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## Foreword

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# ST. JOHN'S LAW REVIEW

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## SYMPOSIUM

### SANCTIONING ATTORNEYS FOR DISCOVERY ABUSE—THE RECENT AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: VIEWS FROM THE BENCH AND BAR†

#### FOREWORD

PAUL A. BATISTA\*

The role of financial sanctions on attorneys in the federal discovery process is no longer a parochial concern limited to the members of the legal community. It has in recent months come to the attention of the press, transforming the scope of the lawyer's responsibility for the conduct of pretrial discovery into a matter of public debate and consideration.

When the United States Judicial Conference announced in September 1982 extensive proposals for amendments to the Federal Rules of Civil Procedure, *The New York Times*<sup>1</sup> featured a front page article highlighting those proposals which mandated the imposition of monetary sanctions on lawyers.<sup>2</sup> No other aspect of

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† This Symposium is adapted from a panel discussion sponsored by the Association of the Bar, City of New York, on December 6, 1982. The moderator of the discussion was Paul A. Batista, and the panel consisted of Judge Abraham D. Sofaer, Peter M. Fishbein, and Nicholas deB. Katzenbach.

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<sup>1</sup> N.Y. Times, Sept. 27, 1982, at A1, col. 1.

<sup>2</sup> *Id.* at B6, col. 6. In June 1981, the Commission on Rules of Practice and Procedure of the Judicial Conference of the United States proposed a set of amendments to the Federal Rules of Civil Procedure. Comm. on Rules of Prac. and Proc., U.S. JUD. CONF., *Preliminary*

the conference's proposals was treated similarly. This virtually unprecedented attention appears to be the result of the growing public perception that lawyers are the primary, if not the exclusive, obstacle to judicial economy.<sup>3</sup> This perception appears to be grounded in the notion that lawyers are inefficient and unduly expensive. Thus, the discipline of lawyers through money sanctions is regarded as one way to bridle this inefficiency. In fact, the Advisory Committee to the Judicial Conference of the United States acknowledged this perception when it stated that "[c]oncern about discovery abuse has led to widespread recognition that there is a need for more aggressive judicial control and supervision."<sup>4</sup> This

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*Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, 90 F.R.D. 451 (1981) [hereinafter cited as *Preliminary Draft of Proposed Amendments*]. These proposals were amended and adopted by the United States Judicial Conference in September 1982. U.S. JUD. CONF., PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE (1982) [hereinafter cited as PROPOSED AMENDMENTS], reported in Nat'l L.J., Oct. 11, 1982, at 13, col. 3, and N.Y.L.J. Sept. 29, 1982, at 1, col. 2.

<sup>3</sup> See Note, *Sanctions Imposed by Courts on Attorneys Who Abuse the Judicial Process*, 44 U. CHI. L. REV. 619, 619 (1977) [hereinafter cited as Note, *Sanctions Imposed*]. To a large extent, attorneys are responsible for the present congestion and delay in the courts. *Id.* Attorney abuse of the judicial process takes various forms, including tardiness, absence and unpreparedness at pretrial conferences or hearings. *Id.* Perhaps the most criticized misuse of time and resources, however, lies in the abuse of discovery. See *infra* note 17. Attorneys both resist justified discovery requests, Krupp, *Rule 37: Sanctions for Discovery Resistance*, 7 LITIGATION 32, 32 (Spring 1981), and make demands that are unfounded or excessive, Note, *Excessive Discovery in Federal and Illinois Courts: A Tool of Harassment and Delay?*, 11 LOY. U. CHI. L.J. 807, 808-09 (1980). The abuse of discovery often results in exorbitant costs to litigants, and in unfair settlements when the opposing litigant cannot afford to undergo extensive pretrial preparation. See *infra* note 17.

<sup>4</sup> *Preliminary Draft of Proposed Amendments*, *supra* note 2, at 483, Rule 26(g) advisory committee note. Greater judicial supervision over the discovery process is frequently cited as a solution to the problem of discovery abuse. Pollack, *Discovery—Its Abuse and Correction*, 80 F.R.D. 219, 221 (1978); Note, *supra* note 3, at 824 & n.89. Justice Powell, an ardent advocate of reform in the area of discovery abuse, has emphasized that "there is a pressing need for judicial supervision [by the district courts] in this area." *ACF Indus., Inc. v. EEOC*, 439 U.S. 1081, 1087 (1979) (Powell, J., dissenting from the denial of certiorari). The Supreme Court, in *Herbert v. Lando*, 441 U.S. 153 (1979), stated that "the district courts should not neglect their power to restrict discovery where 'justice requires [protection for] a party or person from annoyance, embarrassment, oppression, or undue burden or expense.' . . . [J]udges should not hesitate to exercise appropriate control over the discovery process." *Id.* at 177 (quoting FED. R. CIV. P. 26(c)). Judicial involvement may serve to increase the efficiency of the pretrial preparation period. Suggestions regarding the form judicial involvement should take include, for example, greater use of the discovery conference. See FED. R. CIV. P. 26(f); Underwood, *Curbing Litigation Abuses: Judicial Control of Adversary Ethics—The Model Rules of Professional Conduct and Proposed Amendments to the Rules of Civil Procedure*, 56 ST. JOHN'S L. REV. 625, 664-67 (1982). Some commentators suggest an increase in the use of protective orders. *E.g.*, American College of Trial Lawyers, *Recommendations on Major Issues Affecting Complex Litigation*, 90 F.R.D. 207, 224

exhortation for more active judicial supervision of discovery abuse evinces a firm position on the part of the Advisory Committee.

The old federal discovery rules create an inevitable tension in the lawyer's role.<sup>5</sup> Rule 26, characterized as "one of the most significant innovations of the Federal Rules of Civil Procedure,"<sup>6</sup> permits lawyers to obtain discovery of all relevant, nonprivileged information in preparation for trial.<sup>7</sup> There is no need to emphasize

(1981). See generally Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions*, 91 HARV. L. REV. 1033, 1036-37 (1978). Imposition of discovery sanctions has also been recommended. See *J.M. Cleminshaw Co. v. City of Norwich*, 93 F.R.D. 338, 359 (D. Conn. 1981) ("just and reasonable sanctions is one of the established techniques which a trial court may use to achieve the end of speedy justice"). Failures by attorneys to comply with discovery rules work an injustice on the court system, as well as on the opposing party. In order to "[vindicate] the public interest," the sanctions "are an appropriate means of deterring further violations . . ." *Id.* at 360.

For similar viewpoints regarding judicial involvement as a solution to the discovery abuse problem, see *National Commission for the Review of Antitrust Laws and Procedures*, 80 F.R.D. 509, 522 (1979); Nordenberg, *The Supreme Court and Discovery Reform: The Continuing Need for an Umpire*, 31 SYRACUSE L. REV. 543, 562 (1980); Note, *supra*, at 1045 & n.76; see also *Preliminary Draft of Proposed Amendments*, *supra* note 2, at 481, Rule 26 advisory committee note (rule 26(b)(1) amended to "encourage judges to be more aggressive in identifying and discouraging discovery overuse").

<sup>5</sup> See Note, *supra* note 4, at 1035-36. Ordinarily, discovery is an extrajudicial endeavor, since most requests do not entail court involvement. *Id.*; see *infra* notes 11-15. Additionally, the federal rules provide few restrictions upon what and how much material may be discovered. See *infra* note 16 and accompanying text. In fact, the rules appear to encourage "fishing expeditions." Kaufman, *Judicial Control Over Discovery*, 28 F.R.D. 111, 120 (1962); see Note, *supra* note 4, at 1036 ("[i]ronically, [the] fundamental features of the discovery rules—their breadth and reliance on party initiative—render them susceptible to abuse").

One of the principal mechanisms through which discovery must be controlled, therefore, is cooperation between attorneys themselves. Kaufman, *supra*, at 116. Since attorneys are often paid on an hourly basis, however, there is "a lack of economic incentive to curtail discovery." Pollack, *supra* note 4, at 223. There is, in addition, always a concern that something will be overlooked, and that the attorney will be charged with legal malpractice. Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 AM. B. FOUND. RESEARCH J. 217, 244-45; Smith, *The Concern Over Discovery*, 28 DRAKE L. REV. 51, 51 n.1 (1978). The result is that attorneys are torn between their duty as an officer of the court to remain within reasonable bounds and their duty to represent their clients zealously. Cohn, *Federal Discovery: A Survey of Local Rules and Practices in View of Proposed Changes to the Federal Rules*, 63 MINN. L. REV. 253, 255-56 & n.25 (1978). See generally Kaufman, *supra*, at 120-25.

<sup>6</sup> *Hickman v. Taylor*, 329 U.S. 495, 500 (1947).

<sup>7</sup> FED. R. CIV. P. 26(b)(1). Rule 26(b)(1) provides that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party . . ." *Id.*

The discovery provisions were seen by many as the most innovative and drastic change in federal civil practice caused by the Federal Rules of Civil Procedure. See, e.g., J. LANDERS & J. MARTIN, *CIVIL PROCEDURE* 560 (1981); C. WRIGHT, *HANDBOOK OF THE LAW OF THE FEDERAL COURTS* § 81, at 398 (3d ed. 1976). Discovery was to supplant detailed and comprehen-

the broad scope of this disclosure. Invariably, lawyers resort to the Supreme Court's 1947 decision in *Hickman v. Taylor*<sup>8</sup> for the ritual citation of the concept that rule 26 is to be accorded "broad and liberal treatment."<sup>9</sup> "Mutual knowledge of all the relevant facts gathered by both parties," stated the *Hickman* Court, "is essential to proper litigation."<sup>10</sup>

In an effort to implement the broad mandate of rule 26, the federal rules have placed at the disposal of attorneys an extensive array of discovery tools. These include oral depositions,<sup>11</sup> written depositions,<sup>12</sup> interrogatories,<sup>13</sup> document requests under rule 34<sup>14</sup> and requests for admissions.<sup>15</sup> The tools themselves are not only numerous, but are also capable of almost infinite service. As the

sive pleading; it seeks to achieve the "fullest possible knowledge of the issues and facts before trial." *Hickman v. Taylor*, 329 U.S. 495, 501 (1947). The discovery process 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 . . . .

C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2001, at 15 (1970). In addition, the drafters of the federal rules sought to "secure the just, speedy, and inexpensive determination of every action." FED. R. CIV. P. 1. The replacement of rigid pleading rules with liberal ones and the addition of discovery to replace the old pleadings' function "were intended not only to eliminate the technical rigidity associated with previous practice, but also to mitigate the 'sporting' quality of adversarial litigation." Note, *supra* note 4, at 1033 (footnotes omitted); see *Tiedman v. American Pigment Corp.*, 253 F.2d 803, 808 (4th Cir. 1958).

<sup>8</sup> 329 U.S. 495 (1947). In *Hickman*, the Supreme Court limited the scope of discovery by creating a privilege against forced disclosure of the opposing attorney's work product. See *id.* at 510. "[T]he 'work product of the lawyer'" has been defined as "the result of his use of his tongue, his pen, and his head, for his client . . ." C. WRIGHT, *supra* note 7, § 82, at 406.

<sup>9</sup> *Hickman*, 329 U.S. at 507.

<sup>10</sup> *Id.* In explaining the purpose for liberal discovery rules, the Supreme Court explained that the "procedure simply advances the stage at which the disclosure can be compelled . . . thus reducing the possibility of surprise." *Id.* The Court added that the "fishing expedition" is not necessarily an evil, even though it had been regarded as one in the past. *Id.* Primarily, the mutuality of the opportunity to "fish" mitigates the dangers. *Id.* at 507 n.8; accord 4 J. MOORE, *MOORE'S FEDERAL PRACTICE* ¶ 26.02[2], at 26-66 n.4 (2d ed. 1983).

<sup>11</sup> FED. R. CIV. P. 30(a) ("[a]ny party may take the testimony of any person, including a party, by deposition upon oral examination").

<sup>12</sup> FED. R. CIV. P. 31(a) (any party is permitted to "take the testimony of any person . . . by deposition upon written questions").

<sup>13</sup> FED. R. CIV. P. 33; see Flegal & Umin, *Curbing Discovery Abuse in Civil Litigation: We're Not There Yet*, 1981 B.Y.U. L. REV. 597, 599, 604-06.

<sup>14</sup> FED. R. CIV. P. 34.

<sup>15</sup> *Id.* 36. Requests for admission result in a narrowing of the issues and factual controversies, since "any matter admitted is conclusively established." *Id.* 36(b).

rule itself provides: "the frequency of use of these methods is not limited."<sup>16</sup> It is not surprising that this power, although serving the valuable goals of limiting and defining the issues for trial, has also led to misuse, abuse and overuse, and to what is sometimes termed the "scorched earth" approach to pretrial discovery.<sup>17</sup>

The discovery largesse of rules 26 through 36 of the Federal Rules of Civil Procedure is balanced by the penalties provision set out in rule 37, which is described simply as "sanctions."<sup>18</sup> In *Roadway Express, Inc. v. Piper*,<sup>19</sup> the Supreme Court strongly admonished the lower federal courts that "Rule 37 sanctions must be applied diligently both 'to penalize those whose conduct may be

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<sup>16</sup> *Id.* 26(a).

<sup>17</sup> *Chrysler Corp. v. Fedders*, 540 F. Supp. 706, 731 (S.D.N.Y. 1982); see Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, 70 F.R.D. 83, 95-96 (1976); Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposal for Change*, 31 VAND. L. REV. 1295, 1323-25 (1978). In addition to "fishing expeditions," excessive documentation, and overly extensive interrogatories, discovery abuse takes the form of document production in a disorganized manner and in large quantities, forcing opposing counsel to sort through mounds of paper. At other times, counsel may not respond at all to justified requests. Underwood, *supra* note 4, at 659. Finally, overuse of discovery has been noted by many as the most pressing form of abuse. *E.g.*, Flegal & Umin, *supra* note 13, at 597; see D. SEGAL, *SURVEY OF LITERATURE ON DISCOVERY FROM 1970 TO THE PRESENT: EXPRESSED DISSATISFACTION AND PROPOSED REFORMS* 11 (1978).

In 1980, the federal rules were amended in order to deter misuse of the discovery process and to reduce the costs of discovery. See *Amendments to the Federal Rules of Civil Procedure*, 85 F.R.D. 521, 526, Rule 26(f) advisory committee note (1980). Justices Powell, Stewart and Rehnquist dissented to the amendments, stating that "the changes . . . [fell] short of those needed to accomplish reforms in civil litigation that are long overdue." *Amendments to the Federal Rules of Civil Procedure*, 446 U.S. 997, 997-98 (1980) (Powell, J., dissenting). Justice Powell emphasized that "[t]he present Rules . . . invite discovery of such scope and duration that district judges often cannot keep the practice within reasonable bounds." *Id.* at 999 (Powell, J., dissenting) (footnote omitted). He also cited a report of the Litigation Section of the American Bar Association as "mak[ing] clear that the 'serious and widespread abuse of discovery' will remain largely uncontrolled." *Id.* at 998 (Powell, J., dissenting). Many commentators have expressed similar views regarding the insufficiency of the amendments, particularly the absence of any change in the interrogatory procedure. See, *e.g.*, Flegal & Umin, *supra* note 13, at 600 & n.11.

<sup>18</sup> FED. R. CIV. P. 37. The federal rules provide for various sanctions which are to be imposed at the discretion of the trial court for a "failure to make or cooperate in discovery." *Id.* The trial court may regard designated facts as established, disallow designated claims or defenses, strike or dismiss pleadings, render a default judgment, or find the party in contempt of court. *Id.* 37(b)(2)(A)-(D). In addition to or in place of any of these sanctions, the judge may require the party disobeying the order or his attorney 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." *Id.* 37(b)(2)(E). Attorney's fees and costs may similarly be granted to a party who is forced to go to court to achieve compliance with discovery requests. *Id.* 37(a)(4).

<sup>19</sup> 447 U.S. 752 (1980).

deemed to warrant such a sanction, and to deter those who might be tempted to such conduct in the absence of such a deterrent.'"<sup>20</sup> Although virtually all of the specific remedies enumerated in rule 37 to penalize and deter abusive conduct are directed at the party rather than his attorney,<sup>21</sup> the real focus of *Roadway Express* is on attorney sanctions and not on the punishment of the client.<sup>22</sup> Apparently due to the Court's concern that the client should not be made to suffer for conduct essentially within the lawyer's domain—the conduct of pretrial discovery—the courts are more fre-

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<sup>20</sup> *Id.* at 763-64 (quoting *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643 (1976)). In *Roadway Express*, the Court reviewed the powers of the federal courts to assess monetary penalties against attorneys. The Court integrated the "American Rule"—that attorney's fees are not available to the winning party—into title 28, section 1927 of the United States Code, holding that an award of costs against an attorney for "multiplying the proceedings" may not include attorney's fees. 447 U.S. at 759-63.

In its discussion of rule 37, the Court stressed the importance of strict sanctioning of both parties and attorneys who do not comply with the discovery rules or court orders pertaining to discovery. *Id.* at 763-64. The Court directed the district court to act upon the request for costs and attorney's fees caused by counsel's behavior, which had ultimately resulted in the dismissal of the action. *Id.* at 764.

<sup>21</sup> See *supra* note 18. An order which denies the party an opportunity to dispute certain facts, FED. R. Civ. P. 37(b)(2)(A), or to put forth certain claims or defenses, *id.* 37(b)(2)(B), or one which strikes a pleading or a portion of a pleading, *id.* 37(b)(2)(C), and especially a dismissal or default judgment, *id.* 37(b)(2)(D), clearly has more of an adverse effect on the attorney's client than on the attorney himself. The fact that sanctions will harm the client for the "sins of his attorney" has been recognized as a cause of judicial reluctance to impose sanctions. Renfrew, *Discovery Sanctions: A Judicial Perspective*, 67 CALIF. L. REV. 264, 273 (1979). This concern has also been a relevant factor in considering the appropriate sanction to be imposed. In *Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130*, 657 F.2d 890 (7th Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982), the Seventh Circuit noted that the grant of summary judgment is a burden which "fall[s] too heavily upon the parties," and therefore the court reduced the harshness of the punishment. *Id.* at 904; *cf.* *J.M. Cleminshaw Co. v. City of Norwich*, 93 F.R.D. 338, 355 (D. Conn. 1981) (notwithstanding that rule 41(b) provides only for dismissal, money sanctions may be imposed if the violation is caused by an attorney).

Despite the harsh punishment a party may suffer for his attorney's malfeasance, circuit courts often affirm the imposition of even the strictest penalties, such as dismissal and default, as falling within the discretion of the trial court. See, e.g., *Barta v. Long*, 670 F.2d 907, 910 (10th Cir. 1982); *Penthouse Int'l Ltd. v. Playboy Enters., Inc.*, 663 F.2d 371, 391-92 (2d Cir. 1981); *Glukstad, Inc. v. Lineas Aereas Nacional-Chile*, 656 F.2d 976, 979 (5th Cir. 1981); *Davis v. Fendler*, 650 F.2d 1154, 1161 (9th Cir. 1981). But see *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 212 (1958) (severe sanctions, such as dismissal, are not invoked unless there is wilful refusal, bad faith or fault). In *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976), the Supreme Court affirmed the district court's dismissal of an action under rule 37. *Id.* at 643. The Court reviewed the imposition of the sanction under an "abuse of discretion" standard, and found that it was not an abuse for the trial judge to dismiss the action since the attorneys showed bad faith and a "callous disregard" of their responsibilities." *Id.*

<sup>22</sup> See 447 U.S. at 766.

quently following the direction of rule 37(a)(4) that, "[i]f the [discovery] motion is granted, the court shall . . . require . . . the attorney advising such conduct [which necessitated the motion] to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees . . . ." <sup>23</sup> In this rule lies the basis for the more aggressive judicial control and supervision which the Judicial Conference has urged and which has already in fact come to characterize the decisions of the federal courts in the wake of the 1980 Supreme Court opinion in *Roadway Express*. <sup>24</sup>

This increased emphasis on aggressive control impacts the judiciary and, of course, the client. For lawyers actively engaged in litigation in the federal courts, the emerging emphasis on punishment and deterrence <sup>25</sup> has practical consequences. <sup>26</sup> The district courts in the Second Circuit, for example, following the directive of *Roadway Express*, are imposing sanctions on attorneys with increasing frequency. <sup>27</sup> Not only are the penalties being imposed in favor of prevailing adversaries, but they are also, in some cases, being imposed in favor of the court itself, <sup>28</sup> apparently on the the-

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<sup>23</sup> FED. R. CIV. P. 37(a)(4). Rule 37(a)(4) provides for the mandatory imposition of costs and attorney's fees when an order to comply is granted unless the opposing party's noncompliance with discovery requests can be "substantially justified." *Id.*

<sup>24</sup> Batista, *New Discipline in Old Game—Sanctions for Discovery Abuses*, N.Y.L.J., Aug. 16, 1982, at 1, col. 3; see, e.g., *In re Plywood Antitrust Litig.*, 655 F.2d 627, 638 (5th Cir. 1981); *Davis v. Fendler*, 650 F.2d 1154, 1161 (9th Cir. 1981); *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208, 1212 (8th Cir.), *cert. denied*, 454 U.S. 968 (1981).

<sup>25</sup> Underwood, *supra* note 4, at 662-63; Note, *supra* note 4, at 1044-54. In the final analysis, courts rarely impose sanctions on attorneys or parties. Flegal & Umin, *supra* note 13, at 603. More recently, however, courts have begun to note the need to deter abuse of the discovery process. In *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976), the Supreme Court stated that "the most severe in the spectrum of sanctions provided by statute or rule must be available to the district court . . . , not merely to penalize . . . , but to deter those who might be tempted to such conduct in the absence of such a deterrent." *Id.* at 643; see *Paine Webber Jackson & Curtis, Inc. v. Immobiliaria Melia de Puerto Rico, Inc.*, 543 F.2d 3, 6 (2d Cir. 1976), *cert. denied*, 430 U.S. 907 (1977).

<sup>26</sup> Batista, *supra* note 24, at 2, col. 2 (a penalty imposed upon an attorney "carries substantial risks to the attorney's reputation").

<sup>27</sup> Epstein, Corcoran, Krieger & Carr, *An Up-Date on Rule 37 Sanctions After National Hockey League v. Metropolitan Hockey Clubs, Inc.*, 84 F.R.D. 145, 153 (1980).

<sup>28</sup> See *J.M. Cleminshaw Co. v. City of Norwich*, 93 F.R.D. 338, 351-60 (D. Conn. 1981). In *Gamble v. Pope & Talbot, Inc.*, 307 F.2d 729 (3d Cir. 1962), a fine levied against counsel, payable to the court, was disallowed since there was no finding of contempt prior to assessment of the penalty. *Id.* at 732. More recently, however, the Second Circuit, in *In re Sutter*, 543 F.2d 1030 (2d Cir. 1976), affirmed the assessment of a fine against counsel, payable to the court, for delaying commencement of trial. The fine was levied pursuant to a local rule of the Eastern District of New York, *id.* at 1037, and as such, the Second Circuit declined to follow the reasoning of the Third Circuit in *Gamble*, *id.* at 1037-38.



ory that misuse of the discovery process in private litigation constitutes some type of public harm.<sup>29</sup> For lawyers, then, this increased use of monetary sanctions necessitates, at a minimum, careful examination of discovery issues, for a discovery disagreement which becomes a litigated dispute before a federal judge implicates the sanction mechanisms of rule 37. It should be noted that in addition to penalizing flagrantly abusive conduct, courts are imposing money sanctions for negligence, inadvertance, and mere ineptitude.<sup>30</sup>

For the judiciary, financial penalties on lawyers also involve sensitive issues. The recent amendments adopted by the Judicial Conference appear to make the use of sanctions mandatory.<sup>31</sup> At a

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In *Cleminshaw*, the district court fined the attorney \$150, payable to the court, in addition to costs and attorney's fees to the opposing party. 93 F.R.D. at 347. While it is feasible that section 1927 of title 28 of the United States Code could have been the basis for the court's authority to fine the attorney, the court did not base its holding on the statute. *Id.* at 353 n.12. In a detailed discussion of the propriety of the additional sanction, Judge Cabranes drew an analogy to other sources of authority which have empowered courts to impose penalties upon attorneys. These authorities, the court held, are drawn from the "inherent power to control the disposition of the case before it." *Id.* at 352 (citation omitted).

<sup>29</sup> *Cleminshaw*, 93 F.R.D. at 360.

<sup>30</sup> Underwood, *supra* note 4, at 661-62; see *United States v. Sumitomo Marine & Fire Ins. Co.*, 617 F.2d 1365, 1370 (9th Cir. 1980). *But see* *Marshall v. Segona*, 621 F.2d 763, 768-69 (5th Cir. 1980) (dismissal is inappropriate when the disobedience is the result of neglect or inability to comply).

<sup>31</sup> Amendments to the Federal Rules of Civil Procedure, 51 U.S.L.W. 4501, 4503 (U.S. May 3, 1983) (Rule 26(g)). The amendments address three goals: "(1) reform of procedures for the holding of pretrial conferences and for the scheduling and management of litigation by district judges, (2) the control of discovery abuse, and (3) the need to conform the rules to the jurisdictional provisions of the Federal Magistrates Act of 1979." *Preliminary Draft of Proposed Amendments*, *supra* note 2, at 455. Rule 26(g) adds an attorney verification provision similar to rule 11:

Every request for discovery, or response or objection . . . shall be signed by at least one attorney of record . . . . The signature of the attorney . . . constitutes a certification that he has read the request, response, or objection, and that . . . it is formed . . . (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose either upon the person who made the certification, or upon the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

minimum, as Judge Cabranes has recently stated, attorney sanctions under existing rules are "an established technique" of "case management"<sup>32</sup>—a euphemism under which the judge ordered a lawyer to pay money sanctions to his adversary and to the clerk of the court.<sup>33</sup>

With respect to the public interest, attorney sanctions directly involve interests that are important to the client. Any proposal for change which promises both to increase the efficiency and fairness of the litigation process, as well as to decrease its expense, has obvious public appeal and benefit. Whether the increased application of monetary sanctions on lawyers will advance these goals will surely be the subject of much dialogue and debate.

In furthering this dialogue, the views of three distinguished members of the legal community are presented in this Symposium. Judge Abraham D. Sofaer will provide a view from the bench in a comprehensive analysis of attorney discovery-abuse sanctions. Peter M. Fishbein, in an informal commentary, will discuss the recently adopted discovery abuse sanctions from a litigator's perspective. Finally, Nicholas deB. Katzenbach will offer his remarks on the new rules from the viewpoint of the corporate defense bar.

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PROPOSED AMENDMENTS, *supra* note 2, Rule 26(g).

<sup>32</sup> 93 F.R.D. at 359; *see supra* note 4.

<sup>33</sup> *See supra* note 28.