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Daniel S. Mehr III

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I. INTRODUCTION

A core principle of the American legal philosophy is that disputes should be decided on their merits. However, attorneys often wrangle over legal procedure and deprive meritorious disputes of their day in court. At times, the discovery process reflects a battleground with little indicia of ethical advocacy.[1] In *Lee v. Max International, LLC*,[2] the Tenth Circuit correctly reproved an abusive litigant who was granted substantial leniency during the discovery process. The court sustained the most severe of sanctions—dismissal with prejudice.

This Note argues that the Tenth Circuit correctly affirmed the dismissal sanction provided under Rule 37 of the Federal Rules of Civil Procedure (FRCP) and appropriately followed Supreme Court precedent. Those circuits that have not yet adopted the Supreme Court's framework should eliminate the inflexible tests they require of their district court judges in deciding dismissal sanction cases. The increased complexity and expense of discovery provides shameless attorneys with a system in which they often can test the resolve of the district courts and disregard their discovery obligations. The Tenth Circuit's opinion rightfully concluded that a district court should not be required to discuss a detailed set of factors while analyzing the appropriateness of a dismissal sanction. Any additional test would be superfluous within the current dismissal framework outlined by the Supreme Court.

1. For an example of aggressive advocacy gone awry, see Professor Charles Yablon's description of a libel suit brought by Phillip Morris Company against the American Broadcasting Company. Charles Yablon, *Stupid Lawyer Tricks: An Essay on Discovery Abuse*, 96 COLUM. L. REV. 1618, 1618 (1996). The attorneys for Philip Morris responded to the discovery requests of ABC with documents later referred to as "critically sensitive flavoring documents." *Id.* All of the estimated one million documents were printed on "red paper with squiggly lines," making them difficult to photocopy or read. *Id.* In addition, attorneys for ABC claimed that the documents "gave off noxious fumes that made it difficult to work with the altered copies for any extended periods of time." *Id.*

2. 638 F.3d 1318 (10th Cir. 2011).

II. FACTS AND PROCEDURAL HISTORY

The case began as many do. Markyl Lee filed a complaint alleging that Max International breached a distributorship agreement between the two parties.[3] During the discovery process, Max made standard discovery requests with which Lee did not comply, and Max filed a motion to compel.[4] The magistrate judge granted Max's motion and ordered that Lee produce "a variety of documents," but to no avail.[5] In light of Lee's disregard of the court order, Max filed a request to dismiss the case. Fortunately for the plaintiff, the court granted Lee one additional opportunity to satisfy the court order by producing the requested documentation.[6] The judge was clearly frustrated with Lee's disobedience and issued a warning that "'continued non-compliance [would] result in the harshest of sanctions.'"[7]

After the court's warning, Lee declared to the court that he had complied with the court order, even though he had only provided a few of the requested documents.[8] Max was not satisfied with Lee's efforts as evidenced by a letter he sent to Lee "claiming that various materials still remained missing."[9] Lee did not respond to the letter and Max renewed his motion to dismiss, which apparently motivated Lee to provide more of the requested documents. In the intervening weeks prior to the judge's decision on the motion to dismiss, Max received more of the remaining documents.[10]

As the documents trickled in, the magistrate judge reviewed the motion to dismiss.[11] It was obvious to the court that Lee had not complied with the court order at the time of his sworn declaration. Apparently, what motivated Lee was not necessarily the court order, but the fear of possible sanctions. The magistrate judge was not pleased with Lee and recommended to the district court that it grant Max's request for dismissal, which it did, dismissing the case with

3. *Id.* at 1319.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at 1320.
9. *Id.*
10. *Id.*
11. *Id.*

prejudice.[12] On appeal, the Tenth Circuit sided with the district court and affirmed the dismissal.[13]

III. SIGNIFICANT LEGAL BACKGROUND

A. The Evolution of Rule 37 Sanctions

The Federal Rules of Civil Procedure provide that a party may seek a motion to dismiss in the event that an opposing party violates a court order compelling discovery.[14] Rule 37 states: "If a party or a party's officer, director, or managing agent . . . *fails* to obey an order to provide or permit discovery . . . the court where the action is pending may issue further just orders," which may include "dismissing the action or proceeding in whole or in part."[15] The word "failure" and its derivatives were part of the earliest edition of the rules.[16] However, the text of the various subsections of the first edition continually switched back and forth between the usage of "failure" and "refusal."[17] This "aimless shuttling between 'refusal' and 'failure'" caused difficulty in the "administration [of the rules] outside the courts [and] flexible use in them."[18]

Arguably, the subtle, yet meaningful, difference between "failure" and "refusal" caused a misapplication of the rules. For Rule 37 sanctions, the distinction was critical because, at that time, the rule provided sanctions for a party that *refused* to obey a court order.[19] On occasion, this phrase caused courts to interpret the rule only to allow sanctions when a party had *refused*, and not simply *failed*, to obey the order.[20] The persistence of this distinction was

12. *Id*.

13. *Id*.

14. FED. R. CIV. P. 37(b)(2)(A)(v); *see also* 8B CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2281 (3d ed. 2011) ("[A]ny party or person who seeks to evade or thwart full and candid discovery incurs the risk of serious consequences.").

15. FED. R. CIV. P. 37(b)(2)(A)(v) (emphasis added).

16. WRIGHT, *supra* note 14.

17. *Id*.

18. Maurice Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 COLUM. L. REV. 480, 489 (1958).

19. *Id*. at 489 (emphasis added).

20. Jodi Golinsky, *Discovery Abuse: The Second Circuit's Imposition of Litigation-Ending Sanctions for Failure to Comply with Discovery Orders: Should Rule 37(b)(2) and Dismissals be Determined by a Roll of the Dice?*, 62 BROOK. L. REV. 585, 592 (1996).

one of the reasons that later motivated a change in the rules: removing "refusal" from the rules altogether.[21]

The Supreme Court sought to limit the minor distinction that had played out in the lower courts.[22] In *Societe Internationale v. Rogers*,[23] the Court made it clear that this "too fine a literalism" between "failure" and "refusal" created an inappropriate distinction between the subsections of the rules.[24] According to the Court, this was an unintended distinction upon which lower courts should not rely.[25]

In 1970, the Advisory Committee replaced "refusal" with "failure" to align the rules with the Supreme Court's interpretation in *Societe Internationale*.[26] This clear interpretation and subsequent modification of the rules reflected the Court's and the Committee's intention to close a potential loophole for unyielding attorneys. Both institutions made it clear that a litigant that simply failed to obey a discovery order, as opposed to refusing to obey, could potentially face dismissal of his case. The new direction represented an expansion of potential dismissal actions.

Because dismissal is the most severe of sanctions, the Court recognized that there may be instances where dismissal would not be appropriate.[27] The Court in *Societe Internationale* outlined a difference between which litigant actions warranted dismissal and which actions required a lesser sanction. The Court said that Rule 37 "should not be construed to authorize dismissal of [a] complaint because of petitioner's noncompliance with a pretrial production order when it has been established that *failure to comply has been due to inability*, and not to willfulness, bad faith, or any fault of petitioner."[28] Therefore, a failure to comply with a court order because a litigant lacks the ability to comply with the order does not warrant dismissal.[29] The potential for dismissal comes when a failure

21. *Id.* at 592–93.

22. Societe Internationale Pour Participations Industrielles Et Commerciales, S. A. v. Rogers, 357 U.S. 197, 207–08 (1958).

23. *Id.*

24. *Id.* at 207.

25. *See id.*

26. *Id.*

27. *Id.* at 212.

28. *Id.* (emphasis added).

29. WRIGHT, *supra* note 14, § 2283 (The two principle facets of the constitutional limits stemming from the Fifth and Fourteenth Amendments are: "First, the court must ask

to comply falls within the "willfulness, bad faith, or any fault of petitioner" analysis.[30]

B. The U.S. Supreme Court's Commitment to Enforce Dismissal Sanctions

In *National Hockey League v. Metropolitan Hockey Club, Inc.*, the Supreme Court reaffirmed its intention to enforce sanctions when a litigant fails to comply with a discovery order.[31] Previously, the Supreme Court was mostly concerned with the sanctions affecting the litigants appearing in the current case. However, *National Hockey* represented an effort by the Court to provide a general deterrent to all litigants contemplating disobedience of discovery orders.[32]

Over a seventeen month period, the plaintiffs in *National Hockey* failed to answer various interrogatories submitted by the defendants during discovery, continually "flouting" the court's discovery orders and timelines.[33] In dismissing the case, the district court stated that the plaintiff's actions represented a "callous disregard of responsibilities counsel owe to the Court and to their opponents."[34] The Third Circuit Court of Appeals, however, overturned the district court's decision.[35] Utilizing the language of *Societe Internationale*, the court found that there was insufficient evidence that the failure to act "was in flagrant bad faith, willful or intentional."[36] The court reasoned that new counsel was representing the litigant, that counsel had a difficult time "obtaining some of the requested information," and that "none of the parties had really pressed [the] discovery"

whether there is a sufficient relationship between the discovery and the merits sought to be foreclosed by the sanction to legitimate depriving a party of the opportunity to litigate the merits. Second, before imposing a serious merits sanction the court should determine whether the party guilty of a failure to provide discovery was unable to comply with the discovery.").

30. *Societe Internationale*, 357 U.S. at 212. *See also* Archibeque v. Atchison, Topeka & Santa Fe Ry. Co., 70 F.3d 1172, 1174 (10th Cir. 1995).

31. 427 U.S. 639, 643 (1976).

32. *Id.* at 643 (Allowing a district court to dismiss is not only "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.").

33. *Id.* at 640, 643.

34. *Id.* at 640.

35. *In re* Prof'l Hockey Antitrust Litig., 531 F.2d 1188, 1195 (1976), *rev'd sub nom.* Nat'l Hockey League v. Metro. Hockey Club, Inc., 427 U.S. 639 (1976).

36. *Id.*

obligations.[37] According to the Third Circuit, the litigants' extenuating circumstances warranted leniency.[38]

The Supreme Court reversed the Third Circuit explaining that lenity is certainly a factor to consider when imposing sanctions under Rule 37, but it is not the only factor.[39] The appellate court undoubtedly felt the significant weight that a dismissal with prejudice imposes. However, the Supreme Court explained that lenity "cannot be allowed to wholly supplant other and equally necessary considerations embodied in [the] Rule."[40] The Court further explained that hindsight creates a natural tendency to minimize the severity of sanctions, which can result in a court incorrectly reversing an earlier dismissal.[41] Because of this tendency, the Court held that it was necessary to balance the role of lenity with that of enforcement, because it is equally as important not to allow litigants to "flout . . . discovery orders."[42]

By overturning the Third Circuit, the Supreme Court minimized the "willfulness, bad faith, or any fault of petitioner" language of *Societe Internationale*.[43] After *National Hockey*, questions still remain as to whether any showing of willfulness, bad faith, or fault is still required.[44] Also, some suggest that through *National Hockey* the

37. *National Hockey*, 427 U.S. at 640 (1976). (The Supreme Court listed a summary of factors considered by the Third Circuit: "[N]one of the parties had really pressed discovery until after a consent decree was entered between petitioners and all of the other original plaintiffs . . . . [R]espondents' counsel took over the litigation, which previously had been managed by another attorney . . . . [R]espondents' counsel encountered difficulties in obtaining some of the requested information . . . . [And] respondents' lead counsel assured the District Court that he would not knowingly and willfully disregard the final deadline.").

38. *Id*.

39. *Id*. at 642.

40. *Id*.

41. *Id*.

42. *Id*. at 643.

43. *See* Eric. C. Surette, Annotation, *Sanctions Available Under Rule 37, Federal Rules of Civil Procedure, Other Than Exclusion of Expert Testimony, for Failure to Obey Discovery Order Not Related to Expert Witness*, 156 A.L.R. Fed. 601, *3a (2011) ("While the Supreme Court in *Societe Internationale Pour Particpations Industrielles Et Commerciales, S.A. v. Rogers* . . . held that before a complaint can be dismissed the district court must make a finding that the offending party's failure to comply with a discovery order was the result of willfulness, bad faith, or fault, the continued viability of this holding is in doubt in light of *National Hockey League v. Metropolitan Hockey Club, Inc*.").

44. *Id*.

Supreme Court not only endorsed "utiliz[ing] the extreme sanction of dismissal," it encouraged it.[45]

The Supreme Court has consistently reformed the rules in favor of enforcing dismissal sanctions. From the earliest amendments of the Federal Rules of Civil Procedure to the Court's opinion in *National Hockey*, the Court has attempted to provide a procedural deterrent to unrestrained attorneys. The *Societe Internationale* language, "willfulness bad faith, or any fault of petitioner," is helpful in analyzing the difference between a litigant's failure to comply and an inability to comply. However, this language was later minimized in favor of a harsher standard in *National Hockey.* Arguably, the Court's trend reflects a desire to remove hurdles that prevent district courts from enforcing discovery sanctions.

IV. THE COURT'S DECISION

In *Lee v. Max International, LLC*, the Tenth Circuit determined that Lee's failure to comply with the magistrate judge's discovery orders represented "strong evidence of willfulness and bad faith," and, therefore, the court affirmed the district court's dismissal with prejudice.[46]

The plaintiffs argued that the district court had not discussed what is colloquially referred to in the circuit as the *Ehrenhaus* test when it dismissed the case with prejudice. The *Ehrenhaus* test emphasizes five factors for the district court to consider:

> [A] court may wish to consider when deciding whether to exercise its discretion to issue a dismissal sanction: (1) the degree of actual prejudice to the defendant; (2) the amount of interference with the judicial process; (3) the culpability of the litigant; (4) whether the court warned the party in advance that dismissal of the action would be a likely sanction for non-compliance; and (5) the efficacy of lesser sanctions.[47]

However, the circuit court concluded that these factors "do not represent a rigid test that a district court must always apply."[48] The court said that the facts may be helpful in determining when

45. Golinsky, *supra* note 20, at 593.

46. Lee v. Max Int'l LLC, 638 F.3d 1318, 1321 (10th Cir. 2011).

47. *Id.* at 1323 (citing Ehrenhaus v. Reynolds, 965 F.2d 916, 921(10th Cir. 1992) (internal quotation marks omitted)).

48. *Id.*

dismissal is warranted, but a "district court's failure to mention or afford them extended discussion does not guarantee an automatic reversal."[49]

Additionally, the court adopted a general deterrence policy.[50] The court accepted the principle that "district courts must have latitude to use severe sanctions for purposes of general deterrence."[51]

V. ANALYSIS

The decision in *Lee v. Max International, LLC*, correctly sustained the Rule 37 dismissal sanction. By pronouncing a general deterrent, the Tenth Circuit rightfully sought to motivate litigants to comply with discovery orders or face unforgiving sanctions. The Tenth Circuit's opinion concluded that a district court is not required to discuss a detailed set of factors while analyzing the dismissal sanction. Arguably, a specific test or detailed set of factors would be superfluous to the current framework provided by the Supreme Court. Those circuits that have not yet adopted the position of the Supreme Court in *National Hockey* should eliminate the stringent tests necessary for review of dismissal sanction cases. Courts should instead encourage early judicial intervention in the discovery process. Encouraging courts to enforce discovery obligations earlier in the case through court orders will not only preempt discovery abuse but it will also provide a stronger warning to litigants. This early intervention must be sustained through the courts' continued support of a general deterrence policy. A general deterrence policy will further support the early judicial intervention principles—preempting abuse and providing a warning.

A. The Circuit Courts Should Eliminate the Superfluous Tests and Afford Discretion to the District Courts

Among the various circuit courts, no single test or approach has been adopted in more than one circuit.[52] The circuits' varying approaches are representative of the uncertainty that pervades the dismissal doctrine. Arguably, the Supreme Court has attempted to

49. *Id*. at 1324.
50. *Id*. at 1320.
51. *Id*.
52. Golinsky, *supra* note 20, at 596.

encourage the lower courts to enforce the sanction without a need for a detailed list of factors that a district court must consider. However, these tests or lists remain.

The Third, Fourth, Fifth, Sixth, and Ninth Circuits have each outlined some form of a test.[53] For example, in the Ninth Circuit, the district court is required to consider "(1) the public's interest in expeditious resolution of litigation, (2) the court's need to manage its dockets, (3) the risk of prejudice to the party seeking sanctions, (4) the public policy favoring disposition of cases on their merits, and (5) the availability of less drastic sanctions."[54] In the circuits requiring specific factors, each court's test differs from the other circuits in the quantity of factors and substance of their tests.[55]

The remaining circuits, the First, Second, Seventh, Eighth, Tenth, and Eleventh, consider general guidelines that do not subscribe to any specific factors.[56] For example, the Seventh Circuit stated that "[t]he cases in this circuit . . . do not set up a row of artificial hoops labeled 'bad faith' and 'egregious conduct' and 'no less severe alternative' through which a judge must jump in order to be permitted by us appellate judges to dismiss a suit."[57] It is enough to warrant dismissal in the Seventh Circuit when "a pattern of noncompliance with a court's discovery orders emerge[s]."[58] As the Seventh Circuit suggests, a pattern of noncompliance should be

53. *See* Harris v. City of Philadelphia, 47 F.3d 1311, 1330 n.18 (3d Cir. 1995) (discussing the Third Circuit's six factor test); Mut. Fed. Sav. & Loan Ass'n v. Richards & Assocs., Inc., 872 F.2d 88, 92 (4th Cir. 1989) (discussing the Fourth Circuit's four factor test); FDIC v. Conner, 20 F.3d 1376, 1380–81 (5th Cir. 1994) (discussing the Fifth Circuit's several factor test); Beil v. Lakewood Eng'g & Mfg. Co., 15 F.3d 546, 552 (6th Cir. 1994) (discussing the Sixth Circuit's several factor test); Hyde & Drath v. Baker, 24 F.3d 1162, 1166 (9th Cir. 1994) (discussing the Ninth Circuit's five factor test).

54. Hyde & Drath v. Baker, 24 F.3d 1162, 1166 (9th Cir. 1994).

55. *Supra* note 53. *See also* Golinsky, *supra* note 20, at 603–04.

56. *See* Damiani v. Rhode Island Hosp., 704 F.2d 12, 16 (1st Cir. 1983). (discussing the First Circuit's adherence to *National Hockey*'s general deterrence doctrine); Oliveri v. Thompson, 803 F.2d 1265, 1271 (2d Cir. 1986) (discussing the Second Circuit's lack of "an integrated code of sanctions"); Edgar v. Slaughter, 548 F.2d 770, 772 (8th Cir. 1977) (discussing the Eighth Circuit's strong policy of deciding a case on its merits); *see also* Golinsky, *supra* note 20, at 588, 596.

57. Newman v. Metro. Pier & Exposition Auth., 962 F.2d 589, 591 (7th Cir. 1992) (citing Patterson v. Coca-Cola Bottling Co., 852 F.2d 280, 284–85 (7th Cir.1988) (per curiam); *see also* Harmon v. CSX Transp., Inc., 110 F.3d 364 (6th Cir. 1997) (Sufficient egregious conduct warranted dismissal. In this case the record provided sufficient evidence of egregious conduct.).

58. *Newman*, 962 F.2d at 591.

sufficient to justify dismissal. Arguably, this approach more closely aligns with the intention of the Supreme Court in *National Hockey*. The Tenth Circuit has followed this line of reasoning by adopting this principle in *Lee*. [59] In the Tenth Circuit, such a pattern of noncompliance is prima facie evidence of willfulness and bad faith.[60]

The Tenth Circuit's decision not to a adopt a specific test was clearly explained in *Lee*.[61] The court refused to require the district court to review the list of factors included in the *Ehrenhaus* test.[62] Many of the factors adopted by the circuits requiring tests are similar to the *Ehrenhaus* test.[63] In the Tenth Circuit, however, the test is not really a test at all. Rather, it is a set of factors that could be considered by a lower court before it imposes a dismissal sanction.[64] The factors are more appropriately referred to as "guide posts [a] district court may wish to 'consider' in the exercise of what must always remain a discretionary function."[65] These "guide posts" are not part of an exhaustive list of considerations,[66] but merely an aid for the district court to consider in exercising its discretion.

A district court is rightly afforded discretion when it comes to matters of discovery because a district court judge deals with discovery more often than an appellate court. As the *Lee* court suggested, "discovery disputes are analogous" to the criminal sentencing context in that the trial judge is in the best position to rule on the issue and should have discretion.[67] Similar to the criminal context, the district court judges experience the attorneys' maneuvering and schemes first hand. Arguably, requiring a district court to consider a list of factors that are not inherently exhaustive removes discretion and places unnecessary hurdles in the system.

59. Lee v. Max Int'l, LLC, 638 F.3d 1318, 1321 (2011) ("[A] party's thrice repeated failure to produce materials that have always been and remain within its control is strong evidence of willfulness and bad faith, and in any event is easily fault enough, we hold, to warrant dismissal or default judgment.").

60. *Id*.

61. *Id*. at 1323.

62. *Id*. at 1324.

63. *Supra* note 53.

64. *Lee*, 638 F.3d at 1323; *see also* Ocelot Oil Corp. v. Sparrow Indus., 847 F.2d 1458, 1465 (10th Cir. 1988) (citations omitted).

65. *Lee*, 638 F.3d at 1323 (citation omitted).

66. *Id*.

67. *Id*. at 1320.

On the most basic level, the Tenth Circuit has followed the Supreme Court precedent. As emphasized in *National Hockey*, a district court that has considered the entire record and made a decision dismissing a case with prejudice has not necessarily abused its discretion.[68] The Tenth Circuit's focus was on the review of the entire record, not on a five factor test. The court sufficiently outlined in *Lee* that the *Ehrenhaus* test is not determinative in dismissing a case in the Tenth Circuit.[69] The factors are general guidelines to the district court as it performs its discretionary function in reviewing the record. Those circuits requiring tests should follow the Tenth Circuit's approach because their rigid tests fail to afford the appropriate level of discretion to the district courts and place unnecessary hurdles in the way of appropriate sanctions.

B. Early Judicial Intervention and General Deterrence Are Key

1. Judicial intervention limits discovery time and expense

Discovery abuse thwarts the main goal of the FRCP "to secure the just, speedy, and inexpensive determination of every action and proceeding."[70] Courts, practitioners, and clients all acknowledge that the discovery process can unnecessarily increase both the time and expense of litigation.[71] Our system cannot simply remove discovery from the process, so it must be modified. One significant way to decrease discovery time and expense is for attorneys to honor discovery requests and court orders. For obvious reasons, appealing to an attorney's altruistic desire to honor discovery requests and comply with court orders will not prove effective. Instead, a definitive approach to encourage compliance would be for courts to engage with discovery early in litigation by issuing court orders earlier in the process and to continue to deter other litigants from noncompliance by utilizing the harsher dismissal sanction.

The Federal Judicial Center (FJC) and other legal institutions recognize the problems imposed by the delays and cost of discovery.[72] In an effort to determine ways in which the system could

68. Nat'l Hockey League v. Metro. Hockey Club, Inc., 427 U.S. 639, 641–42 (1976).

69. *Lee*, 638 F.3d at 1323.

70. FED. R. CIV. P. 1.

71. EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., ATTORNEY SATISFACTION WITH THE FEDERAL RULES OF CIVIL PROCEDURE 2 (2010).

72. *Id.* at 1–2.

be improved, the FJC conducted surveys of various legal practitioners.[73] The surveys were a useful tool that resulted in increased discussion of possible improvements to the FRCP.[74] One of the results of the surveys was a series of "Pilot Project Rules" that were promulgated by the Institute for the Advancement of the American Legal System.[75] Rule Twelve of the pilot rules addresses sanctions.[76] It states that sanctions are "appropriate for any failure to provide or for unnecessary delay in providing required disclosures or discovery."[77] The rule is not dissimilar from Rule 37 of the FRCP. Apparently, the newly drafted Pilot Project Rules seem to be based on the idea that enforcement of sanctions should be based on a *failure* to provide, or in other words, a noncompliance type standard. This is in line with the Tenth Circuit's approach and with what the Supreme Court promulgated in *National Hockey*.

The FJC's survey results also demonstrate that practicing attorneys identify discovery as the primary cause of litigation delay; one of the most common practitioner responses to the question "about 'the primary cause of delay in the litigation process' was 'time to complete discovery.'"[78] In addition, the survey suggests that attorneys are disaffected with the finagling that goes on during the discovery process. One attorney stated that "[d]iscovery abuse is rampant—parties . . . stonewall routinely and then negotiate over how many of their legal obligations they can avoid."[79] Regardless of the inherently time-consuming nature of discovery, if the judiciary were to engage in the discovery process earlier, discovery abuse could be limited. Once a discovery plan is in place, the court should enforce the timelines and reasonable demands of counsel seeking compliance with the discovery order. Providing early warnings and, if necessary, court orders will increase the integrity of the FRCP. The judiciary can set the tone of the discovery stage early in the litigation process and insist on compliance.

73. *Id*.

74. PAUL C. SAUNDERS & REBECCA L. KOURLIS, AMERICAN COLLEGE OF TRIAL LAWYERS, REPORT FROM THE TASK FORCE ON DISCOVERY AND CIVIL JUSTICE 1–4 (2010).

75. 21ST CENTURY CIVIL JUSTICE SYSTEM: A ROADMAP FOR REFORM PILOT PROJECT RULES, INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM (2009).

76. *Id*. at 7.

77. *Id*.

78. LEE & WILLGING, *supra* note 71, at 2.

79. *Id*. at 8 n.13.

Apart from the extended length of time, there are two additional reasons why discovery is expensive. First, the lack of judicial enforcement of discovery obligations not only increases the time it takes to complete discovery, but it also increases the cost.[80] Second, the generally accepted law firm economic model provides an incentive to increase the costs of discovery[81] because lawyers may use it as a way to increase the number of hours they bill to clients.[82] While changing this economic model could be considered a desirable outcome, encouraging such a change is probably not the most effective solution. Rather, dealing with the first suggested obstacle will necessarily impact the second. Arguably, encouraging the judiciary to enforce sanctions will invariably affect the agency problem inherent in the law firm economic model.

Early judicial intervention in discovery issues will decrease both time and costs. Many practitioners agree that "[i]ntervention by judges or magistrate judges early in the case helps to limit discovery."[83] If discovery can be limited, it will more closely align with the stated goals of the FRCP. By aligning discovery with the stated goals, time and capital necessary to complete discovery should decrease.

2. A general deterrence policy sustains the Rule 37 sanctions

In addition to early intervention, the judiciary should continue to support a general deterrence policy. Such a policy was adopted by the Supreme Court in *National Hockey*.[84] Some have suggested that this policy was one the Federal Rules did not intend.[85] However, in light of current practitioner opinion regarding the lack of respect and

80. *Id*. (Another attorney suggested that costs would decrease "if judges would '[e]nforce sanctions for discovery abuses. Much of the costs we deal with relate to trying to get sufficient discovery—the delay and the costs of filing motions to compel, etc., increase costs significantly.'").

81. *Id*. at 1 ("The statement, 'Economic models in many law firms result in more discovery and thus more expense than is necessary,' elicited more agreement than disagreement in each of the surveys and among all groups.").

82. Jack B. Weinstein, *What Discovery Abuse? A Comment on John Setear's* The Barrister and the Bomb, 69 B.U. L. Rev. 649, 654 (1989).

83. LEE & WILLGING, *supra* note 71, at 2.

84. Golinsky, *supra* note 20, at 594.

85. *Id*. ("Prior to *National Hockey* general deterrence was not an established or even articulated goal of sanctions, particularly the imposition of harsh sanctions.").

enforcement of the Rules of Civil Procedure,[86] such a negative view of the Supreme Court's emphasis on dismissal is unwarranted. The possibility that future parties could disregard their discovery obligations suggests that providing notice of the potential for harsh sanctions could deter them from such a decision. As the Second Circuit concluded:

> Negligent, no less than intentional, wrongs are fit subjects for general deterrence. And gross professional incompetence no less than deliberate tactical intransigence may be responsible for the interminable delays and costs that plague modern complex lawsuits. . . . [W]here gross professional negligence has been found—that is, where counsel clearly should have understood his duty to the court—the full range of sanctions may be marshalled.[87]

The Tenth Circuit has likewise employed a general deterrence policy.[88] The *Lee* court stated that "no one . . . should count on more than three chances to make good a discovery obligation."[89] Apart from deterring future litigants, the policy will protect the efficiency of the judicial system, help control court dockets, and lessen the unfair prejudice imposed on unsuspecting litigants. Courts will do well to continue to emphasize general enforcement of the rules and protect future litigants and courts. A combined effort of early intervention and general deterrence will increase the integrity of the rules.

VI. CONCLUSION

Based on the egregious conduct of Lee in this case, the Tenth Circuit correctly concluded that Lee's disregard of discovery obligations was strong evidence of willfulness and bad faith warranting dismissal with prejudice. The court correctly came to this conclusion by relying on the Supreme Court precedent in *National Hockey*, an opinion that minimizes the need to follow a specific test in order to determine willfulness or bad faith. The Tenth Circuit recognized that a test or list of factors is not exhaustive and should therefore only be used as potential considerations/guidelines for a

86. *See supra* Part V.B.1.

87. Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d 1062, 1067–68 (2d. Cir 1979) (citations omitted).

88. Lee v. Max Int'l LLC, 638 F.3d 1318, 1320 (10th Cir. 2011).

89. *Id.* at 1319.

district court considering the dismissal sanction. Those circuit courts still enforcing a required list of factors should adopt the principles espoused by the Tenth Circuit and supported by the Supreme Court. In this way, district courts will be afforded broad discretion in making a determination regarding dismissal. Such determinations will be less frequent and less damaging with early judicial intervention in the discovery process. Furthermore, a general deterrence policy, as outlined by the Tenth Circuit, will guide future litigants and help ensure that they will comply with their discovery obligations.

Daniel S. Mehr III[*]

* J.D. candidate, April 2012, J. Reuben Clark Law School, Brigham Young University.