporate the holding of the case into the new language but rather to restructure the rule to accommo-

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76. *Id.* at 198.

77. *Id.* at 200.

78. *Id.* at 209.

79. *Id.* at 210.

80. *Id.*

81. *Id.* at 212.

82. *Id.*

83. *Id.* at 208. 8 C. WRIGHT & A. MILLER, *supra* note 15, § 2283, at 762.

84. The reform suggestions first appeared in the literature in Rosenberg, *supra* note 2, which was published while *Société Internationale* was pending before the Supreme Court. *Société Internationale* highlighted the concerns expressed in Professor Rosenberg's article.



date *Société's* lesson. The revised rule eliminated all references to "willful" conduct and "refusal" to disclose, thus expanding the rule to include negligent and good faith failures to comply.<sup>85</sup> The element of willfulness became merely a factor for the Court to consider in choosing the appropriate sanction. But later events have indicated that there was no need to incorporate the holding of *Société Internationale* into the revised rule. Courts have paid heed to its doctrine by exercising restraint in imposing drastic sanctions in good faith contexts.<sup>86</sup>

Questions persist regarding the discretionary selection of a discovery sanction within the confines of *Hovey*, *Hammond Packing*, and *Société Internationale*. An examination of individual cases in which sanctions have been imposed is not particularly informative because the vagaries of the district courts are usually accompanied by Spartan analysis.<sup>87</sup> Neither constitutional limitations nor *Société Internationale* is discussed with much regularity. Indeed, a case that goes beyond pure discretion in analyzing the application of a sanction is the exception rather than the rule.<sup>88</sup>

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85. See text accompanying notes 49-56 *supra*.

86. For a discussion of the effect of good faith efforts toward compliance on court imposed sanctions, see Annot., 2 A.L.R. Fed. 811 (1969).

87. Typically, when assessing the propriety of a sanction, courts merely state the facts and then proclaim starkly that a particular sanction is just or unjust. In *United States v. One 1964 Cadillac Coupe DeVille*, 41 F.R.D. 352 (S.D.N.Y. 1966), the court described the facts and the motion under rule 37 and then, after noting that striking a pleading and dismissal are harsh sanctions, presented the following sentence as its analysis: "Under the circumstances I conclude that the laxity demonstrated by the government in this case does not constitute a 'wilfull' failure to serve answers which would warrant dismissal of the action." *Id.* at 354. Another example of sparse analysis is the cryptic opinion in *French v. Zalstem-Zalessky*, 1 F.R.D. 240 (S.D.N.Y. 1940). In that case, a defendant's pleadings were apparently stricken after an abortive effort to secure a protective order and the subsequent failure by the defendant to appear for an unspecified examination. Only one sentence in the opinion even remotely touched upon the selection of the sanction: "Parties over whom the court has acquired jurisdiction and who fail to respond to a notice for examination pursuant to Rule 26 et seq. may be penalized by striking out a pleading." *Id.* at 240. No other rationale for the sanction was stated. This paucity of analysis prompted one commentator to describe the case law on this subject as "plenteous but diffuse." Rosenberg, *supra* note 2, at 489. But see *Bon Air Hotel, Inc. v. Time, Inc.*, 376 F.2d 118 (5th Cir. 1967), *cert. denied*, 393 U.S. 859 (1968). Here the court analyzed the factual basis of the imposition of the sanction and gave great weight to the diligence and good faith of the recusant party's attempts to comply. *Id.* at 119-21. Moreover, the discretionary analysis recognized the due process limitations on sanctioning. *Id.* at 121.

88. For an excellent example of an effort by a court to relate its analysis to multifarious considerations of policy and purpose within a particular factual setting, see *Ketchikan Cold Storage Co. v. Alaska*, 491 P.2d 143 (Alaska 1971) (construing ALASKA CIV. R. 37(b), the substantial equivalent of FED. R. CIV. P. 37(b)). The *Ketchikan* court focused on the severity of the sanction (both in the abstract and in light of the particular facts), the relationship of the sanction to the critical issue of the case, the purpose of the rule, the good

This is not surprising since it is much simpler for a court to rely upon its discretion in imposing a sanction than to analyze its action according to standards of due process and the policy considerations underlying rule 37. While such a technique may be expeditious, it obscures the purposes of discovery. The court must be aware of the outer limits of its discretion and the need to delineate factors considered in the exercise of its sanctioning power under rule 37.

#### IV. THE ANATOMY OF THE SANCTIONING PROCESS

In order to place rule 37 in its proper perspective within the adjudicatory process and to visualize the various alternatives available to the parties and the court during the sanctioning process, a brief step-by-step outline will be helpful. An action is brought, pleadings are filed, and at some point thereafter, the parties, in preparation of their cases, initiate discovery.<sup>89</sup> For the purposes of this illustration, assume that the defendant has failed to supply an answer to an interrogatory served by the plaintiff pursuant to rule 33. If the defendant believes that the information sought by the plaintiff is beyond the scope of discovery as outlined in rule 26(b), he may seek a protective order.<sup>90</sup> The court will entertain arguments from the parties concerning the nature and scope of the information sought and rule on the propriety of the discovery desired in response to the motion for a protective order. If, however, the defendant does not avail himself of a protective order, and fails, for whatever reason, to respond to the interrogatory, the plaintiff may then seek an order compelling discovery pursuant to rule 37(a).<sup>91</sup> In considering a rule 37(a) motion, the

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faith of the recalcitrant party, and the availability of a lesser sanction to achieve an adequate judicial response to the breakdown in the discovery. *Id.* at 146-48.

89. The scope and bounds of the discovery process are found in FED. R. CIV. P. 26.

90. FED. R. CIV. P. 26(c).

91. Within the context of this illustration, the examination focuses on the sanctioning process under rule 37(b). The sanctions found in that subdivision cannot be imposed unless a court order issued under rule 37(a) has been violated. The sanctions called into play by rules 37(c) and (d) may be invoked even in the absence of a court order. Rule 37(c) "provides a sanction for a failure to make an admission requested under Rule 36 . . . . It makes the admission procedure . . . workable with a minimum of judicial intervention by imposing on a litigant who improperly refuses to admit a matter the cost of proving it." 8 C. WRIGHT & A. MILLER, *supra* note 15, § 2290, at 801. Rule 37(d) addresses "especially serious disregard of the obligations imposed . . . by the discovery rules even though [the conduct] has not violated any court order." *Id.* § 2291, at 807. It enables a court acting on motion to deal promptly with matters such as failure to appear for a deposition, failure to answer an interrogatory, or failure to serve written response to a request for inspection. Rule 37(d) is not resorted to absent flagrant failure to fulfill discovery obligations. *Id.*

court will address the propriety of the discovery sought<sup>92</sup> and will respond to the situation presented in accordance with the discretionary function and sanctions available under rule 37,<sup>93</sup> bearing in mind the limitations on the sanctioning process as a result of *Hovey*, *Hammond Packing*, and *Société Internationale*.<sup>94</sup>

It is at this point that the court's views, not only of the factual pattern presented to it but also of the discovery and adjudicatory processes, becomes determinative of the outcome of the proceedings to follow. Facing a breakdown in the discovery process, the court must act affirmatively to move the litigation from its immobile state.<sup>95</sup> The discovery procedures will either be returned to a course that will promote the "just, speedy, and inexpensive determination"<sup>96</sup> of the action, or will be hopelessly short-circuited.<sup>97</sup> The rule 37 sanctions are made available at the discretion of the court both to eliminate the obstruction that has arisen and to do justice to the party seeking the order, the non-compliant party, the court itself, and the adjudicatory system. In addressing such a situation in which a multiplicity of factors must be evaluated, the court is fortunate not to be bound by rigid and unyielding principles. Rather, "[t]he sanctions enumerated in the rule are not exclusive and arbitrary, but flexible, selective, and plural. The court may, within reason, use as many and as varied sanctions as are necessary to hold the scales of justice even."<sup>98</sup>

But just as flexibility is the hallmark of the discovery sanctions, discretion is the linchpin of that flexibility. The guidance

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92. The propriety of the discovery sought is not at issue at the time the sanctions under rule 37(b) are actually imposed; that issue is addressed only when the rule 37(a) motion is sought. *E.g.*, *Independent Prods. Corp. v. Loew's, Inc.*, 30 F.R.D. 377, 380 (S.D.N.Y. 1962); *Developments in the Law—Discovery*, *supra* note 2, at 986.

93. Rule 37 leaves the matter completely to the discretion of the court. 8 C. WRIGHT & A. MILLER, *supra* note 15, § 2284. This discretion is, of course, extremely personal because "regardless of the degree of emphasis within a provision, the discretionary decision must still be left in the hands of the judge." *Federal Discovery Rules: Effects of the 1970 Amendments*, *supra* note 2, at 643.

94. The rule commands those sanctions "as are just." FED. R. CIV. P. 37(b)(2), (d). Those three words—"as are just"—provide the margin for discretion which makes analysis within the sanctioning process so difficult. *See* text accompanying notes 99–110 *infra*.

95. In the present scheme, judicial control of the discovery process does not exist until a complete breakdown in the process causes a party to seek such control under rule 37. This lack of judicial control has been pinpointed as one of the most serious flaws in the current scheme of discovery. P. CONNOLLY, E. HOLLEMAN & M. KUHLMAN, *supra* note 13, at 21–26.

96. FED. R. CIV. P. 1.

97. *See* text accompanying notes 146–52 *infra*.

98. 8 C. WRIGHT & A. MILLER, *supra* note 15, § 2284.

provided by rule 37 is meager, requiring the court to impose such sanctions "as are just."<sup>99</sup> Under this rubric, the court's discretion is both a powerful tool and a safety valve when faced with a difficult decision. As a result, courts may be tempted to cloak a visceral reaction to a difficult issue in the guise of discretion rather than to tackle the demanding task of analyzing the subjective and objective qualities of the matter and the underlying purposes of discovery. This is not to suggest that the discretionary function is not central to a reasoned and pragmatic approach to applying discovery sanctions. On the contrary, it is a pivotal element *provided* that the purposes of discovery and the fundamental aim of the adjudicatory process remain the framework for the court's decision.

In attempting to sketch guidelines for the exercise of discretion in the choice of sanctions under rule 37, it is helpful to refer to Dean Pound's observations:

[T]he significant thing is not the fixed rule but the margin of discretion involved in the standard and its regard for the circumstances of the individual case. For three characteristics may be seen in legal standards: (1) they all involve a certain moral judgment upon conduct. It is to be "fair", or "conscientious", or "reasonable", or "prudent", or "diligent". (2) they do not call for exact legal knowledge exactly applied, but for common sense about common things or trained intuition about things outside everyone's experience. (3) they are not formulated absolutely or given an exact content . . . but are relative to times and places and circumstances and are to be applied with reference to the facts of the case in hand. They recognize that within the bounds fixed each case is to a certain extent unique.<sup>100</sup>

With regard to discovery sanctions, a sense of policies and purposes serves as the bounds for the "margin of discretion": discretion must be oriented to the needs of the parties and the court, and the fundamental aims of the discovery process.

It is both impossible to formulate a body of concrete rules concerning the imposition of discovery sanctions and unwise to do so

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99. FED. R. CIV. P. 37(b)(2).

100. R. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 57-58 (1974). Dean Pound's philosophies on judicial administration are noted in a recent article on efficiency in discovery. Becker, *Modern Discovery: Promoting Efficient Use and Preventing Abuse of Discovery in the Roscoe Pound Tradition*, 78 F.R.D. 267 (1978). Judge Becker confines his remarks to a critical analysis of a proposed change in rule 26. He criticizes proposals designed to limit the control of litigation by the trial judge in discovery matters and to return to the specificity of issue pleading, calling them "reactionary proposals that are contrary to the clear and explicit reachings of Dean Pound." *Id.* at 267.

because such standards would force unique factual situations into generalities devoid of the equitable considerations central to the discretionary function.<sup>101</sup> Nevertheless, some observations may be made concerning the imposition of sanctions under rule 37 based on court decisions and practice: (1) if the failure to respond to a request for discovery is the result of inability rather than willful refusal, bad faith, or fault, the less severe sanctions are invoked;<sup>102</sup> (2) drastic sanctions are generally judiciously employed and saved only for the most flagrant abuses;<sup>103</sup> (3) conditional orders are often employed in lieu of final sanctions as a prod for balking parties;<sup>104</sup> (4) courts may refrain from imposing any sanction where it is deemed inappropriate;<sup>105</sup> (5) the imposition of sanctions is often tempered with leniency.<sup>106</sup>

It has been argued that one of the primary shortcomings of the discovery process is that the courts have been far too lenient in applying sanctions.<sup>107</sup> Historically, it appears that judges were hesitant to impose the rule 37 sanctions.<sup>108</sup> This attitude has been ascribed to a concern for the disposition of cases on the merits and thus is completely in accord with the purposes of the discovery process.<sup>109</sup> Nevertheless, some courts, including the Supreme Court, have recently drifted from this pattern of lenity and appear to be more intent on punishing transgressors than on fashioning remedial orders to encourage compliance with discovery orders.<sup>110</sup>

The Supreme Court's more punitive approach to sanctioning is

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101. See text accompanying note 100 *supra*.

102. *Société Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958).

103. *E.g.*, *Independent Prod. Corp. v. Loew's, Inc.*, 30 F.R.D. 377 (S.D.N.Y. 1962).

104. *E.g.*, *Hendricks v. Alcoa S.S. Co.*, 32 F.R.D. 169 (E.D. Pa. 1962).

105. *E.g.*, *Campbell v. Johnson*, 101 F. Supp. 705 (S.D.N.Y. 1951).

106. *E.g.*, *Gill v. Stolow*, 240 F.2d 669 (2d Cir. 1957). (The opinion was written by Judge Clark, the draftsman of the original Federal Rules of Civil Procedure).

107. *National Hockey League, Inc. v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, *rehearing denied*, 429 U.S. 874 (1976); Rosenberg, *supra* note 2; *Developments in the Law—Discovery*, 74 HARV. L. REV. 940 (1961); Note, *Recent Innovations to Pretrial Discovery Sanctions: Rule 37 Reinterpreted*, 1959 DUKE L.J. 278; Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions*, 91 HARV. L. REV. 1033 (1978).

108. Pike & Willis, *Federal Discovery in Operation*, 7 U. CHI. L. REV. 297, 327 (1940) ("The courts, exhibiting a generous attitude toward the recusant party, have deemed it better to withhold the thunderbolt on condition of future compliance than to foreclose determination of the matter on its merits.").

109. *Id.*; W. GLASER, *supra* note 17, at 154-56.

110. *National Hockey League, Inc. v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976); *Affanato v. Merrill Bros.*, 547 F.2d 138 (1st Cir. 1977); *Paine, Webber v. Immobiliara Melia de Puerto Rico, Inc.*, 543 F.2d 3 (2d Cir. 1976), *cert. denied*, 430 U.S. 907 (1977); *Emerick v. Fenick Indus., Inc.*, 539 F.2d 1379 (5th Cir. 1976).

reflected in *National Hockey League, Inc. v. Metropolitan Hockey Club, Inc.*<sup>111</sup> In that case, the Court held that the district court had not abused its discretion in applying the sanction of dismissal because of the plaintiffs' "flagrant bad faith" and their counsel's 'callous disregard of their responsibilities.'<sup>112</sup> The Court explained that the issue in determining whether such a dismissal should be reversed is not whether, as an original matter, the appellate court would have decided the case differently but whether the lower court had abused its discretion.<sup>113</sup>

*National Hockey League* is a pivotal case in the development of the policy considerations underlying the selection of discovery sanctions. It signifies a subordination of lenity in the imposition of sanctions in favor of the theory that noncompliance can be deterred through the imposition of harsh sanctions.<sup>114</sup> Thus, the next step in this analysis of rule 37 and its application is this conflict between the traditional and more lenient approach to the imposition of discovery sanctions and the emerging emphasis on deterrence. This investigation requires a consideration of policy and practice in order to determine which philosophy better serves the objectives of the discovery process and the Federal Rules of Civil Procedure.

## V. A PRAGMATIC APPROACH TO DISCOVERY SANCTIONS

The failure of a party to respond to discovery requests disrupts and delays a lawsuit.<sup>115</sup> It is the elimination of this disruption that prompts the rule 37 remedy.<sup>116</sup> Rule 37 offers a wide array of remedial devices,<sup>117</sup> but only minimal guidance regarding the exercise of discretion in the selection of the most appropriate rem-

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111. 427 U.S. 639, *rehearing denied*, 429 U.S. 874 (1976). See text accompanying notes 153-59 *infra*.

112. *Id.* at 643.

113. *Id.* at 642.

114. It should perhaps be noted that too much emphasis can be placed upon this lenity-deterrence distinction. After all, both terms refer to nothing more than the attitude held by the court in approaching a sanctioning decision. The court has many factors, interests, and policies to weigh in making such an analysis and the attitude—be it lenient or harsh—must find its place within the more crucial factors considered by the court.

115. It must be remembered that the imposition of a discovery sanction is based on a construction of the applicable section of rule 37, a rule which "shall be construed to secure the just, speedy, and inexpensive determination of every action." FED. R. CIV. P. 1.

116. A remedy is simply the "means employed to enforce a right or redress an injury . . . ." BLACK'S LAW DICTIONARY 1457 (rev. 4th ed. 1968).

117. The recourses available to the court were very early recognized as a "truly amazing array of sanctions." Pike & Willis, *supra* note 108, at 326.

edy. Some guidance may be gleaned from the consideration that the essence of effective remedial action is the coordination of the remedy selected with the right being sought.<sup>118</sup> When applying rule 37 sanctions, the court must be mindful that "the remedy is merely the means of carrying into effect a substantive principle or policy" and that "the remedy should be selected and measured to match that policy."<sup>119</sup>

Putting aside for the moment whether a court should subscribe to a theory of lenity or a theory of deterrence in applying sanctions under rule 37,<sup>120</sup> it would appear that the inadequacies of the discovery sanctions stem from an avoidance of policy-oriented analysis in the selection of the appropriate remedial response.<sup>121</sup> Cognizance of the inter-relationship between right and remedy supplies the firmest foundation for determining the appropriate sanction. Sensitivity to this congruence between right and remedy requires the perception that rule 37 sanctions vary in the severity of their impact on the recusant party. Thus, the nature and effect of each sanction will be individually discussed.

The sanction of taking certain facts as established<sup>122</sup> may permit resolution of the dispute on the merits provided that the facts so established relate to issues subordinate to the ultimate resolution of the controversy. However, if the facts withheld by a party and later established by the court relate to a determinative issue, then the establishment sanction may be little more than a masquerade for dismissal with prejudice.<sup>123</sup> Certainly there are instances in which fairness to the moving party and the administration of justice dictate that the recusant party be precluded from presenting his version of the merits. Yet the more appropriate response is to dismiss with prejudice rather than to manipulate the provisions of the rule so that specific factual situations transform one sanction into another. The same considerations and possible results apply to the sanction of precluding a

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118. D. DOBBS, LAW OF REMEDIES § 1.2 (1973).

119. *Id.*

120. See text accompanying notes 152-67 *infra*.

121. See note 87 *supra*.

122. FED. R. CIV. P. 37(b)(2)(A).

123. See, e.g., *McMullen v. Travelers Ins. Co.*, 278 F.2d 834 (9th Cir.), *cert. denied*, 364 U.S. 867 (1960), where the court stated: "[W]e can find no abuse of discretion, even though the court may have done in two steps what could have been done in one." *Id.* at 835. Nevertheless, rules 37(b)(2)(A) and (b)(2)(c) provide for two separate remedies. The construction of the rule logically requires that each sanction have its own role.

claim or defense by barring relevant evidence.<sup>124</sup>

The striking of a pleading,<sup>125</sup> dismissal of a cause without prejudice,<sup>126</sup> and a stay of proceedings<sup>127</sup> all enable the processes of discovery and litigation to begin again. Such sanctions, as a response to relatively minor disruptions allow the recusant party to reconsider its position yet still have an opportunity to obtain a resolution on the merits.<sup>128</sup> Dismissal with prejudice<sup>129</sup> and the entry of a default judgment<sup>130</sup> are the most drastic sanctions found in rule 37 because both result in the resolution of the dispute without reference to the merits. The use of these sanctions represents an admission by the court that the adjudicatory process has failed its goal of a "just, speedy, and inexpensive determination"<sup>131</sup> of the action. Therefore, these drastic penalties should be reserved for the most egregious and unremediable disruptions of the discovery mechanism.<sup>132</sup>

The assessment of costs and expenses<sup>133</sup> against the noncompliant party represents both prod and punishment. A threat of being charged for a delay, even if the amount is not great, still represents an unnecessary expenditure. Such an assessment after belated compliance serves as a reminder that even a relatively minor disruption may result in costs that need not be incurred. However, the sanction should not be out of proportion to the offense; therefore, costs, including attorneys' fees, should be dictated

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124. FED. R. CIV. P. 37(b)(2)(B).

125. FED. R. CIV. P. 37(b)(2)(C).

126. *Id.*

127. *Id.*

128. *E.g.*, *General Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1209 (1973), *cert. denied*, 414 U.S. 1162 (1974) (struck pleading); *Austin Theatre, Inc. v. Warner Bros. Pictures, Inc.*, 22 F.R.D. 302 (S.D.N.Y. 1958) (stay of proceedings). A stay has a further encouraging effect upon a recalcitrant plaintiff because such an order is not immediately appealable. 28 U.S.C. § 1291 (1976). Of course, if the recusant party were a defendant stalling for time, a stay would be an inappropriate sanction.

129. FED. R. CIV. P. 37(b)(2)(C).

130. *Id.*

131. FED. R. CIV. P. 1.

132. Dismissal with prejudice seems to be the sanction most often imposed on plaintiffs who obstruct the orderly progression of the suit which they had instituted. *E.g.*, *Interstate Cigar Co. v. Consolidated Cigar Co.*, 317 F.2d 744 (2d Cir. 1963). There may also be constitutional limits upon the use of such sanctions. See notes 62-75 *supra* and accompanying text. FED. R. CIV. P. 37(b)(2)(D) permits an additional sanction: "treating as a contempt of court the failure to obey any order except an order to submit to a physical or mental examination." This sanction, while not surfacing with any degree of regularity, does provide the court a further tool for compelling compliance mandated by the rule 37(a) order.

133. FED. R. CIV. P. 37(b)(2)(E).



by notions of fairness. The provision that the recusant party's attorney may be personally assessed these costs and expenses<sup>134</sup> lends depth to a court's ability to deal with some forms of dilatory conduct. After all, decisions concerning responses to discovery requests are generally made by the lawyer. This sanction may more effectively dissuade counsel from sidestepping the processes of the court.<sup>135</sup> It further serves to allay the fears of those who deem it unfair that a party may be punished for the actions of his counsel. Unfortunately, the sanction is rarely imposed.<sup>136</sup>

The so-called creative sanctions of rule 37—those orders “as are just”<sup>137</sup>—are seldom imposed. When used they generally take the form of conditional orders threatening a drastic sanction should the noncompliance continue.<sup>138</sup> The remedial value of conditional orders is difficult to gauge. The order may give the recalcitrant party time to re-analyze his failure to respond and possibly to conclude that compliance is his best option, or it may merely serve the recusant party's desire for further delay. Hence, in evaluating the propriety of a conditional order, the court must be extremely sensitive to the motivations of the noncompliant party.<sup>139</sup>

To this juncture, various components which serve as analytical factors in a court's approach to the sanctioning process have been discussed: the fundamental aid of the adjudicatory process,<sup>140</sup> the purposes of discovery,<sup>141</sup> the policy underlying procedure in general and discovery in particular,<sup>142</sup> discretion,<sup>143</sup> remedial congruence,<sup>144</sup> and the possible effects of the individual sanctions.<sup>145</sup> One other indispensable factor in the court's equation must be considered—the interests of the actors in the courtroom. The

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134. *Id.*

135. Such a concern is expressed in analyzing the leniency in assessing sanctions in Brazil, *supra* note 9, at 1343.

136. W. GLASER, *supra* note 17, at 155.

137. FED. R. CIV. P. 37(b)(2). The list of sanctions under rule 37(b)(2) is not meant to be exhaustive because the rule states that the order listed may be made “among others.”

138. Rosenberg, *supra* note 2, at 495. See 8 C. WRIGHT & A. MILLER, *supra* note 15, § 2284, at 768–71.

139. Motivational analysis should not be restricted to considerations involving conditional orders. The perceived motive of the delaying party is a touchstone in the court's equitable use of its discretionary remedial authority. See text accompanying note 83 *supra*.

140. See text accompanying note 18 *supra*.

141. See text accompanying notes 41–43 *supra*.

142. See text accompanying notes 39–43 *supra*.

143. See text accompanying notes 99–101 *supra*.

144. See text accompanying notes 115–21 *supra*.

145. See text accompanying notes 122–39 *supra*.

court must balance the interests of the moving party, the interests of the recusant party, and its own interests in the administration of justice. The interests of the moving party include the most favorable resolution of the claim made by or against him, and the optimal exploitation of the procedural devices available to him. The rights of the recusant party are the same as those of the movant, plus the right to an examination of the factors that prompted his noncompliance. The court's interests focus upon the meritorious resolution of the dispute before it, the protection of the rights and interests of the parties before it, and the administration of the judicial system to afford its maximum adaptability to the needs of all who seek to use it.

This balance of interests must be accomplished within the contours of the sanctioning process previously discussed and within the factual context of each case. The recognition of all these considerations, particularly the fundamental aim of the Rules of Civil Procedure—the “just, speedy, and inexpensive determination of every action”<sup>146</sup>—mandates that in selecting the appropriate sanction the emphasis be on an immediate and effective means of removing the obstacle, unburdened by considerations with which the discovery process is not concerned. A corollary to this is the realization that in imposing a sanction, purely punitive action, based on a policy of deterrence, must assume a secondary role to the primary thrust of employing sanctions to fulfill the mission of discovery within the adjudicatory process. If, within the confines of the interests of all involved and the interests of the processes at work, lenity is a necessary component of fairness, then the notions of deterrence and punishment must be cast in a subordinate role. But, in instances of flagrant abuse of the discovery mechanism, the administration of justice and the vindication of the discovery process may require that lenity give way to harsher sanctions.

The deterrence theory, by its very nature, rejects lenity in the judicial application of discovery sanctions. Deterrence, if accepted as the policy guide in the application of discovery sanctions, requires harsher action in response to noncompliance both to remedy the infraction in the present case and, more importantly, to discourage similar conduct in the future.<sup>147</sup> There are, however, fundamental weaknesses in such an approach. The stiffer and swifter penalties resulting from the deterrence theory,

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146. FED. R. CIV. P. 1.

147. Note, *supra* note 107.

while arguably discouraging noncompliance, do not actively encourage the parties to cooperate within the structure of party initiative "to obtain the fullest possible knowledge of the issues and facts before trial."<sup>148</sup> Within an adversarial framework, the threat of harsh recourse may engender compliance without full regard to the relationship of the information sought to the matter at hand.<sup>149</sup> A resultant overcaution on the part of counsel might lead to a clouding of issues through disclosure of irrelevant facts delivered out of fear of potential sanctions. The discovering party, aware of the more aggressive attitude of the court under the deterrence theory, could perceive an offensive weapon within its grasp and press for more fringe information should the court be convinced of the data's relevance.<sup>150</sup> Logjams caused by delays due to noncompliance would not be eliminated. The dilatory effects of failure to make discovery would be translated into time spent arguing and deciding motions for protective orders<sup>151</sup> and additional time spent gathering the greater bulk of information sought.

The weakness of the deterrence theory is, however, more fundamental than is reflected by speculative analysis of its possible effects should it gain acceptance. On a priority scale, the deterrence theory exalts discouragement of future hypothetical conduct over the policy of discovery in a case at bar. Under the deterrence theory, the severity of the sanction becomes paramount to achieving the goals of the sanctioning process. In so doing, the theory runs roughshod over the concept of remedial congruence<sup>152</sup> by subordinating the larger policy considerations of the sanctions to the hope that future failures to make discovery will be discouraged.

Nevertheless, the deterrence theory has found support in the Supreme Court of the United States. In overturning a Third Circuit decision to reinstate a dismissed claim, the Court in *National*

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148. *Hickman v. Taylor*, 329 U.S. 495, 501 (1947).

149. For an exhaustive analysis of the adversarial context of discovery, see W. GLASER, *supra* note 17, at 4-14 and Brazil, *supra* note 9, at 1303-05, 1311-15.

150. Most information is considered relevant for purposes of discovery. "[D]iscovery at the pretrial stage is not fettered with the rules as to admissibility that apply at a trial, and the utmost freedom is here allowed . . ." C. WRIGHT, *supra* note 13, § 81, at 399. The scope of permissible discovery is, therefore, expansive. See 8 C. WRIGHT & A. MILLER, *supra* note 15, § 2007.

151. FED. R. CIV. P. 26(c).

152. See text accompanying notes 118-19 *supra*.

*Hockey League, Inc. v. Metropolitan Hockey Club, Inc.*<sup>153</sup> indicated its disapproval of the lenity demonstrated by the court of appeals. *National Hockey League* involved an antitrust action brought against the N.H.L. by teams making up the World Hockey Association.<sup>154</sup> After a series of consent decrees, only Metropolitan remained a plaintiff in the action.<sup>155</sup> Interrogatories submitted by the N.H.L. remained substantially unanswered for seventeen months, and despite some justifications advanced by Metropolitan, the district court dismissed the action.<sup>156</sup> The Third Circuit reversed, concluding that dismissal was inappropriate because, *inter alia*, the noncompliance was not willful.<sup>157</sup>

The Supreme Court granted certiorari and reversed without hearing arguments in a single per curiam opinion that offered meager analysis. The Court stated that lenity is to be a nondeterminative factor when assessing the appropriate rule 37 sanction:

There is a natural tendency on the part of reviewing courts, properly employing the benefit of hindsight, to be heavily influenced by the severity of outright dismissal as a sanction for failure to comply . . . . It is quite reasonable to conclude that a party who has been subjected to such an order will feel duly chastened, so that even though he succeeds in having the order reversed on appeal, he will nonetheless comply promptly with future discovery orders . . . .<sup>158</sup>

The Court went on to endorse a vigorous approach to the deterrence theory:

But here, as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.<sup>159</sup>

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153. 427 U.S. 639, *rehearing denied*, 429 U.S. 847 (1975).

154. *In re Professional Hockey Antitrust Litigation*, 63 F.R.D. 641, 643 (E.D. Pa. 1974).

155. *Id.* at 646.

156. *Id.* at 642. Among the justifications put forth by Metropolitan, as outlined in the Third Circuit's opinion, were that the lawyers for Metropolitan were unable to gain access to files because accountants and a former lawyer for Metropolitan had invoked liens on them, that there were too many interrogatories to be answered in the time allotted, that the lawyers were confused about when certain answers were due, that a due date had inadvertently been omitted from a calendar, and that they had erroneously juxtaposed two other important dates. *In re Professional Hockey Antitrust Litigation*, 531 F.2d 1188, 1190-91 (3d Cir. 1976).

157. 531 F.2d at 1193.

158. 427 U.S. 639, 642-43 (1976).

159. *Id.* at 643. This statement of support for the deterrence theory had been followed

As previously noted, this method of applying the deterrence theory restricts appellate review to the inquiry of whether the lower court abused its discretion and not whether, as an original matter, the appellate court would have done otherwise.<sup>160</sup> Moreover, the Supreme Court's decision to focus on future recusant parties as well as on the case at hand directly conflicts with the previously discussed multitude of considerations that should be weighed in approaching a sanctioning order. It also flies in the face of Dean Pound's admonition that discretion is tied to the case at bar.<sup>161</sup>

But even if the deterrence theory is tempered by the application of a "least restrictive alternative" approach<sup>162</sup> or by a closer scrutiny of the record and the district court's exercise of discretion when a drastic sanction has been imposed,<sup>163</sup> the theory is still flawed by several realities of district court proceedings. Foremost among those realities is that the discovery sanctions never have been<sup>164</sup> and are not now often sought.<sup>165</sup> When the Court states that the imposition of powerful sanctions must be done with an eye to the present case and in anticipation of similar transgressions in the future, it is implicitly assuming that such abuse has reached sufficient proportions in civil trial practice to merit such measures. A situation in which only eighteen percent of the supposedly aggrieved parties feel a need to resort to a court sanction to which they are entitled<sup>166</sup> does not appear to be one in which injury abounds and party initiative is blunted at every turn.<sup>167</sup>

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by a number of lower federal courts. *E.g.*, *Affanato v. Merrill Bros.*, 547 F.2d 138, 140 (1st Cir. 1977); *Paine Webber v. Inmobiliaria Melia de Puerto Rico, Inc.*, 543 F.2d 3, 6 (2d Cir. 1976), *cert. denied*, 430 U.S. 907 (1977); *Emerick v. Fenick Indus., Inc.*, 539 F.2d 1379, 1381 (5th Cir. 1976).

160. 427 U.S. at 642.

161. R. POUND, *supra* note 100, at 57-58.

162. Note, *Standards for Imposition of Discovery Sanctions*, 27 ME. L. REV. 247 (1975). The author suggests that the imposition of a sanction turns on a means-ends relationship, and draws an analogy to the invalidation of regulatory legislation "where it infringes more broadly than is necessary to accomplish an otherwise legitimate purpose." *Id.* at 265. Thus, if a sanction "infringes more broadly than is necessary," it, too, should be invalidated.

163. *E.g.*, *Wilson v. Volkswagen of Am., Inc.*, 561 F.2d 494 (4th Cir. 1977).

164. A 1968 study revealed that of a group of lawyers who felt that their adversaries had unduly interfered with their discovery efforts only slightly over one-third sought any form of judicial relief. W. GLASER, *supra* note 17, at 34-35.

165. P. CONNOLLY, E. HOLLEMAN & M. KUHLMAN, *supra* note 13, at 18-21.

166. *Id.* at 19. The figure refers to interrogatories left unanswered.

167. This failure to seek enforcement of rights by the discovering party reflects badly on the concern over future noncompliant parties envisioned by the Supreme Court in *National Hockey League*. See text accompanying note 159 *supra*.

In order to evaluate the effect of deterrence on the discovery process, it may be helpful to consider deterrence in another context. In criminal law, deterrence as a theory of punishment is conceived to rely not on the severity of the punishment inflicted—as stated by the Court in *National Hockey League*<sup>168</sup>—but rather on the swiftness and sureness of the sanction.<sup>169</sup> Similarly, the swiftness and sureness of the sanction is also recognized as a pinion of the efficiency of the discovery sanctions.<sup>170</sup> However, when the sanctioning process is invoked in only eighteen percent of the instances of delay or failure to answer an interrogatory,<sup>171</sup> no sanction, regardless of its severity, can be labeled “swift and sure.” Thus, the incremental deterrent value of a more severe sanction would appear to be negligible and clearly outweighed by its aforementioned drawbacks.<sup>172</sup>

The real problem of breakdowns in the discovery process is not limited to the fact that the rule 37 sanctions have been applied in a questionable manner. The sanctioning process has also suffered because courts have neither heeded the totality of factors that weigh in the balance nor taken a sufficiently active role in the control and operation of the discovery process.<sup>173</sup> Since the advent of the Federal Rules of Civil Procedure and their consolidation of federal practice in law and equity, there has been a gradual and continual relaxation of judicial control over the discovery process.<sup>174</sup> Simultaneously, however, the function and importance of the process has expanded. Inasmuch as the orderly function of the process has been left almost exclusively to lawyers representing opposing litigants, much of the delay and disruption

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168. 427 U.S. at 643 (“[T]he most severe in the spectrum of sanctions provided . . . must be available . . . to deter those who might be tempted to such conduct in the absence of such a deterrent”).

169. [C]ertainty, considered by itself, has a moderate deterrent effect for all crimes, while severity acting alone is not associated with lower rates of crime. When certainty and severity are combined . . . the impact of severity is filtered through the certainty value. This means that increasing severity in a condition of low certainty will have little effect on crime rates.

Antunes & Hunt, *The Deterrence Impact of Criminal Sanctions: Some Implications for Criminal Justice Policy*, 51 J. URB. L. 145, 158 (1973). For evidence correlating effective imposition of penalties with deterrence, see F. ZIMRING & G. HAWKINS, *DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL* 158-72 (1973).

170. W. GLASER, *supra* note 17, at 154.

171. P. CONNOLLY, E. HOLLEMAN & M. KUHLMAN, *supra* note 13, at 19.

172. See text accompanying note 161 *supra*.

173. See generally P. CONNOLLY, E. HOLLEMAN & M. KUHLMAN, *supra* note 13, at 77-84.

174. *Id.* at 5-10.

may well be attributed to the diametrically opposed vantage points of opposing counsel.<sup>175</sup>

As a means of injecting a healthy dose of arm's length impartiality into the control of discovery, a recent analysis suggests initiative on the part of district courts to avail themselves of rule 83 to bolster the rule 37 sanctions.<sup>176</sup> Rule 83 reads in pertinent part:

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.

Bearing in mind the flexibility of rules 37 and 83, the suggestion that the district courts could meritoriously experiment in discovery control is alluring. Studies and experiments could be implemented to speed the discovery process and make it more efficient. The courts could attempt to encourage compliance through active judicial participation, and—backed ultimately by the policy-oriented balance of interests approach outlined throughout this Note—avail themselves of a direct and informed means for imposing sanctions in harmony with the goal of procedure outlined in rule 1.<sup>177</sup>

## VI. CONCLUSION

Proposals for amendments to the discovery rules are currently under consideration and are being analyzed by the profession.<sup>178</sup> In the time between the present and any eventual adoption of new discovery processes and sanctions, the existing sanctions must be focused to achieve optimal efficiency under the current formulation. Fortunately, the sanctions afford flexibility in their application and may, when invoked in light of the purposes of discovery and the policies of the civil rules, foster more efficient practice in the federal courts. The analysis within rule 37 is discretionary, and that discretion is circumscribed only by the tractability of the language of the rule, the particular facts of the case, and the interests of all involved. To devote disproportionate attention to a no-

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175. See Brazil, *supra* note 9, at 1303-05.

176. P. CONNOLLY, E. HOLLEMAN & M. KUHLMAN, *supra* note 13, at 17.

177. For a suggested model of district court control of the discovery process, see *id.* The model proposed suggests active judicial management with an emphasis on rule 83. The amount of control exerted would be tempered by reliance on empirical data compiled on the amount of discovery information generally sought in similar cases flexibly tailored to meet the needs of the particular case.

178. *Preliminary Draft of Proposed Amendments*, 77 F.R.D. 613, 623 (1978).

tion of deterrence or any other single factor within the factual equation seems impolitic in light of the rule's innate capacity to accommodate an expansive spectrum of relevant factors.

Difficult goals are seldom attained without constant vigilance and concentrated effort. As discovery is intended to represent a crucial concomitance in the federal formulation designed to lead to the "just, speedy, and inexpensive determination of every action" then, despite distractions encountered along the path, that goal must remain resolutely in the sight and mind of all who are enroute. When it falls upon the court to determine whether a sanction is appropriate, and, if so, which one, that court must pay particular heed to the sensitivities of the individual matter before it within the context of the adjudicatory system. If this analysis is pursued in cognizance of the fundamental aim of procedure,<sup>179</sup> the purposes<sup>180</sup> and policies<sup>181</sup> underlying discovery, and the function of discretion,<sup>182</sup> and if consideration is given to remedial congruence,<sup>183</sup> the effects of the sanctions employed,<sup>184</sup> and the ultimate balance of fairness to be struck among the parties and the court, then the discovery process may more effectively achieve the mission it was assigned in 1938.

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179. See text accompanying note 18 *supra*.

180. See text accompanying notes 41-43 *supra*.

181. See text accompanying notes 39-43 *supra*.

182. See text accompanying notes 99-101 *supra*.

183. See text accompanying notes 115-21 *supra*.

184. See text accompanying notes 122-39 *supra*.