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COMMENT

THE USE OF SUPERVISORY CONTROL IN DISCOVERY MATTERS

Pretrial Procedure via the Supreme Court

Mark S. Williams

I. INTRODUCTION

The Montana Supreme Court traditionally has restricted issuance of the writ of supervisory control. "It is a fundamental proposition that the writ of supervisory control is an extraordinary remedy which will only be granted under extraordinary circumstances."[1] Interlocutory discovery orders present an area in which the supreme court is hesitant to issue the writ.[2] The court prefers to abstain from pretrial involvement, an area it considers best left to the sound discretion of district court judges.[3] The court fears that liberal interlocutory review will open a "Pandora's Box of abuses."[4] In the past decade, however, the court exercised supervisory control over discovery matters in a handful of cases,[5] without yet unlocking "Pandora's Box."

The informed Montana attorney should realize that the writ of supervisory control is available even in the discovery process. An attorney may seek the writ when a district court issues discovery orders that are neither founded in the Rules of Civil Procedure nor previously condoned by the Montana Supreme Court, and when such orders threaten irreparable harm to the client or case. This

1. State *ex rel.* Seader v. District Court, 143 Mont. 475, 477, 389 P.2d 178, 179 (1964) (citing State *ex rel.* O'Sullivan v. District Court, 119 Mont. 429, 431, 175 P.2d 763, 764 (1946)).

2. *See* State *ex rel.* Guarantee Ins. Co. v. District Court, ___ Mont. ___, 634 P.2d 648 (1981).

3. *Id.*

4. *Id.* at ___, 634 P.2d at 651.

5. *See* State *ex rel.* United States Fidelity & Guar. Co. v. District Court, 240 Mont. 5, 783 P.2d 911 (1989); State *ex rel.* Burlington N. R.R. v. District Court, 239 Mont. 207, 779 P.2d 885 (1989); Kuiper v. District Court, ___ Mont. ___, 632 P.2d 694 (1981); Jaap v. District Court, 191 Mont. 319, 623 P.2d 1389 (1981).

comment reviews the writ's development, discusses proper use of the writ and defines the standard of issuance in discovery matters.

II. BACKGROUND

A. History

The Montana Supreme Court invented the writ of supervisory control in *State ex rel. Whiteside v. District Court*,[6] relying on the general supervisory power granted by the 1889 Montana Constitution.[7] The Montana Constitution provides the supreme court with "supervisory control over all other courts."[8] The *Whiteside* court reasoned that the phrase "general supervisory control" contains a "clear grant of power," and that an appellate court has the inherent power " 'to invent new writs to suitably exercise the jurisdiction conferred.' "[9] The court deemed the new writ necessary for situations in which other writs are insufficient.[10] Supervisory control is distinct from the writs of certiorari and prohibition, which are limited to questions of lower court jurisdiction.[11] Supervisory control is also distinct from mandamus, because mandamus can compel only a legally required act and is not used to correct errors or to control lower court judges' discretion.[12] Supervisory control now overshadows the other writs because of its broad availability and scope.

Rule 17 of the Montana Rules of Appellate Procedure codified supervisory control. Subsection (a) provides:

> The supreme court is an appellate court but it is empowered . . . to hear and determine such original and remedial writs as may be necessary or proper to the complete exercise of its jurisdiction. The institution of such original proceedings in the supreme court is sometimes justified by circumstances of an emergency nature, as when a cause of action or a right has arisen under conditions making due consideration in the trial courts and due appeal to this court an inadequate remedy, or when supervision of a trial

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6. 24 Mont. 539, 63 P. 395 (1900).

7. *Id.* at 558, 63 P. at 398.

8. *Id.* (quoting MONT. CONST. of 1889, art. VIII, § 2). The language of article VII, section 2, clause 2 of the 1972 Montana Constitution is identical to that of the 1889 Constitution providing "general supervisory control over all other courts."

9. *Whiteside*, 24 Mont. at 558, 63 P. at 398 (citing Wheeler v. Northern Colo. Irrigation Co., 9 Colo. 248, 11 P. 103 (1886)).

10. *Id.*

11. MONT. CODE ANN. §§ 27-25-102, 27-27-101 (1989).

12. *Whiteside*, 24 Mont. at 562, 63 P. at 399-400. *See also* MONT. CODE ANN. § 27-26-102 (1989).

court other than by appeal is deemed necessary or proper.[13]

After creating the writ in 1900, the Montana Supreme Court severely restricted its use in the first half of the century. The court avoided appellate interference in pretrial proceedings, lest "appellate jurisdiction . . . be destroyed for all practical purposes."[14] The court eventually discarded this view for a new goal of judicial economy and embraced pretrial supervisory control for prevention of needless litigation.[15] Using the "needless litigation" standard, the court has exercised supervisory control to overturn orders at almost every phase of the trial process, including motions to dismiss,[16] motions to stay proceedings,[17] motions for summary judgment,[18] final orders,[19] rulings on bifurcation of issues[20] and, more recently, for pretrial discovery rulings.[21] Although the court has yet to intervene in questions of evidence presented during trial, the court has not ruled out such a possibility.[22]

B. Traditional Test for Issuance of the Writ

The court's original standard for exercising supervisory control is slightly different from the standard used in discovery cases.[23] The court considers supervisory control on a case-by-case basis,[24] and occasionally varies the guidelines for issuance of the writ. The original language set forth in *Whiteside* authorizes use of the writ when: (1) "inferior courts . . . are proceeding within their jurisdiction, but," (2) have made a "mistake of law or" are willfully disregarding the law, (3) resulting in "a gross injustice," and (4) "there

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13. MONT. R. APP. P. 17(a).

14. State *ex rel.* Bonners Ferry Lumber Co. v. District Court, 69 Mont. 436, 443, 222 P. 1050, 1052 (1924).

15. *See, e.g.*, State *ex rel.* Regis v. District Court, 102 Mont. 74, 55 P.2d 1295 (1936).

16. State *ex rel.* Buttrey Foods, Inc. v. District Court, 148 Mont. 350, 420 P.2d 845 (1966).

17. State *ex rel.* Ryder v. District Court, 148 Mont. 56, 417 P.2d 89 (1966).

18. State *ex rel.* Great Falls Nat'l Bank v. District Court, 154 Mont. 336, 463 P.2d 326 (1969).

19. Walker v. Tschache, 162 Mont. 213, 510 P.2d 9 (1973).

20. State *ex rel.* Fitzgerald v. District Court, 217 Mont. 106, 703 P.2d 148 (1985).

21. *See* State *ex rel.* United States Fidelity & Guar. Co. v. District Court, 240 Mont. 5, 783 P.2d 911 (1989); State *ex rel.* Burlington N. R.R. v. District Court, 239 Mont. 207, 779 P.2d 885 (1989); Kuiper v. District Court, ___ Mont. ___, 632 P.2d 694 (1981); Jaap v. District Court, 191 Mont. 319, 623 P.2d 1389 (1981).

22. State *ex rel.* Woodahl v. District Court, 168 Mont. 511, 542 P.2d 1222 (1975) (request for supervisory control on evidence question denied without discussion).

23. This comment will refer to the court's original standard as the "traditional test," while referring to the standard employed in discovery cases as the "modified test."

24. State *ex rel.* Deere & Co. v. District Court, 224 Mont. 384, 730 P.2d 396 (1986).

is no appeal, or the remedy by appeal is inadequate."[25]

The court also has exercised supervisory control to prevent extended and needless litigation,[26] to alleviate "procedural entanglements" that may prolong the litigation[27] and in cases where, absent the writ, the relator would be denied a fundamental right.[28]

III. The Discovery Cases

A. *The Trend in Discovery Cases*

The court slightly modified the original standard of issuance in discovery cases. This modification was based partially on the court's inherent reluctance to interfere in the trial court's discretion over discovery.[29] Furthermore, the court was concerned with future policy implications that may result from issuance of the writ in pretrial disputes. By "interjecting itself"[30] into discovery matters, the supreme court would make the trial judge's job more difficult and open a "Pandora's Box of abuses."[31] This would defeat the goal of speedy and inexpensive discovery and would create the risk that the court would be buried in a "paper blizzard of applications for supervisory control."[32]

Despite this inherent reluctance, the court has exercised supervisory control over discovery matters and appears ready to do so more often. Although the court first exercised supervisory control over a pretrial discovery issue in 1972, it was not until 1989 that the court articulated the appropriate standard for such issuance.[33] The court's central goal clearly was judicial efficiency. In

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25. State *ex rel.* Whiteside v. District Court, 24 Mont. 539, 563, 63 P. 395, 400 (1900). This standard is reiterated in Continental Oil Co. v. Elks National Foundation, 235 Mont. 438, 440, 767 P.2d 1324, 1325-26 (1989), and State Highway Commission v. District Court, 160 Mont. 35, 42-43, 499 P.2d 1228, 1232 (1972).

26. Continental Oil Co. v. Elks Nat'l Found., 235 Mont. 438, 767 P.2d 1324 (1989).

27. State *ex rel.* Fitzgerald v. District Court, 217 Mont. 106, 114, 703 P.2d 148, 154 (1985). Note that this test corresponds to the previously discussed judicial goal of promoting efficiency by preventing needless litigation.

28. *Id.*

29. State *ex rel.* Guarantee Ins. Co., ___ Mont. ___, ___, 634 P.2d 648, 650 (1981) (citing Massaro v. Dunham, 184 Mont. 400, 603 P.2d 249 (1979)).

30. *Id.* at ___, 634 P.2d at 651.

31. *Id.*

32. *Id.*

33. In 1972, the court granted supervisory control to narrow the scope of an interrogatory in State *ex rel.* Banker's Life & Casualty Co. v. Miller, 160 Mont. 256, 502 P.2d 27 (1972). Nine years later, the court granted supervisory control over discovery issues in two cases, Jaap v. District Court, 191 Mont. 319, 623 P.2d 1389 (1981), and Kuiper v. District Court, ___ Mont. ___, 632 P.2d 694 (1981), without comment on the significance of issuing the writ for discovery orders. Immediately thereafter, the court denied supervisory control on a discovery issue in State *ex rel.* Guarantee Insurance Co. v. District Court, ___ Mont.

deciding whether to exercise supervisory control, the court weighs the additional burden of pretrial appellate intervention against the potential injustice of awaiting a final judgment obtained on an erroneous basis.

B. Montana Discovery Cases

1. Jaap *and* Kuiper

In 1981, the court exercised supervisory control over district court discovery orders in *Jaap v. District Court*[34] and *Kuiper v. District Court.*[35] Without discussion, the court greatly broadened the availability of the writ, which essentially invited a surge of applications from litigators disgruntled with lower court rulings.

In *Jaap*, the district court allowed private discovery interviews between defense counsel and plaintiff's physicians.[36] The supreme court granted supervisory control without discussing the appropriateness of the writ generally or the merits of the writ in this case. The court did, however, discuss the district court's error. The supreme court held that "a private interview of an adversary witness is not one of the 'methods' of discovery for which the Rules of Civil Procedure provide."[37] The court further noted that "[a]ny attempt to enforce a method of discovery not provided by the Montana Rules of Civil Procedure is outside the power of the District Court. We hold that the [District] Court is without power to order a private interview."[38] By failing to follow the Rules of Civil Procedure, or by attempting to expand them, the district court made an error of law. Moreover, the remedy by appeal was inadequate because the damaging interview would have already occurred. Thus, these circumstances clearly satisfied the necessary requisites for supervisory control as originally set forth in *Whiteside.*[39]

In *Kuiper v. District Court,*[40] the plaintiff sued Goodyear Tire

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___, 634 P.2d 648 (1981), in which it set forth the previously discussed reasons for not interfering with the district court's trial authority. *Id.* at ___, 634 P.2d at 650. It was not until 1989 that the court again granted supervisory control in discovery cases, in State *ex rel.* Burlington Northern Railroad v. District Court, 239 Mont. 207, 779 P.2d 885 (1989), and State *ex rel.* United States Fidelity & Guaranty Co. v. District Court, 240 Mont. 5, 783 P.2d 911 (1989), and at the same time added new language that may increase the availability of the writ.

34. 191 Mont. 319, 623 P.2d 1389 (1981).
35. ___ Mont. ___, 632 P.2d 694 (1981).
36. *Jaap*, 191 Mont. at 320-21, 623 P.2d at 1390.
37. *Id.* at 322-23, 623 P.2d at 1391.
38. *Id.* at 324, 623 P.2d at 1392.
39. *See supra* section II (A).
40. ___ Mont. ___, 632 P.2d 694 (1981).

and Rubber Company in strict liability for a defective tire rim.[41] The district court issued a protective order in favor of Goodyear preventing the use of, or deposition questions regarding, documents from similar product liability litigation involving the same rim model.[42] The district court based its reasoning on the attorney-client privilege, the work product rule and "public policy."[43] As in *Jaap*, the supreme court did not specifically address issuance of supervisory control. Asserting supervisory control, the court held "that the work product rule . . . can form the basis of a protective order even though the 'work product' is [already] in the possession of the adverse party."[44] The district court, however, erred by shielding critical information about the product's defect, knowledge of which was in the public interest.[45] The court also stated that Rule 26(c), Montana Rules of Civil Procedure, "does not provide for [protective orders based] on 'public policy' grounds."[46] As in *Jaap*, the district court erred by issuing a discovery order not included in the Rules of Civil Procedure. Additionally, the remedy by appeal was inadequate because the damage caused by concealing the information could not be rectified.

2. State *ex rel.* Guarantee Insurance Co. v. District Court

Shortly after *Kuiper* and *Jaap*, the Montana Supreme Court suddenly reconsidered the practicality of granting supervisory control for discovery orders. Observers believe the court reigned in issuance of the writ because of a surge in applications following *Kuiper* and *Japp*.[47]

In *Guarantee Insurance*,[48] the defendant insurance company claimed two interrogatories were oppressive and burdensome. The interrogatories requested detailed information on the company's loss-payment history.[49] The district court denied the defendant's objection and the defendant applied for supervisory control.[50] The

41. *Id.* at ___, 632 P.2d at 696.
42. *Id.*
43. *Id.* at ___, ___, 632 P.2d at 698, 702.
44. *Id.* at ___, 632 P.2d at 700.
45. *Id.* at ___, 632 P.2d at 702.
46. *Id.*
47. Interview with Professor William Crowley, University of Montana School of Law, in Missoula, Mont. (Nov. 15, 1990). Interview with Judge Gordon Bennett, in Missoula, Mont. (Apr. 17, 1991).
48. State *ex rel.* Guarantee Ins. Co. v. District Court, ___ Mont. ___, 634 P.2d 648 (1981).
49. *Id.* at ___, 634 P.2d at 649-50.
50. *Id.*

supreme court denied the application.[51]

The court found the circumstances failed to justify supervisory control under the traditional standard but, for the first time, articulated important policy considerations for future applications. The court acknowledged that it had issued the writ for discovery orders in two previous cases,[52] but warned:

> If this Court were to continue a policy of interjecting itself into an interlocutory review of rulings of the District Courts of this state concerning interrogatories and objections thereto, we would not only make it difficult for the District Court to control day to day trial administration but we would open a Pandora's Box of abuses.[53]

The court noted that the district court has inherent discretionary power to control discovery and is in a better position to supervise daily discovery matters.[54] True to its word, the supreme court refrained from supervisory involvement with discovery matters for the next eight years.

3. State *ex rel.* Burlington Northern Railroad v. District Court

The eight-year hiatus following the court's warning against discovery-related supervisory control in *Guarantee Insurance* ended when the court exercised supervisory control in *State ex rel. Burlington Northern Railroad v. District Court.*[55] In *Burlington Northern*, a railroad car ran over and seriously injured a railroad employee.[56] Plaintiff served defendant with interrogatories, requests for production, notice of deposition and deposition sub-

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51. *Id.* at ___, 634 P.2d at 650. The court grounded its decision on four bases: (1) The application for the writ was untimely because it was made 40 days after the answers to interrogatories were due; (2) the relator had not exhausted its available remedies because it had not applied for a protective order; (3) the relator had an adequate remedy at law because the district court can assess the costs of answering the interrogatory against the losing party; and (4) policy considerations. *Id.* at ___, 634 P.2d at 650-51.

52. *Id.* at ___, 634 P.2d at 651.

53. *Id.* Note that the increased applications for supervisory control in discovery matters seem to correspond to the court's willingness to use Rule 37 sanctions to facilitate discovery. In 1981, Montana followed the federal courts in their treatment of discovery abuses; that is, abuses will no longer be tolerated and the trial courts' use of Rule 37 sanctions to enforce discovery orders is encouraged. *See* Owen v. F.A. Buttrey Co., 192 Mont. 274, 627 P.2d 1233 (1981) (following National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976)). Only one year later, the court warned of the "paper blizzard" of applications for the writ. *Guarantee Ins.*, ___ Mont. at ___, 634 P.2d at 651 (1981). Interview with Professor William Crowley, University of Montana School of Law, in Missoula, Mont. (Nov. 15, 1990).

54. *Guarantee Ins.*, ___ Mont. at ___, 634 P.2d at 650.

55. 239 Mont. 207, 779 P.2d 885 (1989).

56. *Id.* at 209, 779 P.2d at 887.

poena duces tecum.[57] Included was a request for defendant's entire investigative file, investigative reports, photographs of the scene, and witness statements taken by the claims representative.[58] Following disagreement over production of the investigative file, witness statements, and disclosure of the identity of all expert witnesses consulted by defendant, plaintiff filed a motion to compel.[59] Defendant in turn filed a motion for an order to protect the witness statements and the identities of the nontestifying experts.[60]

The district court denied defendant's motion and ordered the defendant to identify its nontestifying experts and to produce witness statements taken by the claims representative.[61] The court also restrained defendant from pursuing further discovery until defendant complied with the order and awarded costs and attorney's fees to plaintiff.[62] Defendant applied for a writ of supervisory control.

In a four-to-three decision, the supreme court granted the defendant's writ of supervisory control.[63] The majority cited the traditional *Whiteside* test, but also held that supervisory control in discovery matters is appropriate " 'when [a lower court's] order [would] place a party at a significant disadvantage in litigating the merits of the case.' "[64] Burlington Northern would have been disadvantaged by the disclosure of the identity of nontestifying expert witnesses and by the inability to pursue discovery. In this case of first impression, the court held "that the identity of non-testifying experts is discoverable under Rule 26(b)(4)(B) . . . only upon a showing of exceptional circumstances."[65] The majority also concluded that the sanction imposed (denying defendant further discovery until it complied with the discovery order) was significant and exceeded the scope of Rule 37, Montana Rules of Civil Procedure.[66]

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57. *Id.*

58. *Id.*

59. *Id.* at 210, 779 P.2d at 888.

60. *Id.*

61. *Id.* at 211, 779 P.2d at 888.

62. *Id.*

63. *Id.* at 212, 779 P.2d at 889 (Weber, Turnage and Harrison, JJ., concurring; Gulbrandson, J., specially concurring and dissenting; McDonough, Hunt and Sheehy, JJ., dissenting).

64. *Id.* (quoting National Farmer's Union Property & Casualty Co. v. District Court, 718 P.2d 1044, 1046 (Colo. 1986) (The Colorado court held that requiring the defendant insurance company to produce privileged investigative files would place that party at a significant disadvantage in litigating the merits of the case because insurer's counsel would become a potential witness, which would mandate his withdrawal from the case.)).

65. *Id.* at 215, 779 P.2d at 890.

66. *Burlington Northern*, 239 Mont. at 219, 779 P.2d at 893. Rule 37(b)(2), Montana

With the adoption of the "significant disadvantage" language, the court broadened the potential availability of the writ. Although the traditional test is still valid, when the writ involves an interlocutory order, the "gross injustice" prong of the traditional test is apparently satisfied if the order places a party at a significant disadvantage in litigating the case.

4. State *ex rel.* United States Fidelity & Guaranty Company v. District Court[67]

The modification of the traditional test set forth by the *Burlington Northern* court was followed and confirmed in *USF & G*,[68] a bad faith action based on the Unfair Trade Practices Act.[69] The plaintiff requested production of the entire claims file, including " 'all written communications or memoranda of communications between the Defendant and its attorney.' "[70] "Defendants moved for a protective order asserting the attorney-client privilege and work product rule as to [certain] letters."[71] These letters were between the defendant and its attorney and "were written . . . after the damage action was filed."[72] The district court denied the protective order motion and the defendant petitioned for a writ of supervisory control.[73]

Rules of Civil Procedure, provides for sanctions against a party failing to comply with discovery order:

> If a party . . . fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just . . . .

MONT. R. CIV. P. 37(b)(2).

Note that the court also affirmed the order to produce witness statements taken by the claims representative and affirmed the award of costs and attorney's fees to compensate plaintiff for the expense of bringing a motion to compel production of discoverable photographs and witness statements.

The Dissent: Justice Gulbrandson concurred with the majority's holding on all issues except the affirmation of the award of attorney's fees. Justices McDonough and Hunt dissented to the grant of supervisory control, arguing that discovery orders are interlocutory, nonappealable, and did not dispose of any major aspect of the case. Supervision in this case was, therefore, "not necessary or proper." Justice Sheehy, with Justice Hunt concurring, dissented on the issues of nontestifying experts and severity of the sanctions. Although he did not directly address the appropriateness of supervisory control, Justice Sheehy stated that the majority opinion frustrates the district court's ability to make the rules of discovery work properly.

67. *USF & G*, 240 Mont. 5, 783 P.2d 911 (1989).
68. *Id.*
69. MONT. CODE ANN. § 33-18-201(2), (3), (6) (1989).
70. *USF & G*, 240 Mont. at 8, 783 P.2d at 912.
71. *Id.*
72. *Id.*
73. *Id.*

The court's unanimous opinion set forth the traditional test for issuance of the writ[74] and reiterated "that interlocutory review of discovery orders is not favored," but cited *Burlington Northern*, *Kuiper* and *Jaap* as examples of appropriate review.[75] The court also noted that the discovery of attorney-client communications in the context of bad faith litigation was an issue of first impression in Montana, and held that disclosure of the letters would place the party at a significant disadvantage and the remedy of appeal was, therefore, inadequate.[76] The court concluded that issuance of the writ was necessary.[77]

IV. ANALYSIS

A. *Proper Use of the Writ in Montana*

1. *Be Aware of the Writ and Follow the Rules*

The informed practitioner should realize that supervisory control exists for errant discovery orders that are neither founded in the Rules of Civil Procedure nor previously addressed by the Montana Supreme Court. The supreme court likely will grant supervisory control in these circumstances when the errant order would place the client at a significant disadvantage and when the remedy by appeal is inadequate.

The attorney should strictly adhere to the application rules. The application must be timely, and the opportunity for appeal must be wholly inadequate. An appeal most likely is inadequate when a discovery order is harmful and improper.

2. *Use Prior Cases as Factual Models*

The attorney may have a problem interpreting the "significant disadvantage" requirement. In fact, many litigants opposed to discovery orders may speculate that the orders significantly disadvantage their case. In order to define "significant disadvantage," it is helpful to look at the specific factual situations at issue in the supervisory control cases. Significant disadvantage likely exists when a district court fashions a discovery order not provided by the

74. *Id.* at 8, 783 P.2d at 913 (citing Continental Oil Co. v. Elks Nat'l Found., 235 Mont. 438, 767 P.2d 1324 (1989), and MONT. R. APP. P. 17(a) as setting forth the standard for issuance of the writ).

75. *Id.* at 8-9, 783 P.2d at 913.

76. *Id.* at 9, 783 P.2d at 913.

77. *Id.* The court also held that the attorney-client privilege cannot be overcome by a showing of need (as distinguished from work product) even in the case of third-party bad faith. "[T]he attorney-client privilege must remain inviolate." *Id.* at 14-15, 783 P.2d at 917.

Rules of Civil Procedure, as in *Jaap*, or when a court issues a protective order contrary to public policy, as in *Kuiper*, or orders the discovery of privileged information, as in *Burlington Northern* and *USF & G*. Moreover, the practitioner is subject to the good faith requirement of Rule 11,[78] which may help restrict applications to those cases that are truly threatening to the litigant.

3. *The Court Should Articulate a Definitive Standard*

The supreme court would assist the bench and bar by articulating a definite standard for issuance of the writ. The standard should limit the exercise of supervisory control in discovery matters to those cases of first impression, which are of general importance to the bench and the bar, and are such that the court's holding will provide guidance for future cases.[79] The basis for such a standard already exists. For example, *Kuiper*, *Burlington Northern* and *USF & G* all involved discovery issues of first impression. Further, *Jaap* overturned a discovery method that did not conform to the Rules of Civil Procedure and was upheld only once before.[80] Absent a clear standard, attorneys are likely to apply for the writ more often, thereby burdening the supreme court and slowing the trial process.

Supervisory control was originally intended to correct errors of law by the trial court, which posed irreparable harm, and that were not covered by the other jurisdictional-based writs. The court should amend the error of law requirement to include issues of first impression.

4. *Earmarking Potential Sources for Supervisory Control*

The opportunities for supervisory control based on trial court error probably will be few, but the opportunities arising from cases of first impression should be many in Montana. Possible areas include: Limitations on interrogatories, medical examinations in cases in which the party has not placed its medical condition at issue, stopping a deposition for bad faith or oppressive conduct,[81]

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78. MONT. R. CIV. P. 11.

79. This guideline was adopted by California in Carter v. Superior Court, 218 Cal. App. 3d 994, 267 Cal. Rptr. 290 (1990).

80. The discovery method, a private interview between counsel and the opposing party's doctor, was approved in Callahan v. Burton, 157 Mont 513, 487 P.2d 515 (1971), and overturned by Jaap v. District Court, 191 Mont. 319, 623 P.2d 1389 (1981).

81. MONT. R. CIV. P. 30(d) provides for this remedy, the question of what constitutes bad faith or oppressive conduct has yet to be addressed by the court.

the allowable scope of discovery prior to filing of a suit,[82] and the variety and severity of Rule 37 sanctions.

B. Other Jurisdictions

The writ of supervisory control is unique to Montana, but many other states allow interlocutory review under the writ of mandamus. Often, other states treat appellate review of discovery orders similar to Montana's use of supervisory control, but some states are considerably more restrictive. For example, West Virginia has limited interlocutory review of discovery orders specifically to questions of first impression,[83] and California has limited interlocutory review to questions "of first impression of general importance to the bar and bench, and the answer . . . will provide guidance for future cases."[84] Other state courts do not permit interlocutory review at all because of the "final judgment" rule.[85]

States that do permit interlocutory appeals for discovery orders have varying criteria for granting an appeal, usually similar to Montana's "irreparable harm" standard and promoting the same goal of preventing needless litigation. For example, Vermont's standard of review for overturning a discovery order requires that "the order must involve a controlling question of law, there must be substantial grounds for difference of opinion as to that question, and an immediate appeal must have at least the potential to materially advance the termination of the litigation."[86]

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82. MONT. R. CIV. P. 34 provides for pre-filing discovery, but the scope has not been addressed by the court.

83. *See, e.g.* State *ex rel.* Bennett v. Keadle, 334 S.E.2d 643 (W. Va. 1985). The West Virginia court stated that supervisory control is limited to purely legal issues of first impression, "which means that the Court will not exercise original jurisdiction in future cases to review the matters addressed in this opinion." *Id.* at 646.

84. Carter v. Superior Court, 218 Cal. App. 3d 994, 996, 267 Cal. Rptr. 290, 291 (1990).

85. The final judgment rule allows appeals only after final judgment in the case. *See, e.g.*, Hanley v. Evans, 443 A.2d 65, 66 (Me. 1982); Leathers, *Civil Procedure*, 72 KY. L.J. 315, 316 (1983-84).

86. Castle v. Sherburne Corp., 141 Vt. 157, 162, 446 A.2d 350, 352 (1982). Other examples of standards of review for interlocutory appeal of discovery orders include: "[E]xceptional circumstances and where necessary to protect substantive rights in the absence of an alternative, effective remedy," Soja v. T.P. Sampson Co., 373 Mass. 630, 631, 369 N.E.2d 975, 975 (1977); "[not] unless such interlocutory matter involves a usurpation of judicial power," State *ex rel.* Gross v. Marshall, 39 Ohio St. 2d 92, 94, 314 N.E.2d 170, 172 (1974) (quoting State *ex rel.* Staton v. Common Pleas Court, 5 Ohio St. 2d 17, 213 N.E.2d 164 (1965)); "where a party will be beyond relief if review is not granted at that stage of the proceedings," Ford Motor Co. v. Edwards, 363 So. 2d 867, 869 (Fla. Dist. Ct. App. 1978); "[unless] [t]here has been the determination of a substantial issue and the establishment of a legal right," Levinson v. Conlon, 385 A.2d 717, 719 (Del. 1978) (quoting Gardinier, Inc. v. Cities Serv. Co., 349 A.2d 744 (Del. 1975)).

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C. The Federal Courts

The United States Supreme Court also has granted interlocutory review of discovery orders (via the writ of mandamus) on occasion, but without a clear governing standard. In a 1976 California case, a federal district court granted an order compelling production of confidential personnel files without in-camera inspection.[87] The Supreme Court held that, although "the remedy of mandamus is a drastic one" and Congress intended appellate review for final judgments only, issuance of the writ is largely a matter of the appellate court's discretion and is appropriate when the moving party has no other adequate means of relief.[88] In two earlier decisions, however, the Supreme Court fluctuated between a broad standard of review to settle new and important problems of law[89] and the traditional standard of mandamus, which requires a question of jurisdiction.[90] One scholar commented that this controversy essentially gives the federal appellate courts a free hand to utilize mandamus for interlocutory review as long as the use is within reasonable limits.[91]

V. Conclusion

The writ of supervisory control remains an extraordinary remedy in Montana and is reserved for exceptional circumstances. The Montana Supreme Court has issued the writ to review lower court orders in virtually every phase of the trial process. Recently, the court has shown a willingness to issue supervisory control to review discovery orders, an area traditionally left to the discretion of the district court. Although concerned that appellate supervision of pretrial discovery will flood the judicial system with appeal requests and result in a piecemeal litigation process, the court has chosen to grant the writ under limited circumstances.

As one commentator observed regarding federal interlocutory appeals, "the problem facing [the court] is to formulate a sensibly flexible policy that permits interlocutory review when it is in the interest of justice, but avoids the costs and potential abuse of

87. Kerr v. United States Dist. Court, 426 U.S. 394 (1976).

88. *Id.* at 402-03.

89. Schlagenhauf v. Holder, 379 U.S. 104, 109-12 (1964). The Court also required a potential "usurpation of power" by the trial judge. *Id.* at 111. Note that this case also involved an issue of first impression. *See* Fullerton, *Exploring the Far Reaches of Mandamus*, 49 Brooklyn L. Rev. 1131, 1139 (1983).

90. Will v. United States, 389 U.S. 90, 95 (1967). *See* Note, *Mandamus as a Means of Federal Interlocutory Review*, 38 Ohio St. L.J. 301, 314-15 (1977).

91. Note, *supra* note 90, at 315.

piecemeal litigation."[92] The Montana Supreme Court has exercised the writ when the district court has issued an errant discovery order, thus placing a party at a significant disadvantage in litigating the merits of the case, and when the remedy by appeal is inadequate.

The "significant disadvantage" requirement is vague, but the factual circumstances of the cases discussed herein provide some guidance. Questions involving the discovery of privileged information seem likely to risk placing a party at a significant disadvantage in litigating a case. Furthermore, in three of the four recent cases in which the court granted supervisory control to review a discovery order, the discovery order involved a question of first impression; however, the court has not stated that a case of first impression is included in the "error of law" requirement for issuance of the writ, or required for issuance. The court should clarify the standard. Perhaps the court could limit review of discovery orders to questions of first impression that are of importance to the bench and bar.

To the Montana practitioner, the recent decisions signify that relief may be available for harmful discovery orders. If attorneys restrict their applications to only those cases that truly are unfair to the client or the case, and for which other relief is inadequate, the supreme court can prevent needless litigation while avoiding the dreaded paper blizzard of appeals.

92. *Id.* at 304.