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Federal Rules of Civil Procedure: Defining a Feasible Culpability Threshold for the Imposition of Severe Discovery Sanctions

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I. INTRODUCTION

In recent years, inefficiencies in the discovery phase of federal litigation have been increasingly perceived as an obstacle to justice.[1] Intransigent or merely careless delays in litigants' compliance with discovery orders often so lengthen the pretrial phase of civil litigation that a final decision on the merits seems a remote possibility.[2] Traditionally, courts have imposed the ultimate litigation-ending sanctions authorized under rule 37 of the Federal Rules of Civil Procedure (Federal Rules)[3] only in the clearest cases of intentional discovery abuse. In other cases courts have imposed minimum sanctions, severe enough to persuade the delaying party to expedite the discovery process and to compensate the discovering party for the effects of the delay.[4]

More recently the federal courts have toughened their attitude toward discovery delays and have imposed litigation-ending sanctions in an attempt to compel litigants and their attorneys to comply with discovery orders.[5] At least two courts have imposed litigation-ending discovery sanctions for less than intentional failures to comply with discovery orders,[6] suggesting that "intent" may no longer be the culpability threshold. This increased use of litigation-ending sanctions raises a significant normative question: what degree of culpability should be required before a court may impose such sanctions?

1. *See generally* W. BURGER, 1979 YEAR-END REPORT (1980); Ebersole, *Discovery Problems: Is Help on the Way?*, 66 A.B.A. J. 50 (1980).

2. *See, e.g.*, United States v. Reserve Mining Co., 412 F. Supp. 705, 712-13 (D. Minn. 1976), *aff'd*, 543 F.2d 1210, 1211-12 (8th Cir. 1976) (defendant Reserve Mining was assessed $200,000 discovery sanction for failure to obey discovery order; violations were deemed part of defendant's course of conduct adopted in bad faith for the sole purpose of delaying final resolution of pollution control controversy).

3. Rule 37 provides sanctions of varying severity—from awarding costs to dismissing the action. *See* FED. R. CIV. P. 37(b).

4. *See* notes 24-29 *infra* and accompanying text.

5. *See* notes 36-37 *infra* and accompanying text.

6. *See* notes 44-49 *infra* and accompanying text.

This Note will review case law developments and will analyze some of the problems associated with the lower culpability threshold that has been applied in recent cases. The Note concludes that the use of a lower level of culpability cannot deter discovery order noncompliance at the present time without compromising the fundamental goal of the Federal Rules: to provide litigants with a fair opportunity to have their disputes promptly decided on the merits. The proposals for discovery reforms and changes in the Federal Rules, the local court rules, and the Federal Magistrates Act that are advanced in this Note will increase litigational efficiency by forcing courts and magistrates to clarify the litigants' duties.[7] Adoption of these proposed reforms will also permit the fair imposition of a reduced culpability threshold.

II. THE PROBLEM

The discovery procedures outlined in the Federal Rules were drafted to enable parties to limit trials to issues genuinely in dispute, to ascertain and preserve facts in preparation for trial, and to lay a foundation for settlement or summary judgment. The primary goal of the procedures was to eliminate the egregious aspects of the adversary system—surprise, partisan expert witnesses, overly dramatic cross-examinations, and excessive contentiousness—that underlie the "sporting theory of justice."[8]

Modern pretrial discovery in federal litigation is conducted on a relatively informal basis; written judicial orders are usually unnecessary to obtain oral depositions or to submit written interrogatories. As currently practiced, discovery may be supervised by the court or by court-appointed federal magistrates.[9] The lack of direct authority by federal magistrates over

7. Discovery orders are often ambiguous both in terms of the scope and of the deadline for compliance, making it difficult for the court to find a violation regardless of the culpability threshold employed. *See* notes 68-70 *infra* and accompanying text. Contributing to lax administration of discovery are the Federal Rules' highly discretionary approach to discovery administration, *see* note 70 *infra*; the lack of supplemental local court rules that could force more rigorous discovery administration, *see* notes 78-79 *infra* and accompanying text; and limitations on the powers of federal magistrates, who often supervise the pretrial discovery process, *see* notes 72-75 *infra* and accompanying text.

8. Address by Chief Justice Warren Burger, National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, in St. Paul, Minnesota (Apr. 7, 1976), *reprinted in* 70 F.R.D. 83, 91, 95 (1976).

9. United States magistrates are untenured federal judicial officers who assist district judges most frequently in the areas of pretrial proceedings, administrative review, and minor criminal offenses. Their status is comparable to

pretrial discovery,[10] combined with innocent as well as intentional[11] delays by attorneys have often made discovery a chaotic process. As a result, courts have used discovery sanctions more frequently to promote judicial efficiency.[12]

A. Rule 37: Authority for Discovery Sanctions

Rule 37 of the Federal Rules is the main statutory enforcement mechanism of the pretrial discovery process.[13] Under the scheme adopted in the rule,[14] an aggrieved party must first

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that of bankruptcy judges. *See* Note, *Article III Constraints and the Expanding Civil Jurisdiction of Federal Magistrates: A Dissenting View*, 88 YALE L.J. 1023, 1025-27 (1979).

Magistrate supervision has increasingly become a distinctive feature of pretrial discovery. During the twelve months that ended June 30, 1979, magistrates conducted 24,231 civil pretrial conferences for judges of the federal district courts. At least two full-time magistrates now serve in each of the 25 largest district courts. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1979 ANNUAL REPORT OF THE DIRECTOR 129, 133 (1979).

10. District courts retained authority over the disposition of pretrial matters under the Federal Magistrate Act of 1968, § 101, 28 U.S.C. § 636 (1976 & Supp. II 1978). The Act provides for de novo review by the district court of any findings or recommendations made by the magistrates. *Id.* § 636(b)(1)(C). This statutory authority constitutes the major difference between pretrial discovery supervision by district judges and magistrates. For a federal district judge's view on judicial supervision of discovery proceedings see Renfrew, *Discovery Sanctions: A Judicial Perspective*, 67 CALIF. L. REV. 264 (1979).

11. *See* Roadway Express, Inc. v. Piper, 100 S. Ct. 2455 (1980) (sanctions imposed on lawyers who unreasonably extend court proceedings).

12. In a survey of published opinions over a period of nearly three years from January, 1975, through October, 1977, 75% of the 48 district court opinons that considered the imposition of discovery sanctions stated that some form of sanction was appropriate. Comparison of this figure with other studies suggests that the published opinions are representative of the total group of determinations considering the imposition of discovery sanctions. *See* Werner, *Survey of Discovery Sanctions*, 1979 ARIZ. ST. L.J. 299, 310-12.

13. Rule 37 is the exclusive source of sanctions for noncompliance with a court's production order. Societe Internationale pour Participations Industrielles et Commerciales v. Rogers, 357 U.S. 197, 207 (1958). Arguably, this does not mean rule 37 is the exclusive source of all discovery sanctions. Two alternative sources of authority for controlling discovery abuse are currently available to federal courts. First, a court has statutory authority to assess a penalty against an attorney for unreasonably increasing the costs of litigation. *See* 28 U.S.C. § 1927 (1976). Although the scope of the statute is broad enough to encompass the increased costs of litigation caused by unreasonable resistance to discovery, the statute has rarely been invoked by the courts to limit discovery abuse. *See* Werner, *supra* note 12, at 322-23. Second, a federal judicial district may arguably create additional discovery sanctions through local rules, so long as these new sanctions are not inconsistent with those enumerated in rule 37. *See* FED. R. CIV. P. 83.

14. The rulemakers structured the discovery process on a cooperative model as a party-initiated and controlled procedure to reduce the costs of court management of discovery. *See* Note, *Standards for the Imposition of Discovery Sanctions*, 27 ME. L. REV. 247, 248-49 (1975). It was recognized at the same time, however, that judicial intervention was sometimes necessary to compel re-

move for an order to compel discovery.[15] If a party fails to obey the order, rule 37 provides that the court may establish designated facts,[16] exclude claims and defenses,[17] strike pleadings,[18] or end the litigation either by dismissing a plaintiff's action or by entering a default judgment against a defendant.[19] Alternatively, the court can treat noncompliance as contempt,[20] or apply any other sanction considered "just."[21] If the noncomplying parties inexcusably fail to attend their own deposition, or do not respond to properly served interrogatories or requests for inspection of documents, the court may impose any of these sanctions without a motion to compel.[22] Regardless of the specific sanction imposed, the court can assess expenses, including attorney's fees, to the party or attorney losing the motion.[23]

B. Requisite Culpability for Imposition of Discovery Sanctions

Although rule 37 does not clearly specify the degree of culpability required before discovery sanctions are imposed, a

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sponses to legitimate discovery requests when the parties failed to agree. *Id.* at 264.

15. Fed. R. Civ. P. 37(a). Rule 26(c) protective orders are available to parties against whom discovery is sought, and prevent the vexatious and improper use of orders to compel discovery. *See* Fed. R. Civ. P. 26(c).

16. Fed. R. Civ. P. 37(b)(2)(A).

17. *Id.* 37(b)(2)(B).

18. *Id.* 37(b)(2)(C).

19. *Id.*

20. *Id.* 37(b)(2)(D).

21. *Id.* 37(b)(2).

22. When a party, given proper notice, fails to appear at his own deposition, or fails to serve answers to rule 33 interrogatories, or fails to serve a written response to a rule 34 request for inspection, the court in which the action is pending may make any just order in regard to the failure, including those from the list in rule 37(b)(2). The party failing to act may be assessed for reasonable expenses caused by the failure, unless the court finds substantial justification for the failure or other circumstances which make the award unjust. *Id.* 37(d). *See* Diaz v. Southern Drilling Corp., 427 F.2d 1118, 1126 (5th Cir.) (entry of default judgment against Swiss corporation not an abuse of discretion where deponent, a corporate officer, willfully failed to appear for deposition by plaintiff, United States Government), *cert. denied*, 400 U.S. 878 (1970). For subdivision 37(d) to be applicable, there must be a complete failure to make discovery. *See, e.g.*, Israel Aircraft Indus., Ltd. v. Standard Precision, 559 F.2d 203, 208 (2d Cir. 1977); Fox v. Studebaker-Worthington, Inc., 516 F.2d 989, 995 (8th Cir. 1975).

23. Expenses are awarded under rule 37 for three main types of noncompliance: first, failure to afford discovery under rule 30 (oral depositions), rule 31 (depositions upon written questions), rule 33 (interrogatories to parties), and rule 34 (production of documents and requests for inspection), which necessitates a motion for an order compelling discovery (Fed. R. Civ. P. 37(a)(4)); second, failure to comply with an order compelling discovery (*Id.* 37(b)(2)(E)); and third, failure to attend a party's own deposition, to serve answers to rule 33 interrogatories, or to resond to a rule 34 request for inspection (*Id.* 37(d)).

shift in the permissible culpability threshold has occurred as attitudes concerning discovery sanctions have changed. A review of the forty-year history of rule 37 and an evaluation of the current implementation of the rule reveal three alternative culpability thresholds that justify the imposition of litigation-ending sanctions: (1) conventional *intent*; (2) extreme or *gross negligence*; and (3) *ordinary negligence*.

1. *The Conventional Wisdom: The Intent Threshold*

a. Rule 37 as Promulgated

Immediately after rule 37 was promulgated in 1938, most lower federal courts believed that the rule required willful noncompliance with a discovery order before a sanction could be imposed.[24] The dominant view was that the purpose of discovery sanctions should be remedial and specific: to compensate the injured party or to enforce specific compliance from the noncomplying party.[25] Any deterrent effect on litigants other than the immediate parties was only incidental.[26] Though courts often differed on how discovery problems should be analyzed under this remedial orientation,[27] the results were nevertheless uniform. Because litigation-ending sanctions were inconsistent with a remedial goal, considerable restraint was exercised in imposing the severest of the rule 37 sanctions—dismissal of the action and entry of default.[28] When such sanctions were imposed, appellate courts often reversed, using an abuse of discretion standard of review.[29]

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24. "Rule 37 sometimes refers to a 'failure' to afford discovery and at other times to a 'refusal' to do so. Taking note of this dual terminology, courts have imported into 'refusal' a requirement of 'willfulness.'" Advisory Committee Note, FED. R. CIV. P. 37, 48 F.R.D. 487, 538 (1970).

25. *See, e.g.*, Dorsey v. Academy Moving & Storage, Inc., 423 F.2d 858 (5th Cir. 1970); Robison v. Transamerica Ins. Co., 368 F.2d 37 (10th Cir. 1966).

26. The amendment of rule 37 in 1970 left this remedial orientation unchanged but the rule was toughened by requiring trial courts to tax costs upon the party losing the motion unless that party could demonstrate that his position was substantially justified. *See* 48 F.R.D. 487, 534-38 (proposed amendments to FED. R. CIV. P. 37(a)(4), (b)(2), (d), as amended March 30, 1979). Though this amendment promoted compensatory ends, the main purpose was to discourage resort to judicial process to enforce discovery. *See* Note, *The Emerging Deterrence Orientation In The Imposition Of Discovery Sanctions*, 91 HARV. L. REV. 1033, 1040-41 (1978).

27. *See* notes 30-33 *infra* and accompanying text.

28. *See* Note, *supra* note 26, at 1038.

29. *See, e.g.*, Sapiro v. Hartford Fire Ins. Co., 452 F.2d 215, 217 (7th Cir. 1971) (per curiam); B.F. Goodrich Tire Co. v. Lyster, 328 F.2d 411, 416 (5th Cir. 1964); Gill v. Stolow, 240 F.2d 669, 670 (2d Cir. 1957).

b. *Societe Internationale*

The impetus to revise rule 37 originated in 1958 with the United States Supreme Court's decision in *Societe Internationale pour Participations Industrielles et Commerciales v. Rogers*.[30] The Court held that the plaintiff could not be subjected to rule 37 sanctions when its failure to comply with the lower court's discovery order was "due to inability, and not to willfulness, bad faith, or any fault of petitioner."[31] The Court's use of these alternative criteria to describe the requisite culpability for the imposition of severe discovery sanctions had two implications beyond its immediate holding. First, use of the term "fault," though undefined,[32] appeared to indicate the lower boundary of a permissible culpability range beyond which noncompliance could not be sanctioned by dismissal or default. Second, the Court's use of the term "willfulness" in addition to the term "fault" implied that a severe discovery sanction could be imposed for a less-than-intentional failure to obey.[33]

30. 357 U.S. 197 (1958). Societe Internationale, a Swiss corporation, had brought suit in federal district court against the Attorney General and the Treasurer of the United States for the recovery of assets seized in the United States during World War II under the Trading with the Enemy Act, ch. 106, § 5, 40 Stat. 415 (1917) (current version at 50 U.S.C. § 5(b) (1976)). It was the government's defense that Societe Internationale was a holding company intimately connected with I.G. Farbenindustrie, a German corporation, and therefore was an "enemy" under the terms of the Act. 357 U.S. at 199. To support this contention, the government obtained a discovery order from the district court requiring plaintiff to produce a large number of the records of a Swiss banking firm. *Id.* at 199-200. Swiss law prohibited, under criminal penalty, the disclosure of these records, and the Swiss government confiscated them. *Id.* at 200. Through the efforts of the plaintiff, over 190,000 documents were released by the Swiss authorities and arrangements had been made for neutral parties to inspect the remaining banking records. *Id.* at 203. Nevertheless, the district court directed final dismissal of the action under rule 37(b)(2) for noncompliance with its production order. *Id.* The Court of Appeals for the District of Columbia Circuit affirmed the lower court decision. *Id.* The Supreme Court reversed and remanded the case to the district court for further proceedings. *Id.* at 213.

31. 357 U.S. at 212.

32. Cine Fourty-Second Street Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d 1062, 1067 (2d Cir. 1979) (suggesting that "fault" must have a meaning independent of "willfulness" and "bad faith" unless the Supreme Court chose its words carelessly in *Societe Internationale*).

33. *But see* Werner, *Survey of Discovery Sanctions*, 1979 ARIZ. ST. L.J. 299, 315 (stating that *Societe Internationale* held willful noncompliance necessary for dismissal or default sanction). As late as 1974, some courts interpreted *Societe Internationale* as requiring some element of willfulness or conscious disregard before dismissal of an action for noncompliance with a discovery order. *See, e.g.*, Flaks v. Koegel, 504 F.2d 702, 709 (2d Cir. 1974). Other courts, however, recognized that the mere failure to respond was sufficient for the imposition of lesser sanctions. *See, e.g.*, Dellums v. Powell, 566 F.2d 231, 235 (D.C. Cir. 1977).

c. The 1970 Revisions

Rule 37 was revised in 1970 with the two-fold intention of refining and updating the discovery sanction provisions. Noting the *Societe Internationale* dicta, the rulemakers substituted the term "failure" for the term "refusal" throughout the text, and thus negated federal court decisions interpreting "refusal" as meaning willful or intentional noncompliance.[34] The rulemakers, refining the triple criteria of *Societe Internationale*, introduced proportionality between the severity of the sanction that could be imposed and the degree of culpability of the noncomplying party.[35] On the whole, the 1970 revisions reinforced the prevailing remedial interpretation of rule 37. While negligent noncompliance might justify lesser sanctions, "intent" remained a prerequisite to the imposition of litigation-ending discovery sanctions.

d. *National Hockey League*

In *National Hockey League v. Metropolitan Hockey Club, Inc.*,[36] the Supreme Court went beyond the traditional wisdom that parties will comply in the future, given one more chance, and stated flatly that the unconditional imposition of sanctions is necessary to deter "other parties to other lawsuits" from feeling free "to flout other discovery orders of other district courts."[37]

The language of *Societe Internationale* does not appear to support this view. *See* note 31 *supra* and accompanying text.

34. *See* Advisory Committee Note, *supra* note 24, at 539.

35. The advisory committee's comment to 37(d) emphasized the greater flexibility in the choice of sanctions brought about by the elimination of "willful" failure to comply as a requirement. Flexibility would also result from the use of "light" sanctions for negligent failure to comply. The advisory committee suggested that "light" sanctions of fees and expenses, but not "severe" sanctions or dismissal of default, would be appropriate when the failure to obey was due to "counsel's ignorance of Federal practice" or counsel's "preoccupation with another aspect of the case." *Id.* at 541-42.

36. 427 U.S. 639 (1976). Characterizing the counsel's failure to answer interrogatories as " 'callous disregard' of their responsibilities," the trial judge dismissed the plaintiffs' multidistrict antitrust suit. *Id.* at 643. On appeal, the Third Circuit reversed the dismissal by finding " 'extenuating factors,' " noting a lack of bad faith on the part of the plaintiffs' counsel. *Id.* at 641. The Supreme Court reversed the court of appeals and reinstated the dismissal. *Id.* at 643.

37. *Id.* at 643.

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

Although *National Hockey League* signals a shift away from the traditional intent standard, the Court's decision does not completely reject the conventional wisdom of the intent threshold. The position taken in the advisory committee notes to the 1970 revisions of rule 37—that ultimate discovery sanctions are not justifiable absent a finding of willful violation of a discovery order—appears to remain the predominant view even after the *National Hockey League* endorsement of general deterrence.[38]

Proponents of the intent threshold view *National Hockey League* as irrelevant to the culpability threshold question; they view the case merely as an encouragement to lower courts to abandon the lenient practices of the past. Proponents of the intent threshold support their view by asserting that this standard achieves the proper balance between competing interests and equities. They believe that the societal interest in generally deterring all conduct that tends to impede discovery should be subordinate to the individual's interest in a decision on the merits in cases of careless failure to comply with discovery orders.

Recognizing that dilatory discovery tactics were having an adverse effect on the ultimate objectives of fairness and efficiency embodied in the Federal Rules, commentators have generally approved the *National Hockey League* decision.[39] Nevertheless, unlike intent threshold proponents, some observers would not limit ultimate sanctions to willful violators. One commentator, reading *National Hockey League* broadly, advocates the use of ultimate sanctions even when discovery noncompliance is less than intentional.[40] Adopting this tougher attitude toward discovery noncompliance,[41] at least one federal court has also begun to abandon the remedial rationale.[42]

Id.

38. *See, e.g.*, Renfrew, *supra* note 10, at 276; Werner, *supra* note 12, at 319; Note, *supra* note 26, at 1050.

The advisory committee view is compatible with the *National Hockey League* opinion, *see* National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. at 643, since the Court, while clearly urging lower courts to impose ultimate sanctions more frequently to deter future discovery noncompliance, did not consider whether the cost of such impositions should be placed on less-than-intentional violators. *See* Note, *supra* note 26, at 1050. Further, the recitation of facts in the *National Hockey League* opinion left little doubt that the Court considered plaintiffs' discovery noncompliance to be intentional. *See* National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. at 640-41.

39. *See* Renfrew, *supra* note 18, at 275; Note, *supra* note 26, at 1055.

40. *See* Note, *supra* note 26, at 1047.

41. *See id.* at 1044.

42. *See, e.g.*, Cine Forty-Second Street Theatre Corp. v. Allied Artists Pic-

Courts are increasingly accepting the idea that it is proper to impose sanctions to achieve a general deterrent effect beyond the parties to the instant suit.[43]

2. *The* Affanato/Cine *Position: The Gross Negligence Threshold*

Two United States courts of appeals have held that gross negligence in failing to comply with discovery orders is a sufficient culpability standard for the imposition of the most severe rule 37 sanctions. Both courts explicitly justified their decisions on the general deterrent rationale authorized by the *National Hockey League* Court. In *Affanato v. Merrill Brothers*,[44] the First Circuit affirmed a district court's entry of a default judgment that had been imposed when the defendant in a tort action failed to answer interrogatories.[45] Characterizing the defendant's attorney's conduct as a "near total dereliction of professional responsibility," the circuit court declared the litigation-ending sanction to be within the discretionary power of the trial court because the noncompliance went "well beyond ordinary negligence."[46]

The Second Circuit reached a similar conclusion in *Cine Forty-Second Street Theatre Corp. v. Allied Artists Pictures Corp.*,[47] a private antitrust action. The Second Circuit panel found that in light of the plaintiff's attorneys' grossly negligent failure to obey discovery orders, the district court could bar the plaintiff's evidence under rule 37(b)(2)(B)[48]—in effect, a dis-

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tures Corp., 602 F.2d 1062, 1066-68 (1979); *see* notes 47-55 *infra* and accompanying text.

43. To a great extent this change in attitude came about in the wake of a recomposition of the federal caseload. Not only has the aggregate number of cases brought into federal district courts increased markedly, but the nature of these cases has grown more complex. Multiparty litigation, class actions, multidistrict suits, and antitrust actions typically involve complex factual problems that require greater use of discovery. Additionally, because complex actions tend to be harder fought, parties will more often involve the court in resolving discovery disputes. *See* Note, *supra* note 26, at 1044-45.

44. 547 F.2d 138 (1st Cir. 1977).

45. *Id.* at 139-40. The failure was apparently due to defendant's counsel, who was allowed to continue handling the case despite having left the Massachusetts firm representing the defendant and having established a new residence in Maine. *Id.* at 141. The district court's discovery orders were dispatched to Maine, but the attorney ignored them. *Id.* The attorney's former law firm, trusting in the abilities of its old associate, did not inquire into the progress of the case. *Id.*

46. *Id.* at 141.

47. 602 F.2d 1062 (2d Cir. 1979).

48. Plaintiff's counsel had failed to obey oral discovery orders issued by the United States magistrate in charge of the case. These oral court orders re-

missal of the action.[49]

Both the First Circuit in *Affanato* and the Second Circuit in *Cine* specifically rejected the intent threshold. The *Cine* court, in particular, directly rebutted the contentions of the intent threshold proponents. Although the intent threshold proponents would limit *National Hockey League*'s policy of general deterrence to the facts of the case itself (*i.e.*, to cases in which noncompliance was clearly an intentional trial tactic),[50] the *Cine* court interpreted this policy more broadly. The court believed *National Hockey League* required "strict adherence to the 'responsibilities counsel owe to the Court and to their opponents.' "[51] Having cast the major significance of *National Hockey League* in these broader, more utilitarian terms, the *Cine* court felt free to impose litigation-ending sanctions to deter even nonintentional breaches of these responsibilities to promote "strict adherence."[52] In addition, the *Cine* court rejected the argument that only intentional, calculated discovery noncompliance could be effectively deterred.[53] Although conceding that inability to comply with discovery orders could not be deterred,[54] the court concluded that "[n]egligent, no less than intentional, wrongs are fit subjects for general deterrence."[55]

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quired that interrogatories relating to damages be answered by the plaintiff. *Id.* at 1064-65. Believing plaintiff's noncompliance to be willful, the magistrate recommended to the district court that under rule 37(b) the plaintiff be precluded from introducing evidence with respect to damages—a sanction tantamount to dismissal. *Id.* at 1065. On the district judge's motion, the case was certified for an interlocutory appeal. *Id.* The district judge refused to dismiss on the ground that willful disobedience could not be found in the absence of written discovery orders. A three-member panel of the Second Circuit, following the *Affanato* rationale, found plaintiff's counsel's conduct to be grossly negligent. *Id.* at 1067.

49. *Id.* at 1064. As the *Cine* result demonstrates, use of the terms "lightest" and "severest" in relation to rule 37(b) sanctions is somewhat misleading. Depending on the circumstances, "lesser" sanctions can achieve equally harsh results. The exclusion by the court of a decisive element of a party's claim or defense may be as effective as direct dismissal of the action or entry of default judgment. *See* General Dynamics Corp. v. Selb Mfg. Co., 481 F.2d 1204 (8th Cir. 1973), *cert. denied*, 414 U.S. 1162 (1974). It is a least arguable that the same reasoning which constrains the use of litigation-ending sanctions applies to other sanctions having a comparable effect. *See* Note, *supra* note 26, at 1041 n.52.

50. *See* National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. at 640-41.

51. 602 F.2d at 1067 (quoting National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. at 640).

52. 602 F.2d at 1067.

53. *Id. See generally* note 67 *infra* and accompanying text.

54. 602 F.2d at 1066 (quoting Societe Internationale pour Participations Industrielles et Commerciales v. Rogers, 357 U.S. at 212).

55. 602 F.2d at 1067. Indeed, the criminal codes of many states permit pun-

Courts such as *Affanato* and *Cine* that have adopted a gross negligence culpability threshold differ from the intent threshold proponents in their view of the proper balance of the equities in cases of discovery noncompliance. To these courts, the individual unfairness of denying a decision on the merits is outweighed by the supposedly greater general interest in the efficient administration of discovery. Theoretically, future litigants will be spared the delayed justice that is generated by noncompliance, whether the noncompliance is intentional or merely grossly negligent.

3. *The Ordinary Negligence Threshold*

Affanato and *Cine* represent an emerging trend in the caselaw,[56] and since *National Hockey League*, no discernible line of cases has arisen in opposition to the position taken by these circuit courts.[57] A third position may be hypothesized, however. Although no court has so held, open-ended language in both *Affanato* and *Cine* suggests that even ordinary negli-

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ishment of "criminal negligence" in a variety of contexts under a general deterrence rationale. *See, e.g.*, CAL. PENAL CODE § 192(3)(a) (West 1970); COLO. REV. STAT. § 18-3-106 (1978); FLA. STAT. ANN. § 782.071 (West 1976); HAWAII REV. STAT. §§ 707-703, 704 (1976); ILL. REV. STAT. ch. 38, § 4-7 (1975); MICH. COMP. LAWS ANN. § 750.324 (West 1968); MINN. STAT. § 609.21 (1978); MO. REV. STAT. § 562.016(1), (4), (5) (1978); N.Y. PENAL LAW §§ 120.00(3), 125.10 (McKinney 1975); N.D. CENT. CODE § 12.1-16-03 (1976); TEX. PENAL CODE ANN. tit. 5, § 19.07 (Vernon 1974).

56. *See, e.g.*, Mertens v. Hummell, 587 F.2d 862, 866 (7th Cir. 1978) (dismissal for failure to comply with discovery orders upheld without a finding of willfulness).

57. Though the mandate of *National Hockey League* has not been challenged as such, some appellate courts have set aside litigation-ending discovery sanctions imposed by trial courts in the interest of preserving judicial discretion and maintaining fairness in the discovery process. *See, e.g.*, United Artists Corp. v. Freeman, 605 F.2d 854, 857 (5th Cir. 1979) (trial court's default judgment set aside when pro se defendant refused to answer questions at deposition due to confusion and ignorance as to attorney's advice in regard to fifth amendment privilege; trial judge should have explained to defendant how and under what circumstances he could legitimately claim the privilege); Thomas v. United States, 531 F.2d 746, 749 (5th Cir. 1976) (trial court's dismissal with prejudice of plaintiff's tax refund action and entry of judgment for government's counterclaim reversed when plaintiff asserted fifth amendment privilege against self-incrimination in response to court order compelling him to answer government's interrogatories; dismissal sanction was an abuse of discretion which denied plaintiff the opportunity to show tax assessment was erroneous, arbitrary, and capricious).

Other appellate courts have followed *National Hockey League*'s deterrence rationale without approving the gross negligence position of *Affanato* and *Cine* by characterizing the noncomplying party's conduct from the outset as "willful." *See, e.g.*, Al Barnett & Son, Inc. v. Outboard Marine Corp., 611 F.2d 32, 35-36 (3rd Cir. 1979); G-K Properties v. Redevelopment Agency of San Jose, 577 F.2d 645, 647 (9th Cir. 1978); Securities & Exchange Commission v. Wencke, 577 F.2d 619, 622 (9th Cir.), *cert. denied*, 439 U.S. 964 (1978).

gence might be a legitimate target for deterrence under the *National Hockey League* rationale.[58]

An ordinary negligence culpability threshold is logically defensible and, indeed, may be the inevitable outgrowth of the *Affanato/Cine* position. Since a finding of negligent failure to comply with a discovery order presupposes "fault," the ordinary negligence threshold would comport with *Societe Internationale*'s mandated minimum culpability standard.[59] A negligence threshold would extend the deterrence rationale to its logical limits[60] and would be consistent with *National Hock-*

58. "What is important is that the conduct of counsel with which defendant is chargeable consisted of a series of episodes of nonfeasance which amounted, in sum, to a near total dereliction of professional responsibility by the associate in the law firm defendant had retained." Affanato v. Merrill Bros., 547 F.2d at 141. The Second Circuit panel in *Cine* picked up on this theme:

> The principal objective of the general deterrent policy of *National Hockey* is strict adherence to the 'responsibilities counsel owe to the Court and to their opponents,' 427 U.S. at 640, 96 S. Ct. at 2780. Negligent, no less than intentional, wrongs are fit subjects for general deterrence.

Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d at 1067 (citation omitted). The traditional standard of culpability used to determine liability in professional malpractice is ordinary negligence—the due care shown by a member of the profession having the requisite knowledge, training, and skill. *See* Houser, *Legal Malpractice—An Overview*, 55 N.D. L. REV. 185, 205 (1979); Wolfram, *The Code of Professional Responsibility as a Measure of Attorney Liability in Civil Litigation*, 30 S.C. L. REV. 281, 293 (1979).

59. *See* notes 30-33 *supra* and accompanying text.

60. Indeed, in *Link v. Wabash Railroad*, 370 U.S. 626 (1962), the United States Supreme Court found no denial of due process in a dismissal under rule 41(b) of a personal injury action for plaintiff's attorney's unintentional and probably not grossly negligent failure to appear for trial. *Id.* at 633.

Plaintiff's action had been protracted for over six years. *Id.* at 627. A pretrial conference had been scheduled by the district court at Hammond, Indiana, for 1:00 p.m., October 12, 1960. *Id.* Notice by mail of the scheduled conference had been sent to the counsel for both parties, but on the morning of October 12 plaintiff's attorney was in Indianapolis, Indiana, preparing papers to file in the Indiana Supreme Court. *Id.* At 10:45 a.m. plaintiff's attorney telephoned the district judge's secretary to inform the judge that he could not travel the 160 miles from Indianapolis to Hammond in time for the 1:00 p.m. conference. *Id.* at 627-28. Plaintiff's attorney requested that the conference date be reset for the following afternoon, or anytime thereafter. *Id.* Counsel did not appear for the 1:00 p.m. conference, and the district judge, after waiting two hours, on his own motion dismissed the action with prejudice. *Id.* at 628-29.

On appeal, the Seventh Circuit affirmed the dismissal. *Id.* at 629. On certiorari, the Supreme Court also affirmed, Justice Harlan for the majority noting that counsel's failure to appear was but one instance of a pattern of behavior amounting to failure to prosecute. *Id.* at 633-34.

Justice Black, dissenting, thought the majority was harsh and unrealistic in punishing the client for the counsel's errors on the basis of a theory of agency. *Id.* at 643-48. Yet *Link* remains the leading case standing for the proposition that "the acts and omissions of counsel are normally wholly attributable to the client." Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d at 1068 n.10.

ey League's general policy of combatting delays in federal courts. Moreover, once the propriety of the *Affanato/Cine* threshold is accepted, it is difficult to draw the line at gross negligence. Analogous case law attempting to distinguish gross from ordinary negligence[61] demonstrates that this is often a meaningless distinction. There is, perhaps, more than a measure of truth in Baron Rolfe's remark that gross negligence is but ordinary negligence "with the addition of a vituperative epithet."[62]

C. Problems with a Reduced Culpability Threshold

1. *The Deterrence Rationale of* National Hockey League

The question of what effect *National Hockey League* should have on the culpability threshold for the imposition of ultimate discovery sanctions must be analyzed in terms of the decision's underlying rationale: deterrence. In essence, the deterrence orientation of *National Hockey League* represents a recognition that the overall efficiency of federal administration of civil justice demands a reduction in the delay caused by discovery noncompliance, and that some litigants must suffer a severe sanction in order to increase this overall efficiency. Those who delay discovery must be precluded from asserting their claims or defending themselves against the claims of other parties even though they could have prevailed on the merits.[63]

Prior to *National Hockey League*, this deterrence rationale was given little weight. The remedial rationale of the early

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61. Negligence cannot be treated in the abstract.

> "Gross" negligence is a relative term that does not lend itself to precise definition automatically resolving every case. . . . [T]he modern trend is to reject the common-law divisions of negligence into "gross," "ordinary" and "slight," as having "no distinctive meaning or importance in the law," and tending to uncertainty and confusion . . . .

Oliver v. Kantor, 122 N.J.Eq. 528, 532, 6 A.2d 205, 207 (1939).

62. Wilson v. Brett, 11 M. & W. 113, 116, 152 Eng. Rep. 737, 739 (1843).

63. Courts may often suspect that noncomplying parties would not prevail on the merits in any event. Wealthy parties have used dilatory tactics to increase the cost of litigation for parties with inferior financial resources, thereby forcing unfair settlements. *See generally* Janofsky, *The "Big Case": A "Big Burden" on Our Courts*, 66 A.B.A. J. 848 (1980). One commentator suggests that suits are often begun without a good faith belief by the client or his counsel that a claim exists; the complaint is filed simply to gain access to discovery. The party then uses discovery, not to find evidence supporting his claim, but to discover if any valid claim exists at all. Should the defendant attempt to use discovery, the plaintiff might delay to gain additional time to discover evidence that would support a claim. Under these circumstances, dilatory tactics may lead judges to believe that the noncomplying party has something to hide. *See* Renfrew, *supra* note 10, at 266-67.

cases focused on the injury that noncompliance inflicted on the discovering party. Ultimate sanctions could be imposed under a narrow remedial rationale only when the injury was so great that a lesser discovery sanction could not return the parties in the instant litigation to equal positions. Thus, under the remedial rationale, the degree of culpability was irrelevant to the sanction selection process. No matter how intentional the noncompliance may have been, ultimate sanctions would be illogical so long as there was a lesser sanction that would return the parties' positions to equilibrium.[64] Courts, prior to *National Hockey League*, rarely employed ultimate sanctions even in cases of clearly intentional discovery abuse.[65] Those cases in which litigation-ending sanctions were employed can be explained either as situations in which the discovering party had been so prejudiced by noncompliance that an ultimate sanction

64. Courts that decided discovery abuse cases under the remedial purpose rationale necessarily focused on a narrow balancing of the interests of the parties to the instant lawsuit. In deciding which discovery sanction to apply, courts tended to conceptualize this general process under two judicial tests: the "least restrictive alternative" and the "balancing of interests." *See generally* Note, *supra* note 26; Note, *supra* note 14.

Neither of these concepts originated in the area of discovery procedure. The least restrictive alternative concept was built on an established body of case law that invalidated regulatory legislation infringing on important interests more than was necessary to achieve an otherwise legitimate goal. *See, e.g.*, Shelton v. Tucker, 364 U.S. 479 (1960) (invalidation of state statute requiring schoolteachers to disclose their membership in organizations); Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951) (invalidation of local milk regulation that infringed too broadly on interstate commerce). *See generally* Wurmuth & Murkin, *The Doctrine of the Reasonable Alternative*, 9 UTAH L. REV. 254 (1964).

In the discovery context, the rule developed that courts should impose the lightest sanction consistent with the effective administration of discovery procedures. For example, Gordon v. Federal Deposit Insurance Corp., 427 F.2d 578 (D.C. Cir. 1970), and Von Der Heyt v. Rogers, 251 F.2d 17 (D.C. Cir. 1958), were remanded when the records on appeal did not reveal the basis for the selection of severe sanctions, lending support to the proposition that it is reversible error to neglect to consider milder sanctions before a severe sanction is imposed. Note, *supra* note 14, at 266-67.

Courts came to apply the balancing of interests test by balancing the discovering party's need for the requested information with the recalcitrant party's practical ability to comply with the order. Courts also considered the effect that any sanction would have in resolving the case on the merits. Severe rule 37 sanctions were increasingly applied as the balance tipped further in favor of the discovering party. This balancing process, designed to reach the appropriate sanction, is closely analogous to that mandated by rule 26(b) to determine the propriety of issuing initial discovery orders themselves. *See* Hickman v. Taylor, 329 U.S. 495, 511-12 (1947).

Both of these tests, however, fail to consider the interests of the courts themselves as representatives of the public interest in the resolution of discovery impasses—a consideration mandated by *National Hockey League*.

65. *See* notes 24-29 *supra* and accompanying text.

was the only just solution, or as situations reflecting unspoken punitive purposes.

Since *National Hockey League*, courts have found a remedial approach to be impractical. It would be difficult to calculate the costs that discovery noncompliance inflicts on those who would have had speedier access to the federal courts but for the delay. Similarly, it is impossible to identify those who are injured, since such injury is characterized only as a generalized injury to the public's interest in efficient administration of civil justice. Unlike the purely remedial rationale, the deterrent purpose of *National Hockey League* directly implicates the question of the appropriate culpability threshold, because wholly innocent noncompliance will not be deterred.[66] Moreover, some observers consider calculated, intentional behavior to be the most susceptible to deterrence.[67] The unresolved issue after *National Hockey League* is whether behavior that falls between total innocence and intent—usually termed negligence—warrants ultimate discovery sanctions.

2. *The Breakdown of Deterrence*

Certainty that a particular form of behavior will result in the imposition of a severe sanction is both the essence of general deterrence and a prerequisite to a perception of fairness.[68] The essential difficulty with any of the three alternative culpability thresholds—*intent, gross negligence*, and *ordinary negligence*—lies in the absence of clear standards of conduct for litigants in discovery.[69] The discretionary power of the federal courts to leave indefinite the ultimate deadline past which litigation is brought to an end through dismissal or default, contributes to this uncertainty.[70] In addition, the problem of

66. *See* Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d 1062, 1066 (2d Cir. 1979).

67. *See* G. ERENIUS, CRIMINAL NEGLIGENCE AND INDIVIDUALITY 118-19 (1976). Predictions about the deterrent effect of criminal penalties may not correspond exactly to predictions about the deterrent effect of civil discovery sanctions.

68. *See* Renfrew, *supra* note 10, at 281. The amount of scholarly literature on the general deterrence theory is enormous and continually expanding. For selected references emphasizing the dependance of effective deterrence on the severity of the sanction and the certainty of the severe sanction's imposition, see G. ERENIUS, note 67 *supra*, at 118-19; Andenaes, *General Prevention Revisited: Research and Policy Implications*, 66 J. CRIM. L. & CRIMINOLOGY 338, 362 (1975); Singer, *Psychological Studies of Punishment*, 58 CALIF. L. REV. 405, 414, 417 (1970). *See generally* A. EWING, THE MORALITY OF PUNISHMENT 50-58 (1929).

69. This was a direct consequence of the party-initiated, minimally court-supervised concept of discovery originally embodied in the Federal Rules. *See* note 14 *supra* and accompanying text.

70. Normally rule 37 requires a request for an order to compel discovery

defining culpability is exacerbated when federal magistrates supervise discovery.[71]

Three characteristics of magistrate supervision have encouraged uncertainty. First, the magistrate in charge of the pretrial discovery period lacks authority to impose sanctions upon a noncomplying party under current law.[72] The magistrate instead recommends to the district court that a sanction be imposed on the recalcitrant party, and the district trial judge has the discretion to follow the magistrate's recommendation, ignore it, or devise a different remedy.[73] Under these circumstances, where the district court essentially reviews the case *de novo*,[74] the parties often are uncertain that the magistrate's sanction recommendation will ultimately be imposed. Indeed, the reported cases would indicate that magistrates' recommendations are occasionally ignored by the district courts.[75] Thus, parties have little incentive to take magistrates' warnings seriously. Second, magistrates are not required, and frequently fail, to make a record of discovery orders and deadlines.[76] The absence of definite written discovery orders provides numerous opportunities for parties to fail to comply with discovery orders while preventing district courts from determining if either party is culpable.[77] Finally, there are few procedural guidelines for magistrates to follow in pretrial discovery actions, particularly with regard to the extension of discovery deadlines.[78] The result is a lack of uniformity in extensions, and a comcomitant

prior to a request for a sanction. *See* note 15 *supra* and accompanying text. This gives a recalcitrant discoveree a built-in second chance to delay at relatively little cost; if the judge conditions imposition of the ultimate sanction upon further noncompliance, a third opportunity for dilatory conduct arises. *See* Note, *supra* note 26, at 1037.

71. *See, e.g.*, Cine Forty-Second St. Theatre Corp. v. Allied Artists Picture Corp., 602 F.2d 1062, 1064-65 (2d Cir. 1979) (magistrate recommended to district judge that plaintiff be precluded under rule 37(b) from introducing evidence with respect to damages; district judge refused to dismiss on grounds that willful disobedience could not be found in the absence of written discovery orders). *See generally* Silberman, *Masters and Magistrates Part II: The American Analogue*, 50 N.Y.U. L. REV. 1297, 1329-30 (1975).

72. *See* 602 F.2d at 1065; note 9 *supra* and accompanying text.

73. *See* 28 U.S.C. § 636(b) (1976).

74. *See id.*

75. *See* note 71 *supra.*

76. *See, e.g.*, 602 F.2d at 1064-65.

77. *See id.*

78. Such guidelines could be promulgated by the Judicial Conference of the United States in a manner similar to the promulgation of guidelines for misdemeanor trials conducted by federal magistrates. *See, e.g., Rules of Procedure for the Trial of Misdemeanors Before United States Magistrates*, 85 F.R.D. 417 (1980).

uncertainty as to the real significance of any particular deadline.[79]

Many reforms designed to increase certainty in pretrial discovery have been implemented;[80] others have been recently proposed;[81] and many more must be adopted before the requisite degree of certainty is achieved. Congress, however, took an important step to increase certainty at the magistrate's level when it enacted the Federal Magistrate Act of 1979,[82] which replaced the original statutory source of federal magistrates' authority, the Federal Magistrate Act of 1968.[83] The 1979 Act explicitly authorizes federal districts to designate situations in which magistrates may, at the parties' consent, render final judgments in civil proceedings.[84] Some district courts had previously allowed consensual magistrate trials under the promulgation of local rules.[85] Favorable response to these experimental programs led to the 1979 Act's uniform enabling provisions.[86] The 1979 Act also sets forth guidelines for the con-

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79. *See* note 70 *supra.*

80. *See* notes 34-35 *supra* and accompanying text. Effective August 1, 1980, rules 26 and 37 of the Federal Rules were amended to clarify the duties of litigants in pretrial discovery. *See* 85 F.R.D. 521-44.

Three justices dissented, however, from the Supreme Court's recommendation of the new amendments. 85 F.R.D. at 521. Justice Powell, in a dissenting statement, warned that these amendments, along with amendments to rules 33 and 34, fell short of the need for real reform in discovery procedure:

> I simply believe that Congress' acceptance of these tinkering changes will delay for years the adoption of genuinely effective reforms. The process of change, as experience teaches, is tortuous and contentious. Favorable congressional action on these amendments will create complacency and encourage inertia. Meanwhile, the discovery Rules will continue to deny justice to those least able to bear the burdens of delay, escalating legal fees, and rising court costs.

85 F.R.D. at 523.

81. Congress has currently considered a delay sanctions bill (H.R. 4047, 96th Cong., 1st Sess., 125 *Cong. Rec.* H3044 (1979)) which would amend section 1927 of the Judiciary and Judicial Procedure statute (28 U.S.C. § 1927 (1976)) to require attorneys to personally pay for all expenses and attorney's fees caused by egregious dilatory conduct delaying or increasing litigation costs. *See* 66 A.B.A. J. 709 (1980). The current law requires payment of only "excess costs." *Id. See* note 13 *supra.*

The American Bar Association's proposed Model Rules of Professional Conduct would also enlarge ethical rule prohibitions against dilatory procedural tactics in pretrial discovery. *See* 66 A.B.A. J. 709 (1980).

82. Federal Magistrate Act of 1979, Pub. L. No. 96-82, § 2, 93 Stat. 643 (1979) (to be codified at 28 U.S.C. § 636).

83. Pub. L. No. 90-578, § 101, 82 Stat. 1113 (current version at 28 U.S.C. § 636 (1976 & Supp. II 1978)).

84. Pub. L. No. 96-82, § 2, 93 Stat. 643 (1979) (to be codified at 28 U.S.C. § 636(c)(1)).

85. *See* Note, *Article III Constraints and the Expanding Civil Jurisdiction of Federal Magistrates: A Dissenting View*, 88 YALE L.J. 1023, 1023-24 (1979).

86. *Id.*

duct of consensual trials. For example, magistrates are authorized to begin a written record of the proceeding at the pretrial stage,[87] and the federal government is authorized to pay all the costs. Previously, the party aggrieved by a consensual magistrate's trial could seek relief only in a *de novo* review by the district court.[88] The 1979 Act provides for a formal appeals process that gives the aggrieved party the alternative of appealing to the district court or directly to the court of appeals.[89] Elimination of *de novo* review by the district courts of discovery disputes from the magistrate's level aids in reducing uncertainty in the sanctioning process.

These reforms, though welcome, are only a starting point in the formation of a justiciable culpability threshold. To the extent that current discovery practice is still perceived as uncertain and indefinite, a new approach that brings discovery in the federal courts closer to the deterrence goal of *National Hockey League* is needed.[90]

III. PROPOSALS FOR FURTHER REFORM

The following proposals represent general suggestions for the clarification of litigants' duties to the court in the discovery phase of the lawsuit. Reforms should provide more detailed guidelines for district judges and magistrates supervising pretrial discovery.

In light of previous experience,[91] rules 26(f) and 37(a) should be amended by inserting appropriate language requiring written court orders for establishing discovery plans and for compelling discovery. Written orders promote certainty in the duty of litigants and their attorneys to aid courts in securing "the just, speedy, and inexpensive determination of every action."[92]

The Federal Magistrate Act should also be amended to make final discovery orders in magistrate pretrial proceedings

87. Pub. L. No. 96-82, § 2, 93 Stat. 643 (1979) (to be codified at 28 U.S.C. § 636(c)(7)).

88. Federal Magistrate Act of 1968, Pub. L. No. 90-578, § 101, 82 Stat. 1107 (current version at 28 U.S.C. § 636 (1976 & Supp. II 1978).

89. Pub. L. No. 96-82, § 2, 93 Stat. 643 (1976) (to be codified at 28 U.S.C. § 636(c)(7).

90. *See* Perlman, *The Federal Discovery Rules: A Look at New Proposals*, 15 NEW ENGLAND L. REV. 57, 99 (1979); Renfrew, *supra* note 10, at 264-67; Note, *supra* note 26, at 1055; notes 8-12 *supra* and accompanying text.

91. *See* note 71 *supra*.

92. FED. R. CIV. P. 1.

mandatory in all federal districts.[93] In view of the staggering growth of litigation in recent years, increasing the authority of magistrates is a logical step in the transformation of the federal magistrate system into a new tier of federal courts.[94] Final discovery authority for magistrates would provide the needed incentive for parties, attorneys, and district courts to take magistrates' warnings seriously because they would know with certainty that the magistrates' sanction recommendations would be imposed.

In addition, local rules of court, applicable to both federal district judges and magistrates, should be amended to clarify the supervising judicial officer's procedures in imposing sanctions and thus to enhance the certainty of the sanctions.[95] A bifurcated procedural framework would offer several benefits. At the first stage, the discovery process would be in its ideal state: a party-initiated, consensual means of obtaining information. The supervising judicial officer, in conjunction with the parties, would prepare a discovery compliance schedule under rule 26(f). The schedule would list dates by which time the parties would have to answer discovery requests, but the schedule could be amended for subsequent discovery requests and unanticipated delays.

Such a discovery compliance schedule would be a memorial containing the terms of the parties' discovery agreement. A party's failure to meet a scheduled deadline would therefore be treated in the traditional manner: the noncomplying litigant

93. The proposed amendment could be worded thus:

Section 636(c) of title 28, United States Code, is amended—

(a) by redesignating paragraphs (1) through (7) thereof as paragraphs (2) through (8), respectively; and

(b) by inserting the following new paragraph: (1) When specially designated to exercise jurisdiction over pretrial civil proceedings by the district court, a full-time United States magistrate or a part-time United States magistrate has the authority to enter final judgment in such pretrial proceedings, the lack of the parties' consent to the magistrate's jurisdiction notwithstanding. Nothing in this paragraph will be construed as a limitation of any party's right to object to a magistrate trial in any other proceeding.

For discussions of the constitutional and policy ramifications of proposals to expand the power of magistrates, see Note, *Masters and Magistrates in the Federal Courts*, 88 HARV. L. REV. 779 (1975); Note, *supra* note 85.

94. *See* Note, *supra* note 85, at 1048-49. *See generally* Note, *supra* note 93.

95. The Federal Rules authorize each district court to adopt rules of practice not inconsistent with those rules and declare that in all cases not provided for by rule the district courts may regulate their practice in any manner not inconsistent with the Federal Rules. FED. R. CIV. P. 83. The Federal Magistrate Act grants district courts the authority to promulgate local rules to govern magistrate proceedings. 28 U.S.C. § 636(b)(4) (Supp. II 1980).

would be afforded protection through rule 26(c) protective orders, while the aggrieved litigant could require compliance through rule 37(a) court orders. Upon a party's failure to obey a court order compelling discovery, the supervising judge or magistrate would be free to impose any appropriate sanction enumerated in rule 37. This lenient sanctioning pattern would signify a deliberate attempt to induce parties to reach mutual agreement. If parties could not agree on discovery matters, then the judicial officer would assume a larger role in expediting the discovery process.

A second, less flexible, stage of discovery procedure would be applicable whenever one or more of the litigants became intransigent. The supervising judicial officer would set the discovery deadlines listed in the discovery compliance schedule after reviewing affidavits in which the parties would propose and justify deadlines for discovery requests and answers. The judge or magistrate would be allowed a measure of discretion to reach realistic deadlines with a minimum of delay and expense. A party who allowed a deadline to expire without having obtained a protective order would be given one more chance to comply if the judicial officer determined that compliance was necessary.

Lesser sanctions would be appropriate for initial noncompliance, although rare circumstances might demand that the litigation be terminated or that the litigation be continued without any sanction applied. If the judicial officer determined that a discovery request required an answer, that the noncomplying party had not sought or obtained a protective order, and that the noncomplying party had been previously warned, the case would then be ripe for the application of a dismissal or default judgment under rule 37(b)(2). Only under the most compelling circumstances would the litigation be allowed to continue.[96]

Implementation of these suggestions would provide the greater certainty necessary to enhance fairness in imposing severe, litigation-ending sanctions. The proposed reforms would make an ordinary negligence culpability threshold a practical alternative by clarifying the litigants', and their attorneys', duty to the courts, and would permit courts to follow the *National Hockey League* directive to pursue a general deterrence pur-

96. Of course, a recalcitrant party would retain the right to appeal such a decision to the district or circuit court. The traditional standard for review—whether the lower court abused its discretion—would be applicable.

pose. Imposing ordinary negligence as the standard for discovery sanctions would provide the noncomplying party with a meaningful remedy against his or her attorney if the attorney negligently caused the delay. The discovery sanction culpability standard would be the same as the culpability threshold for the attorney's malpractice liability. Thus, the objections of those who would hesitate to sanction the client for what might be the attorney's obstructions are overcome. The Code of Professional Responsibility's requirement that attorneys accept no greater workloads than they are capable of effectively pursuing might also be strengthened.[97]

IV. CONCLUSION

The Supreme Court and the federal circuit courts are becoming increasingly hostile toward dilatory tactics in complex litigation. They have recognized that the liberalization of pretrial discovery has not been without negative side effects on court efficiency. Uncertainty over the likelihood of the imposition of ultimate discovery sanctions, which aggravates this inefficiency, could well be reduced through the suggested amendments and local rules proposed in this Note. Once the duty of the attorney to the courts is clarified, the required degree of culpability for the imposition of litigation-ending sanctions is clear: it should be no more and no less than that necessary to render attorneys liable to their client for malpractice—ordinary negligence. Until standards for attorneys in discovery are clarified, however, courts will continue to have difficulty in justifying imposition of severe sanctions in any but the clearest cases of intentional obstruction.

97. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 2-30 (1969) ("Employment should not be accepted by a lawyer when he is unable to render competent service . . . .")

> The lawyer deciding whether to undertake a case must be able to judge objectively whether he is capable of handling it and whether he can assume its burdens without prejudice to previous commitments.

Professional Responsibility: Report of the Joint Conference, 44 A.B.A.J. 1159, 1218 (1958).