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Discovery Sanctions: A Judicial Perspective[©]

Charles B. Renfrew[†]

The civil justice system in the United States depends on the willingness of both litigants and lawyers to try in good faith to comply with the rules established for the fair and efficient administration of justice. When those rules are manipulated or violated for purposes of delay, harassment, or unfair advantage, the system breaks down and, in contravention of the fundamental goal of the Federal Rules of Civil Procedure,¹ the determination of civil actions becomes unjust, delayed, and expensive.

My experience as a participant in and observer of civil litigation has convinced me that abuse of the judicial process, while difficult to detect and prove, is widespread.² Abuse of the judicial process occurs most often in connection with discovery. Unjustified demands for and

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† United States District Judge for the Northern District of California. A.B. 1952, Princeton University; J.D. 1956, University of Michigan Law School.

At a meeting of a Federal Judicial Center committee to study discovery abuse, A. Leo Levin, Director of the Center, suggested that it would be helpful to have a paper prepared on the subject of sanctions from the perspective of a trial judge. This Article followed that suggestion.

I wish to express my gratitude to my law clerk, Anthony C. Epstein, for his invaluable assistance in the preparation of this Article.

1. FED. R. CIV. P. 1 requires that the Rules "be construed to secure the just, speedy, and inexpensive determination of every action."

2. I will use the term "abuse of the judicial process" to refer only to conduct that is culpable because it is done either deliberately in bad faith, in reckless disregard for its propriety, or through a negligent failure to observe reasonable standards of care and competence.

Although good faith and non-negligent errors in judgment can cause many of the same consequences as culpable abuse of the judicial process, I will focus only on the latter. Courts have made fault (a term broad enough to include negligence) a precondition for the imposition of sanctions, *see In re Sutter*, 543 F.2d 1030, 1035-36 (2d Cir. 1976), and the Constitution may require that standard at least for sanctions that affect the determination of a substantive issue. So-

refusals to provide discovery prolong litigation and drive up its costs. Fabrication and suppression of material facts are regrettably common occurrences, although lawyers and judges are often reluctant to admit it.³ Because the overwhelming percentage of civil cases settle before trial,⁴ pretrial costs constitute the largest portion of litigation expenses, and measures that would reduce such costs would make litigation significantly more affordable. Moreover, pretrial abuses not only affect actual litigants but also deter potential litigants from resorting to the judicial process for the vindication of their rights.

Perhaps the most notorious recent example of discovery abuse occurred in the trial of an enormous antitrust case in the United States District Court for the Southern District of New York.⁵ After a liability phase that consumed more than 100 days of trial and a damage phase that lasted several more weeks, Berkey Photo recovered over \$100 million in damages from Eastman Kodak for violation of Sections 1 and 2 of the Sherman Act. In the last week of the liability phase, it was discovered that the attorneys for Kodak had failed to produce a report by one of Kodak's main expert witnesses that was covered by Berkey's discovery requests and that eventually played a major role in an effective, if not devastating, cross-examination of the witness. It was also disclosed that a partner of the law firm representing Kodak had falsely stated in an affidavit filed with the court that he had discarded documents that, in fact, he had kept in his office. The case is now on appeal, and disciplinary and criminal investigations are proceeding against certain of the attorneys involved.

This does not seem to be merely an isolated instance of abuse of the discovery process. In a recent meeting of the chief judges of metropolitan federal district courts, a prominent and distinguished trial attorney disclosed that attorney members (including himself) of a blue-ribbon panel formed to study abuse of discovery frankly confessed that they, themselves, had abused discovery rules in various ways. The recent National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, the so-called Pound Conference, identified abuse of the discovery process as an important cause of the

ciete Internationale v. Rogers, 357 U.S. 197, 209 (1958). See 8 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2283, at 763-64 & n.58 (1970).

3. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1054 (1975).

4. According to the Director of the Administrative Office of the United States Courts, only 7.8% of federal civil cases reached trial, 1977 ANNUAL REPORT at 332.

5. In this account of the *Kodak* case, I have relied primarily on Kiechel, *The Strange Case of Kodak's Lawyers*, FORTUNE, May 8, 1978, at 188. I, of course, cannot vouch for the accuracy of that article.

growing crisis in our court system.⁶ Many others share the same conclusion.⁷

Although the most frequent and notorious examples of abuse of the judicial process occur during discovery, it is unrealistic to believe that litigants and lawyers who deliberately frustrate the judicial process in the discovery phase of litigation are unwilling to delay and harass at other stages. Violations of rule 11, which requires that attorneys as well as their clients believe in good faith that there are good grounds to support the allegations in pleadings, are not unknown.⁸ Parties often file complaints in order to gain access to discovery, which they use, not to find evidence to support their claim, but to discover whether they have any claim at all.⁹ I do not mean to suggest that the parties should be required to know all of the facts underlying their claims. For example, an independent gasoline retailer with a number of outlets that sell petroleum products below the prevailing marketing prices of the major outlets suddenly may find himself cut off from a source of supply. Not only is the independent retailer unable to obtain products from his former supplier, but also from all other major suppliers. In such a situation, certain circumstances might lead the independent retailer and his counsel to conclude that he was cut off because of his pricing policy, in violation of the antitrust laws. Yet, without discovery, he may not know whether this was a result of a unilateral refusal to deal, forward vertical integration by his supplier, a group boycott, a price-fixing conspiracy, or exactly what caused his injury. Similarly, a minority plaintiff who was discharged from employment under suspicious circumstances may not know all of the facts essential to support his claim, yet may believe they were related to his race or national origin. Such plaintiffs are often victims and to preclude them from access to the court because they do not know all of the details of their injuries would be unconscionable. It is not these cases to which I refer. Rather, it is the case in which neither the client nor the attorney has any reason

6. Erickson, *The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-First Century*, 76 F.R.D. 277, 288 (1977).

7. E.g., Byrnes, *Discovery: Its Uses and Abuses: The Defendant's Perspective*, 44 ABA ANTI-TRUST L.J. 14-28 (1975); Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, 70 F.R.D. 199, 204 (1976); Comment, *Sanctions Imposed by Courts on Attorneys Who Abuse the Judicial Process*, 44 U. CHI. L. REV. 619 (1977) [hereinafter cited as Chicago Comment]; Comment, *Decline and Fall of Sanctions in Civil Discovery*, 9 U.S.F. L. REV. 360 (1974); Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions*, 91 HARV. L. REV. 1033 (1978).

8. Strike suits occur more often in some areas of the law than in others. The securities fraud field is notorious for this kind of abuse. See *Sullivan v. Chase Investment Serv., Inc.*, 434 F. Supp. 171, 188 (N.D. Cal. 1977).

9. Kirkham, *supra* note 7, at 204.

to believe in good faith that a claim exists, but hopes that something may turn up in discovery that would support a claim.

The enormous reluctance in the American court system to evaluate the merits of cases prior to trial¹⁰ and the huge potential for invasion of privacy that our discovery system permits¹¹ make this kind of abuse particularly costly. These problems are compounded by litigants taking advantage of superior financial resources to bury their opponents in an unending barrage of motions that make capitulation to unfair settlements the only sensible alternative to continued litigation.

Although there is now general agreement that these abuses present a serious problem, no consensus has developed about the proper solutions. The thesis of this Article is simple: The judicious use of sanctions on litigants and lawyers who abuse the judicial process is one effective way to make justice achievable and affordable for the citizens who turn to the courts for the vindication of their rights. Sanctions cannot solve the entire problem; but, in combination with other remedies, they can help to control the misconduct of participants in the judicial process.

I

The range of sanctions presently available to federal judges has been described recently,¹² and I need only summarize a few important features. In this Article, I will not address the various proposals for broadening the range of sanctions available to the trial judge.¹³ I wholeheartedly support such efforts. I do not want courts to wait, however, for statutory or rule changes before considering the appropriate use of sanctions as a judicial tool. Thus, in the following pages I will discuss the presently available, but underemployed, sanctions for discovery abuse.

The primary source of authority for sanctions for abuse of discovery is rule 37 of the Federal Rules of Civil Procedure, which provides for sanctions at two different stages. First, rule 37(a)(4) requires the

10. Lasker, *The Court Crunch: A View From the Bench*, 76 F.R.D. 245, 250 (1977) ("[T]he plight of defendants must be seriously considered in a system which so unconditionally mandates going through trial as long as any genuine issue as to a material fact remains . . .").

11. Rifkind, *Are We Asking Too Much of Our Courts?*, 70 F.R.D. 96, 107 (1976):

I believe it is fair to say that currently the power for the most massive invasion into private papers and private information is available to anyone willing to take the trouble to file a civil complaint. A foreigner watching the discovery proceedings in a civil suit would never suspect that this country has a highly-prized tradition of privacy enshrined in the fourth amendment.

12. See, e.g., Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, 77 F.R.D. 613, 652-53 (1978) (proposed rule 37(e)); Edelstein, *The Ethics of Dilatory Motion Practice: Time for a Change*, 44 FORDHAM L. REV. 1069 (1976); Shenefield, *Improved Manageability of Complex Antitrust Litigation: Alternatives to the Meat Axe*, Remarks before the Ohio State Bar Association Annual Antitrust Law Institute (Oct. 28, 1977).

13. See Chicago Comment, *supra* note 7.

court to award reasonable expenses, including attorneys' fees, to the party prevailing after a hearing on a discovery motion unless the position of the losing party was substantially justified or unless other circumstances make the award unjust.¹⁴ Contrary to a common misunderstanding, rule 37(a)(4) makes it very clear that this sanction can be imposed on parties or attorneys who make unreasonable discovery demands as well as on those who oppose reasonable demands. Second, rule 37(b) empowers the court to impose on parties that fail to obey the court's discovery orders any sanction that is just. Possible sanctions include: establishing certain facts as true for purposes of the action; striking designated claims, defenses, testimony, and exhibits; dismissing the action; rendering a default judgment; and holding the party in contempt.

Courts also have inherent power to impose sanctions for abuse of the judicial process, including abuse of discovery. Rule 37(b) is not the only source of authority to impose sanctions for abuse of discovery.¹⁵ In situations in which the rule applies, there is no reason not to treat it as the exclusive source of authority because its authorization to impose any sanction that is just makes resort to any other source of authority unnecessary. But the coverage of rule 37(b) has gaps. Foremost among them is its failure explicitly to authorize sanctions for discovery abuse that does not involve noncompliance with a court order. An example of this would be a party's false representation that a requested document does not exist, which causes the requesting party to forego seeking a court order compelling production. Sanctions may be appropriate in such cases, and the authority for them comes from the courts' "inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs as to achieve the orderly and expeditious disposition of cases."¹⁶ The Federal Rules of Civil

14. The 1970 amendments to rule 37(a)(4) shifted the burden of proof with respect to justification from the winning to the losing party, so that the losing party must establish that its position was substantially justified even though it did not prevail, rather than the winning party having to establish that its opponent's position was not substantially justified. The purpose of the change was to increase the use of this sanction. See Chicago Comment, *supra* note 7, at 632.

15. *Britt v. Corporacion Peruana de Vapores*, 506 F.2d 927, 932 (5th Cir. 1975), is not to the contrary. In *Britt*, the court of appeals affirmed the district court's decision not to sanction a party for failing to produce evidence, the production of which had been formally requested by the plaintiff but not ordered by the court. The court's statement that "only violation of an order compelling discovery issued under Fed.R.Civ.P. 37(a) could be punished by the sanctions permitted under Fed.R.Civ.P. 37(b)" has no converse implication that courts have no authority to punish a party for abuse of discovery not covered by rule 37(b). The court of appeals affirmed the district court not because the trial judge lacked discretion to impose sanctions but because the judge did not abuse his discretion by not imposing sanctions under the circumstances. The implication is clear that the discretion exists.

16. *Link v. Wabash R.R.*, 370 U.S. 626, 630-31 (1962) (*sua sponte* dismissal of action for lack of prosecution). But see *Societe Interuationale v. Rogers*, 357 U.S. 197, 207 (1957), in which the

Procedure were not intended to circumscribe this essential power,¹⁷ and courts have the authority to deal with litigants and lawyers who undermine the litigation process that the Federal Rules were intended to facilitate. An amendment of rule 37 explicitly authorizing such sanctions is desirable,¹⁸ but not essential.

In addition to their authority under rule 37 and their inherent power, courts have other means to deal with those who abuse the judicial process. Section 1927 of title 28 of the United States Code, an often overlooked provision, authorizes courts to require "[a]ny attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously . . . to satisfy personally such excess costs."¹⁹ Although this statute is directed at the individual who is all too often the real culprit in abusing the judicial process, it has shortcomings. The most serious is its limitation of the sanction to taxable costs, which are often nominal and exclude attorneys' fees,²⁰ and to taxable costs in excess of those that would rea-

Court spoke of rule 37 of the Federal Rules of Civil Procedure as being the exclusive source of authority for a court to dismiss a complaint because of noncompliance with a discovery order. Since the government had successfully obtained the dismissal brought under rule 37, the Court's remarks are necessarily dicta. In any event, the subsequent decision in *Link* makes clear that *sua sponte* dismissals for lack of prosecution—and, I believe, for failure to prosecute properly—is an "inherent power," governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs as to achieve the orderly and expeditious disposition of cases." 370 U.S. at 630-31.

17. In *Link v. Wabash R.R.*, 370 U.S. 626 (1962), the Supreme Court upheld the *sua sponte* dismissal of an action for lack of prosecution even though rule 41, which generally covers dismissal for lack of prosecution, does not provide for *sua sponte* dismissal. The Supreme Court had no trouble concluding that the rules did not limit the settled authority of the courts "to manage their own affairs as to achieve the orderly and expeditious disposition of cases." *Id.* at 630-31. The same principle applies to rule 37. The provision for sanctions in that rule for certain kinds of discovery abuse should not be interpreted to abridge the availability of sanctions for other kinds.

18. Adopting the recommendations of the Report of the Special Committee for the Study of Discovery Abuse, Section of Litigation of the American Bar Association, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States recommended that rule 37 be amended to include the following subsection:

(e) Additional Sanctions. In addition to the sanctions authorized by this rule and those authorized by Title 28, U.S.C. § 1927, the court may impose upon any party or counsel such sanctions as may be just, including the payment of reasonable expenses and attorney's fees, if any party or counsel (1) fails without good cause to cooperate in the framing of an appropriate discovery plan by agreement under Rule 26(f), or (2) otherwise abuses the discovery process in seeking, making or resisting discovery.

In an appropriate case the court may, in addition to other remedies, notify the Attorney General of the United States in a public writing that the United States, through its officers or attorneys, has failed without good cause to cooperate in discovery or has otherwise abused the discovery process.

77 F.R.D. 613, 652-53 (1978).

19. 28 U.S.C. § 1927 (1976).

20. See, e.g., *United States v. Ross*, 535 F.2d 346, 350 (6th Cir. 1976) (McCree, J.); *1507 Corp. v. Henderson*, 447 F.2d 540, 543 (7th Cir. 1971).

This limitation will be removed if Congress adopts section 4 of proposed Senate Bill 390, the

sonably have been incurred, which favors the compensatory function of section 1927 at the expense of needed deterrence. The intent requirement suggested by the term "vexatiously" is also ambiguous.²¹ Some courts have required proof of a bad faith, willful, deliberate multiplication of the proceedings,²² but, as the Supreme Court recently pointed out in a different context, the term does not necessarily imply any subjective bad faith and may mean only that the action is frivolous, unreasonable, or without foundation.²³ Especially in view of the lightness of the sanctions under section 1927, a strict interpretation of the intent requirement seems inappropriate.

Rule 37, section 1927, and inherent judicial power give courts the means to "impose sanctions for conduct by lawyers that falls short of contempt of court."²⁴ The civil and criminal contempt authority is available as well, although its strict intent requirements and procedural formalities reduce its effectiveness in dealing with some kinds of abuse of judicial process.²⁵ Courts also should use to greater advantage their authority to adopt local rules of court that provide sanctions for litigants and lawyers who violate them.²⁶

Finally, the victims of abuse of the judicial process can bring actions for malicious prosecutions or abuse of process, torts that apply to some kinds of misconduct within the scope of this Article. Those actions remit the victims to the same processes that failed them in the first place, however, and the misconduct must be egregious and the damages great to make the prosecution of such actions worthwhile. The

Antitrust Procedural Improvements Act of 1979. S. 390, 96th Cong., 1st Sess., 125 CONG. REC. S1345 (daily ed. Feb. 8, 1979). That section would amend section 1927 to permit the courts to award "excess costs, expenses and attorney's fees reasonably incurred" rather than merely excess costs.

21. The proposed Antitrust Procedural Improvements Act of 1979, *see* note 19 *supra*, addresses this ambiguity. Section 4 of the Act would amend section 1927 to permit the imposition of sanctions on attorneys who engage "in conduct unreasonably and primarily for the purpose of delaying or increasing the cost of litigation." S. 390, 96th Cong., 1st Sess. 125 CONG. REC. S1345 (daily ed. Feb. 8, 1979).

22. *See, e.g.,* *United States v. Ross*, 535 F.2d 346, 348-50 (6th Cir. 1976); *West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1092 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971).

23. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978).

24. *In re Sutter*, 543 F.2d 1030, 1037-38 (2d Cir. 1976) (assessment of \$1500 penalty against attorney who unjustifiably caused three-day delay in start of trial).

25. *See generally* Chicago Comment, *supra* note 7, at 619-23.

26. The legitimacy of reasonable local rules should now be clear after *In re Sutter*, 543 F.2d 1030 (2d Cir. 1976). In *Sutter*, the Court of Appeals for the Second Circuit properly rejected the unduly narrow approach of *Gamble v. Pope & Talbot, Inc.*, 307 F.2d 729, 732 (3d Cir.) (en banc), *cert. denied*, 371 U.S. 888 (1962), and cases like it, *e.g.,* *Padovani v. Bruchhausen*, 293 F.2d 546 n.1 (2d Cir. 1961), which—in the process of striking down unreasonable rules or unreasonable applications of reasonable rules—cast doubt on the propriety of adopting any local rules. Of course, some local rules relating to pretrial procedure are oppressive, but those that conflict with the letter and spirit of the Federal Rules of Civil Procedure are invalid. *See Hendrick v. McCargo*, 545 F.2d 393 (4th Cir. 1976) (local rule held invalid).

increasing abuse of the judicial process despite the availability of these tort remedies suggests that they cannot deal effectively with the problem.

II

The most serious abuse of the judicial process occurs in discovery, and rule 37, together with the inherent power of the courts to punish those who interfere with the administration of justice, gives courts the means to deal with the problem. The basic cause of the underutilization of sanctions is not their unavailability but the courts' unwillingness to use them. A recent study conducted by the Federal Judicial Center found that attorneys move for the imposition of sanctions in less than one percent of the total requests for discovery.²⁷ In other words, for every one hundred requests for discovery, including interrogatories, oral depositions, and document requests, one motion for sanctions is made. The study also found that less than half of those motions (42.7%) resulted in rulings by the courts. Of the motions ruled upon, however, 74.3% were granted. These statistics are impressive because only three of the twenty-six motions granted were granted conditionally. Hence, the losing party usually could not avoid sanctions merely by fulfilling the responsibilities that he had evaded from the beginning.

Whether the contrast between the frequency of discovery abuse and the frequency with which courts impose sanctions continues to be as striking as these data indicate is open to question because of an increasing willingness among judges to impose sanctions for abuse of discovery.²⁸ The deterrent function of sanctions has now been explicitly legitimized by the Supreme Court,²⁹ and the law is equally settled that eventual compliance with the rules of discovery does not preclude the imposition of sanctions.³⁰ The growing awareness of the magnitude of the problem of abuse also should lower judicial barriers to the imposition of sanctions.

Nevertheless, I sense a still substantial reluctance among judges to impose severe, unconditional sanctions. Some of that reluctance is

27. The Federal Judicial Center study analyzed 7117 requests for discovery. Motions for sanctions were made in 67 instances, or 0.9% of the instances in which discovery was requested. The data further revealed that, although motions for sanctions were made in about 0.2% of requests for oral depositions (7 motions in 3065 requests), such motions were made in 1.4% of requests for interrogatories (44 motions in 2519 requests) and in 2.1% of requests for documents (16 motions in 1031 requests). FEDERAL JUDICIAL CENTER, JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY 24 (1978).

28. Note, *supra* note 7, at 1044-47.

29. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643 (1976) (per curiam).

30. *Ohio v. Arthur Andersen & Co.*, 570 F.2d 1370, 1374 (10th Cir. 1978); *Delluins v. Powell*, 566 F.2d 231, 235-36 (D.C. Cir. 1977).

clearly justified, but it depends, I think, on a variety of concerns that overestimate the dangers of sanctions. It is my purpose to address some of those concerns and to suggest counterbalancing considerations.

A. The Double-Edged Sword

One reason why judges are unwilling to impose sanctions is that lawyers are unwilling to seek them, and judges are often inclined to defer to the judgment of lawyers (whose clients may be victimized by abuse) that sanctions are inappropriate. Not only do judges and attorneys share professional and social ties, but most judges remember when they were attorneys, and their attitude at that time toward sanctions affects in some way their attitude as judges toward sanctions.

This judicial faith in the zeal of lawyers to protect the interests of clients possibly injured by abuse of the judicial process is misplaced. Lawyers generally are not at all hesitant to file motions, but I have noticed in my years on the bench an unusual reluctance among lawyers to seek sanctions where they clearly would be justified in moving them even if the ultimate success of the motion is uncertain. I suspect that the reason for this reluctance stems in large part from lawyers' recognition that sanctions for discovery abuse are a double-edged sword. A lawyer who wants the option to abuse discovery when it is to his client's advantage will hesitate to seek sanctions when his client is the victim of such practices—especially if the sanctions are imposed on the attorney instead of, or in addition to, the client. As a result, a kind of gentlemen's agreement is reached, with the tacit approval of the bench, which is extremely convenient for the attorneys who avoid the just imposition of sanctions and extremely unfair to the litigants who pay more and wait longer for the vindication of their rights than they should.

This obstacle to the efficient administration of justice is not immovable. Courts need not and should not wait for lawyers and litigants to initiate proceedings where there is substantial reason to believe that the processes of the court have been abused.

[T]ampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.³¹

31. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246 (1944), *overruled on other grounds*, *Standard Oil Co. v. United States*, 429 U.S. 18 (1976).

Judges must be willing to take it on themselves to help protect the rights of present and potential litigants whose interests are not adequately represented by the attorneys in cases before them. To protect these rights, it may be necessary for judges to assume the additional work required to draft an opinion setting forth their reasons for imposing sanctions in the cases in which such remedies are appropriate. In the long run these efforts will be rewarded many times over because, in furnishing some clarification in this area, they assist in obtaining greater compliance with the spirit and the letter of the Federal Rules.

B. The Sins of the Lawyer and of the Client

Another reason why courts have been reluctant to impose sanctions for abuse of the judicial process is a concern that some kinds of sanctions make the client suffer for the sins of his attorney.³² In cases where the misconduct involves phases of litigation that the attorney and not the client controls, it may be unfair to punish the client for his attorney's wrongdoing. The proper course in that situation may be to impose monetary sanctions directly on the attorney instead of the client that both punish the misconduct and compensate the victim. Rule 37 explicitly authorizes the court to assess costs against lawyers as well as litigants, and section 1927 is aimed solely at attorneys. Moreover, "[t]he inherent power of a court to manage its affairs necessarily includes the authority to impose reasonable and appropriate sanctions upon errant lawyers practicing before it."³³ The danger that the deterrent effect of the sanction will be diluted by attorneys passing on the cost of the fine to the client can be minimized by requiring the attorney to pay the fine personally and by specifically prohibiting the attorney from passing on the cost.³⁴

Sanctions imposed on the attorney are sometimes inadequate and, in those instances, courts should not hesitate to make the client pay for his attorney's wrongs. The concern about visiting the sins of the lawyer on his client is often exaggerated. Frequently, the real issue is: on which client should the sins of the attorney be visited—the client of the offending attorney or of the offending attorney's opponent? Attorney

32. See, e.g., *Link v. Wabash R.R.*, 370 U.S. 626, 637 (1962) (Black, J., dissenting) (quoting *Link v. Wabash R.R.*, 291 F.2d 542, 548 (7th Cir. 1961) (Schnackenberg, J., dissenting)); *In re Sutter*, 543 F.2d 1030, 1037 (2d Cir. 1976) (sanctions may be imposed directly on the attorney when it would be unfair to impose them on the client).

33. *In re Sutter*, 543 F.2d 1030, 1037 (2d Cir. 1976) (quoting *Flaksa v. Little River Marine Constr. Co.*, 389 F.2d 885, 888 (5th Cir. 1968)).

34. That solution was recently employed in *Associated Radio Serv. Co. v. Page Airways, Inc.*, 73 F.R.D. 633, 636-37 (N.D. Tex. 1977). In such cases it may be advisable for the court to notify the client directly of its order to minimize the possibility of misunderstanding or circumvention of the order.

misconduct imposes costs, and if someone must bear them the litigant who retained the offending attorney is most responsible. If the client truly is an innocent victim of his attorney's misconduct, the client can recover damages for any injury he may have sustained because of that misconduct in a tort action for legal malpractice against the attorney. This approach properly puts the burden on the attorney's client rather than on his opponent.³⁵ The responsibility of the judge in a particular case is to do justice between the plaintiff and the defendant, and accommodation of the client vis-à-vis his attorney should be resolved in another forum. The attorney and his client must be viewed as a unit, and the misconduct of the former imputed to the latter. In upholding the dismissal of an action because of dilatory prosecution of a lawsuit by an attorney, the Supreme Court found

no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have "notice of all facts, notice of which can be charged upon the attorney."³⁶

The realistic possibility of sanctions can put lawyers in a difficult position. The failure to take an arguably justifiable position on behalf of his client exposes the attorney to malpractice and disciplinary liability³⁷ and makes his client angry, but the assertion of an unjustifiable position exposes an attorney to substantial sanctions for abuse of the judicial process. Judicious use of sanctions will not, however, significantly deter attorneys from the zealous representation of clients. A minimum requirement of culpability (at least of the level of negligence³⁸) will protect lawyers who make honest errors of judgment while exercising the level of care observed by reasonably competent and ethical lawyers. If the threat of sanctions leads attorneys to investigate a little more fully the claims that their clients want them to assert on their behalf, that result will be generally salutary.³⁹

35. See Note, *supra* note 7, at 1051 & n.104, 1052 n.106.

36. *Link v. Wabash R.R.*, 370 U.S. 626, 633-34 (1962).

37. Canon 7 of the ABA Code of Professional Responsibility requires lawyers to pursue the lawful objectives of their clients by any legally available means.

38. See note 2 *supra*.

39. For a thought provoking suggestion that Canon 7 of the ABA Code of Professional Responsibility, see note 37 *supra*, be revised to include rules regarding the ignorance of attorneys, see Frankel, *supra* note 3, at 1051.

C. *The Goal of Deterrence*

Deterrence of abuse of the judicial process is clearly a legitimate purpose of sanctions.⁴⁰ What judges sometimes tend to overlook is that deterrence, which is an achievable goal, requires a readiness to impose relatively severe sanctions.

Abuse of the judicial process is difficult to detect and prove, and that difficulty means that abuse that is detected and proven must be dealt with severely. The lower the probability of detection and proof, the more severe the sanction must be to deter misconduct effectively. Deterrence is an achievable goal, especially with respect to misconduct by lawyers because they generally make strategic and tactical decisions about litigation in a deliberate, calculating manner and because word of the imposition of sanctions travels quickly through the ranks of the trial bar. Lawyers can pass that word along in subtle ways to clients who they suspect might be inclined to suppress or fabricate evidence or otherwise disobey their obligations as litigants and citizens. If courts begin to impose sanctions, litigants and lawyers willing to engage in questionable tactics will reevaluate their approach to litigation.

Unless severe sanctions are imposed, the low likelihood of detection and proof of harassing tactics will make them worthwhile, and the deterrent function of sanctions will not be achieved. In the recent case of *National Hockey League v. Metropolitan Hockey Club, Inc.*,⁴¹ the Supreme Court emphasized the deterrent function of sanctions under rule 37 and upheld the severe sanction of dismissal so that "other parties to other lawsuits would [not] feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other district courts."⁴² The dynamics of litigation compel that result.

D. *Judicial Awareness of the Court Crisis*

The primary need for an increased use of sanctions derives from the exponential increase in the number and complexity of federal cases.⁴³ An indulgent toleration for the misconduct of lawyers and liti-

40. See note 29 and accompanying text *supra*.

41. 427 U.S. 639 (1976) (per curiam).

42. *Id.* at 643.

43. Note, *supra* note 7, at 1044-45 & nn.72-74. One corollary of this increase is that severe sanctions are more often appropriate in big cases than in little ones. Complex and protracted litigation is completely unmanageable unless the parties act in good faith. Judges must deal swiftly and surely with lawyers and litigants whose misconduct can fatally sabotage the big case. See *In re Professional Hockey Antitrust Litigation*, 63 F.R.D. 641, 655 (E.D. Pa. 1974) (strong sanctions are "particularly appropriate in complex antitrust litigation . . . where efficient and effective discovery procedures are essential to orderly adjudication.") (emphasis in original) (quoting *Philadelphia Hous. Auth. v. American Radiator & Standard Sanitary Corp.*, 50 F.R.D. 13, 18-19 (E.D. Pa. 1970)), *aff'd sub nom.* *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427

gants is simply a luxury that the federal court system can no longer afford.

The recent emergence of a tougher judicial attitude toward those who abuse the judicial process has doubtless been prompted by a growing recognition of these problems. Yet I still fear that some judges continue to underestimate the dimensions of this crisis and the role that sanctions can play in its solution. That is certainly true of trial judges, but appellate judges seem to be somewhat more resistant to stern measures that keep litigation moving. Appellate judges have always tended to take a more restrictive view of sanctions than trial judges,⁴⁴ despite an occasional acknowledgment of the problems facing trial courts.⁴⁵ That trend continues. After the Supreme Court made it unmistakably clear that, in addition to compensation of the injured party, deterrence is a proper goal of sanctions,⁴⁶ a court of appeals continued to apply "the normal rule that the proper sanction 'must be no more severe . . . than is necessary to prevent prejudice to the movant.'"⁴⁷

Perhaps my concern merely reflects the supposed mutual distrust of trial and appellate judges on which many observers have commented. My considered conclusion, however, is that my concern is more than that. Trial judges cannot deal effectively with abuse of the judicial process unless appellate tribunals are willing to back them up, and to date the necessary support has not always been found. There is a more recent decision in the United States Court of Appeals for the Ninth Circuit, however, that I hope will point the way for the other circuits. In *G-K Properties v. Redevelopment Agency*,⁴⁸ the court affirmed a dismissal of an action with prejudice for failure to comply with discovery orders. The opinion strongly endorsed the use of sanctions under such circumstances, stating:

Where it is determined that counsel or a party has acted willfully or in bad faith in failing to comply with rules of discovery or with court

U.S. 639. See also *Dellums v. Powell*, 566 F.2d 231, 236 (D.C. Cir. 1977) ("special structure of discovery in class suits" affects choice of sanction).

44. See *Waterman, An Appellate Judge's Approach When Reviewing District Court Sanctions Imposed for the Purpose of Insuring Compliance with Pretrial Orders*, 29 F.R.D. 420, 424-26 (1961).

45. In *Bardin v. Mondon*, 298 F.2d 235, 237-38 (2d Cir. 1961), the court of appeals explicitly recognized the critical condition of the docket in the Southern District of New York and found that the district court had exercised its discretion in a reasonable manner when it dismissed the action with prejudice. Nevertheless, the court of appeals, concerned with the fate of the litigants, remanded and instructed the district court to dismiss the case without prejudice and to impose sanctions on the plaintiff's attorney.

46. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976) (per curiam).

47. *Wilson v. Volkswagen of America, Inc.*, 561 F.2d 494, 504 (4th Cir. 1977) (ellipses in original) (quoting *Diaz v. Southern Drilling Corp.*, 427 F.2d 1118, 1127 (5th Cir. 1970)), cert. denied, 400 U.S. 878 (1970).

48. 577 F.2d 645 (9th Cir. 1978).

orders enforcing the rules or in flagrant disregard of those rules or orders, it is within the discretion of the trial court to dismiss the action or to render judgment by default against the party responsible for non-compliance. Fed.R.Civ.P. 37(b). *Here the court dismissed the plaintiffs' action with prejudice. It acted properly in so doing. We encourage such orders.* Litigants who are willful in halting the discovery process act in opposition to the authority of the court and cause impermissible prejudice to their opponents. It is even more important to note, in this era of crowded dockets, that they also deprive other litigants of an opportunity to use the courts as a serious dispute-settlement mechanism. Here the appellants' last-minute tender of relevant documents could not cure the problem they had previously created.⁴⁹

E. Failure to Reach the Merits

Another problem is the reluctance of judges to use sanctions that limit or deny "the opportunity for a hearing on the merits" of a party's lawsuit, a goal that might rise to constitutional significance.⁵⁰ To be sure, a party has a right to have his action decided on its merits, and the construction of needless obstacles to the realization of that right would defeat the basic goal of the Federal Rules of Civil Procedure.⁵¹ But that right is not unqualified, and a party's opponent has a corresponding right to have a prompt and inexpensive determination of his substantive rights. When one party abridges the rights of the other, courts should not hesitate to impose sanctions such as dismissal, default, or preclusion⁵² that affect the ultimate result. As Professor Rosenberg has pointed out:

the difficulty with literal adherence to the reach-the-merits philosophy [of the Federal Rules] is that it dulls the cutting edge of sanctions intended to enforce compliance with procedural rules. To some extent, it does this by softening the resolve of judges to compel suitors to play fairly or lose.⁵³

The interest in reaching the merits is obviously an important one. My only point is that it is not an overriding one and it must be bal-

49. *Id.* at 647 (emphasis added). The court of appeals' decision was particularly encouraging to me, as I was the trial judge who had dismissed the case and had done so without the benefit of the teaching of *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976) (per curiam). The opinion below, reported at 409 F. Supp. 955 (N.D. Cal. 1976), set forth in considerable detail the circumstances that led me to conclude that the only available alternative was dismissal with prejudice.

50. *Societe Internationale v. Rogers*, 357 U.S. 197, 209 (1958).

51. See Note, *Dismissal for Failure to Attend a Pretrial Conference and the Use of Sanctions at Preparatory Stages of Litigation*, 72 YALE L.J. 819, 825-26 (1963).

52. By preclusion, I mean precluding the offending party from raising a claim or defense or from offering certain types of evidence. See FED. R. CIV. P. 37(b)(2)(B).

53. Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 COLUM. L. REV. 480, 480 (1958).

anced against other important interests. Dismissal may be too severe a sanction not because of its inherent nature which prevents a determination of the merits but because its severity is not necessarily related to the degree of the offending party's culpability and its consequences. It would be improper to dismiss a \$100,000 claim because the plaintiff's response to court-ordered discovery was a few days late—this would be the equivalent of a \$100,000 fine for such conduct.⁵⁴ But where the misconduct is sufficiently egregious, where the circumstances indicate the likelihood that the misconduct will otherwise be repeated, or where the prejudice to the victim is irreparable, dismissal may be the only sanction that compensates the victim for the past misconduct, protects him from future misconduct, and vindicates the public interest in the continuing integrity of court processes.

F. Abuse of the Sanctioning Process

There is also a concern that an even greater judicial receptiveness to the employment of sanctions will cause abuse of motions for sanctions. Demands for sanctions could become part of boilerplate motions to compel discovery, and courts would be mired in endless hearings about the good or bad faith of parties and lawyers.

Even with more liberal use of sanctions, the focus of litigation can remain on the conduct of the parties before, not after, the filing of the complaint. A principled application of sanctions based on adequate proof of misconduct will not unnecessarily encourage the filing of insubstantial motions for sanctions, and a requirement of some showing of misconduct in addition to a ruling against the allegedly offending individual should serve to screen out the frivolous motions.

III

Liberalized use of sanctions for abuse of the judicial process is no panacea. For a variety of reasons, this abuse will continue despite a greater judicial willingness to impose sanctions.

Perhaps the most important reason why the judicial process is abused is because the stakes of litigation are so high that they create an occasionally irresistible temptation to cheat. As long as millions of dollars in damages and attorneys' fees depend on the outcome of the litigation, both litigants and lawyers will be tempted to abuse the judicial process. The contingent fee system, combined with the gradually expanding recoverability of attorneys' fees by prevailing parties,⁵⁵ are

54. In *National Hockey League v. Metropolitan Hockey Club, Inc.*, the plaintiffs alleged damages of not less than \$3,000,000; hence the Supreme Court upheld what might be construed to be a \$3,000,000 fine against the plaintiffs.

55. See, e.g., *Civil Rights Attorney's Fees Awards Act of 1976*, 42 U.S.C. § 1988 (1976).

factors pointing to the likelihood that this cause of abuse by lawyers will continue. Where the attorneys' fees will be based at least in part on the hours spent on a case, there is simply too often a lack of economic incentive for counsel to expedite preparation for and trial of the case. It is certainly not my intention to suggest that awards of damages and attorneys' fees should be decreased solely to decrease the incentive to abuse the judicial process. But we must understand that one of the inevitable prices we pay for making litigation so profitable is an increase in such abuse. It also points out why the sanctions that are imposed must have a sufficient impact in order to achieve their purpose.

The willingness of lawyers to resist this temptation to abuse the judicial process is reduced by the prevailing ethic that requires a lawyer to assert any position on behalf of his client unless the lawyer is absolutely convinced that the position is frivolous or fraudulent. As Judge Marvin Frankel discussed in his provocative and controversial article, *The Search for Truth: An Umpireal View*,⁵⁶ the problem may be not that law schools do not adequately teach ethical standards but that the ethical standards contained in the Code of Professional Responsibility fail to stress the lawyer's independent duty to seek the truth even when it does not advance his client's interests. Whether the lawyer's obligations toward his client should be redefined is a question far beyond the scope of this paper. Yet one might hope that a redefinition along the lines tentatively suggested by Judge Frankel would lessen the willingness of lawyers to allow, directly or indirectly, their clients to abuse the judicial process and to participate in such abuse.

Another reason why abuse of the judicial process will continue regardless of judicial steps to combat it involves a matter already mentioned—the difficulty of detection and proof of such abuse. It is one thing to say that abuse often occurs; it is another to identify with reasonable certainty the individual cases in which it occurs. Except in the rare case where a party inadvertently discloses a document that he promised did not exist, it usually is impossible to prove that a party is deliberately holding back material that he is obligated to disclose. A party that is determined to abuse the judicial process can generally do so successfully. The court and the opposing party may have a pretty good idea when a party or his attorney abuses the judicial process, but their inability to prove it makes them unable to do anything about it.

This problem of proof is exacerbated by the increasing complexity and confusion of our statutory and judge-made law. The more unwieldy this body of law becomes, the more difficult it becomes to fault a party or his attorney for conduct of which the judge disapproves. The

56. Frankel, *supra* note 3, at 1051-52 (1975).

logical culmination of this trend is illustrated by *Lucas v. Hamm*⁵⁷ in which the California Supreme Court affirmed the dismissal of a legal malpractice action on the pleadings because the legal issue that the lawyer had allegedly butchered—the Rule Against Perpetuities—was so confused that a reasonably competent lawyer could not reasonably be expected to understand it. When different judges and magistrates apply widely varying standards to discovery, how can a judge fairly say that a party's position in a discovery dispute lacks substantial justification, a finding necessary to an award of attorneys' fees under rule 37(a)(4)? Proposed revisions of rule 26(b)(1) that would limit the permissible scope of discovery may, at least in the short run, generate additional uncertainty and litigation.⁵⁸ While it may be impossible to define with perfect clarity what conduct constitutes abuse and what does not, the courts do have an obligation, in my judgment, to select on a case-by-case basis the reason why they find certain conduct to constitute abuse. This is essential if we are to clarify the law in this area and establish standards of conduct so that lawyers and their clients can be held fairly accountable for their failure to meet them.

Finally, some kinds of abuse result more often from good faith errors in judgment than from intentional, reckless, or negligent conduct. Serious as the problem of culpable abuse is, lawyers and litigants place a heavy and unnecessary burden on the judicial process by failing to think through their position or by losing sight of their ultimate objectives while becoming bogged down in unimportant details. All too often, for example, lawyers and their clients fail to decide what they are looking for before they begin discovery and resort to discovery simply because it is there. Once they begin discovery, they never pause to digest the information they have obtained, so they continue to pursue avenues of investigation that they justifiably began but have no need at all to complete.

A partial solution to this source of discovery abuse is not sanctions but careful supervision of the discovery process by the court. The most effective means of supervision that does not excessively involve the

57. 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961). This holding perhaps was modified sub silentio in *Smith v. Lewis*, 13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975).

58. The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States has recommended that rule 26(b)(1) be amended to restrict discovery to "any matter, not privileged, which is relevant to the claim or defense of the party seeking discovery or to the claim or defense of any other party." *Preliminary Draft of Proposed Amendment to the Federal Rules of Civil Procedure*, 77 F.R.D. 613, 623 (1978). Rule 26(b)(1) presently allows discovery of "any matter, not privileged, which is relevant to the subject matter involved in the pending action." This proposed amendment is perhaps less restrictive than that drafted by the Special Committee for the Study of Discovery Abuse of the Section of Litigation of the American Bar Association. The Committee recommended that rule 26(b)(1) permit discovery of "any matter, not privileged, which is relevant to the issues involved in the pending action." See *id.* at 627.

court in the day-to-day management of litigation is through regular status conferences where the parties are required to explain and defend their overall approach to the litigation, through limits on the number of interrogatories that a party can file without court approval, through the early setting of deadlines for the completion of discovery and the commencement of trial, through discovery conferences like those proposed by the Committee on Rules of Practice and Procedure of the Judicial Conference,⁵⁹ and through the refusal to postpone those deadlines without a showing of good cause.

Just as the reforms described in the preceding paragraph play an important role in complementing sanctions, sanctions are a necessary supplement to other means of controlling abuse of the judicial process. Preventive means can never be completely successful, and no matter how closely a judge supervises the discovery process some abuses will go undetected. When they are detected and proven, they must be punished.

IV

An increased willingness to employ sanctions for abuse of the judicial process of course does not mean that judges should take a cavalier attitude toward their use. To the contrary, a careful, considered approach obviously is essential.

Ordinarily, a party must be given notice that sanctions may be imposed and an opportunity to present evidence and arguments concerning the propriety of such sanctions, although not "every order entered without notice and a preliminary adversary hearing offends due process."⁶⁰ The kind of notice and hearing that must be provided depends on the facts of the case and the severity of the sanction to be imposed. The judge who imposes the sanctions should make findings, preferably in writing, explaining why he imposed any sanction and why he chose one sanction instead of another.⁶¹ In some cases, it is advisable for the trial judge to have another judge decide whether sanctions are appropriate in order to avoid any appearance that personal animosity between the judge and the attorney or litigant influenced the decision to impose sanctions.⁶² Observance of these procedural safeguards, com-

59. *Id.* at 624-26.

60. *Link v. Wabash R.R.*, 370 U.S. 626, 632 (1962). *See Israel Aircraft Indus. Ltd. v. Standard Precision*, 559 F.2d 203, 207 (2d Cir. 1977) (dictum) (procedural requirements for sanction of dismissal).

61. *See Wilson v. Volkswagen of America, Inc.*, 561 F.2d 494, 516 (4th Cir. 1977) (need for complete and explicit findings); *Edgar v. Slaughter*, 548 F.2d 770, 773 (8th Cir. 1977) (duty of trial judge to consider whether monetary sanctions may be more just and effective than dismissal of case).

62. *In re Sutter*, 543 F.2d 1030, 1033 n.4 (2d Cir. 1976).

bined with the immediate appealability of some kinds of sanctions,⁶³ strikes a fair balance between the interests of litigants actually victimized by abuse of the judicial process and the interests of litigants unfairly accused of engaging in such abuse. It ensures not only that an abuse for which punishment should be imposed has occurred, but that the severity of the punishment is proportionate to the proven abuse.

Heavy sanctions are not always better than light ones, and light ones are not always better than none. Patience and forbearance are no less essential elements of the judicial temperament in this context than in any other. But judges must be firm with lawyers and litigants who unfairly take advantage of the judicial process. Although we need to know more about the incidence and effect of sanctions for such abuse, there can be no doubt that courts have not made effective use of the sanctions available to them. The current increasing willingness of judges to make better use of those sanctions is an overdue trend that judges should continue to pursue.

63. *Ohio v. Arthur Andersen & Co.*, 570 F.2d 1370, 1372 (10th Cir. 1978) (appealability of order imposing preclusionary and monetary sanctions).