NOTES

Rediscovering Discovery: *Washington State Physicians Insurance Exchange and Association v. Fisons Corporation*

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INTRODUCTION

Attorneys have long been aware of their dual role as zealous advocate and officer of the court. In *Washington State Physicians Insurance Exchange and Ass'n v. Fisons Corp.*,[1] the justices of the Washington Supreme Court faced a conspicuous example of the fundamental tension that inheres in that role.

This decision, handed down on September 16, 1993, marks the court's first interpretation of WASH. SUPER. CT. CIV. R. 26(g) [hereinafter CR26(g)], which deals with discovery requests, responses, and objections thereto.[2] In deciding this case, a unanimous court enunciated a new objective standard by which an attorney's conduct during discovery is to be judged for compliance with CR 26(g). The standard, based on federal courts' interpretations of Federal Rule of Civil Procedure 26(g), focuses on the "reasonable inquiry" provision in CR 26(g).[3] But much more than providing us with a technical interpretation of the

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1. 122 Wash. 2d 299, 858 P.2d 1054 (1993).

2. WASH. SUPER. CT. CIV. R. 26(g) became effective on September 1, 1985. *See* Adoptions, Amendment, and Abrogation of Rules of Court, 104 Wash. 2d 1101. The rule provides:

> The signature of the attorney or party constitutes a certification that he has read the request, response, or objection, and that to the best of his knowledge, information, and belief formed after a reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. Wash. Super. Ct. Civ. R. 26(g).

3. Federal interpretations of FED. R. CIV. P. 26(g) are based, in turn, on federal case law under FED. R. CIV. P. 11. *See* Apex Oil Co. v. The Belcher Co. of New York, 855 F.2d 1009,

discovery rule, the court completely redefined the conceptual boundaries of discovery as a component of the adversarial system.

Section I of this Article will present a model of the adversarial system and argue that the discovery process, although a component of that system, cannot function under the model. Section II lays out the facts of the *Fisons* case, the arguments presented by each side, and the court's decision. Section III discusses a survey conducted by the Author, which sought to ascertain the decision's impact on members of the Seattle bar.[4] Utilizing survey results and observations regarding the adversarial system, the section then pinpoints some potentially troublesome issues left unresolved by the court and suggests ways to resolve them.

I. Discovery and Its Role in the Adversarial System

A. *The Discovery Process: Two Views*

The fundamental conflict addressed in *Fisons*, that which exists between an attorney's concomitant duties to both client and court, arises from two schools of thought which have grown divergent and seemingly incompatible over time. One school is based on policy and rules, and recognizes the attorney's duty to the court as coming before all others. Discovery is regarded as a process in which parties work toward the common goal of "mutual knowledge of all the relevant facts."[5] This view of the discovery process demands a holistic approach to legal matters in which the attorney is involved, and includes among its objectives forthrightness and candor.

The other school of thought is grounded in contemporary ethical, professional, and societal standards, and identifies the attorney's duty to the client as primary.[6] Discovery is considered a tactical device wielded predominantly to help the client win, rather than to ensure procedural and systemic integrity by exposing facts or illuminating issues. A basic philosophy shared by some lawyers is that disclosure of

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1015 (2d Cir. 1988). Fed. R. Civ. P. 11 contains a certification requirement similar to that of Fed. R. Civ. P. 26(g).

4. *See* Appendix for a copy of the Opinion Survey.

5. Hickman v. Taylor, 329 U.S. 495, 507 (1947).

6. Indeed, one of the most oft-quoted statements of a lawyer's duty to his client is found in the Canons of Professional Ethics, which were adopted on August 27, 1908, and in use until 1970. Canon 15 states, "[t]he lawyer owes 'entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability. . . .' " Canons of Professional Ethics Canon 15 (1908).

information is to be avoided if at all possible: "Never be candid and never helpful and make [your] opponent fight for everything."[7]

The conflict between an attorney's duties to client and court is reinforced by incentives present in the system. If an attorney knows that the opponent is going to make tactical use of discovery, failure to respond in kind may expose the attorney to loss of the case, scorn of the client, and possibly a malpractice suit. Indeed, even the United States Supreme Court has acknowledged the gamesmanship that occurs: "Under our adversary system the role of counsel is not to make sure the truth is ascertained but to advance his client's cause by any ethical means. Within the limits of professional propriety, causing delay and sowing confusion not only are his right but may be his duty."[8]

Unhappiness, or at least concern, with discovery practices is widespread.[9] Chief Justice Burger wrote that current legal practices have created a situation in which each dispute is tried twice—once during the pretrial process of discovery and once more at the actual trial.[10] But for all the apparent concern, courts, both state and federal, still appear uncertain as to how to resolve the matter. One indication of this uncertainty is the dearth of decisions making use of Federal Rule 26(g), or in Washington, CR 26(g).[11] As a function of the lack of guidance pro-

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7. Wayne D. Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 AM. B. FOUND. RES. J. 217, 250 n.54 (alteration in original).

8. Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 325 (1985) (quoting Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1288 (1975)).

9. For example, at the American Bar Association's 1990 annual meeting, lawyers, judges, professors, and clients agreed that discovery has gotten seriously out of hand; that the Federal Rules of Civil Procedure's promise of a "just, speedy, and inexpensive determination of every action" has become, at best, illusory, and at worst, a cruel joke; and that the promised benefits of discovery are not worth the toll they take on litigants and the courts. Loren Kieve, *Discovery Reform: Maybe the Best Solution Is No Discovery At All*, A.B.A. J., Dec. 1991, at 79, 80.

10. *See* Warren E. Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, 70 F.R.D. 83, 95-96 (1976).

11. WASH. SUPER. CT. CIV. R. 26(g) is essentially identical to its federal counterpart. CR 26(g) focuses on "request[s] for discovery or response[s] or objection[s] thereto" and provides for a certification requirement similar to that of WASH. SUPER. CT. CIV. R. 11. However, CR 11 was recently amended to make imposition of sanctions discretionary rather than mandatory. At this writing, no such changes have been made for CR 26(g).

The FED. R. CIV. P. 26 advisory committee's note to the 1983 amendments, relied upon by the Washington Supreme Court in this opinion, state that the general policy of the rule is "to provide a mechanism for making relevant information available to the litigants," and that the spirit of the rule is thus violated when "advocates attempt to use discovery tools as tactical weapons rather than to expose the facts and illuminate the issues." *Fisons*, 122 Wash. 2d at 341, 858 P.2d at 1077 (citing FED. R. CIV. P. 26 advisory committee's note to the 1983 amendment, 97 F.R.D. 165, 216-19 (1983)). CR 26(g) imposes an affirmative duty to engage in "responsible" pretrial discovery. *Id.* at 342, 858 P.2d at 1077 (citing advisory committee's note). In addition, CR 26(g) "makes explicit the authority judges now have to impose appropriate sanctions and requires them to use it." FED. R. CIV. P. 26 advisory committee's note to the 1983 amendments, 97 F.R.D. 165, 220 (1983).

vided by courts, the legal community had essentially established its own standard by which an attorney's conduct in civil discovery is measured.[12] The court in *Fisons* replaced that standard with a new objective one, and in doing so, reestablished the courts' control over discovery and the rules governing it.

B. The Adversarial System: A Model

To understand the universe in which discovery and its attendant problems exist, it is necessary to examine the guiding principle of the American legal profession—the adversarial system. To many, the adversarial system is a process of dispute resolution in which "the adversaries, usually through their attorneys, are in confrontation until they persuade the opponent to give up or the tribunal to decide."[13] However, Professor Lon Fuller has suggested that the adversarial process rests on much more sophisticated foundations: first, the presence of a neutral tribunal; second, the preparation and presentation of the case by the parties; and finally, a structured procedural system designed to find the truth.[14]

The presumption of a neutral tribunal is based on the notion that the decision maker or fact finder will rely entirely on the parties or their advocates to provide the information needed to make the decision.[15] Because the tribunal does not conduct any independent investigation, it remains essentially ignorant until the case is presented for decision, and thereby insulates itself from the dangers of forming a bias or reaching premature conclusions.[16] This element of neutrality is missing in the information-gathering systems employed in other countries. For example, in Germany, the court, not the lawyers, takes the responsibility for gathering evidence and sifting through facts.[17]

While the Federal Rules do not envision the pervasive judicial involvement found in the German system, neither do they intend the

12. The standard, expressly rejected by the supreme court, was based on customary and accepted litigation practices. *See Fisons*, 122 Wash. 2d at 344, 858 P.2d at 1078. The viability of this standard is illustrated by the fact that both the trial court and special discovery master adverted to it, rather than to the language of CR 26(g) or the FED. R. CIV. P. advisory committee's notes to the 1983 amendments. *See id.* at 345, 858 P.2d at 1079.

13. William W. Schwarzer, *The Federal Rules, The Adversarial Process and Discovery Reform*, 50 U. PITT. L. REV. 703, 706 (1989).

14. *Id.* (referring to Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978)). The author uses this model purely for illustrative purposes.

15. *Id.*

16. *See* Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 385-86 (1978).

17. John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 826 (1985).

absolute judicial purity proposed by Professor Fuller. In the comments accompanying Rule 26, the advisory committee asserts "[t]he rule contemplates greater judicial involvement in the discovery process and thus acknowledges the reality that [the discovery process] cannot always operate on a self-regulating basis . . . . Concern about discovery abuse has led to widespread recognition that there is a need for more aggressive judicial control and supervision."[18] The call for judicial involvement is embodied in the sanctions provisions of Federal Rules 11, 16(f), 26(g) and 37(b), and by the pretrial conference provisions in Rules 16 and 26(f). For example, Rule 16(a) states,

> the court may in its discretion direct the attorneys . . . to appear before it for a conference or conferences before trial for such purposes as (1) expediting the disposition of the action; (2) establishing early and continuing control so that the case will not be protracted because of lack of management; (3) discouraging wasteful pretrial activities; (4) improving the quality of the trial through more thorough preparation, and; (5) facilitating the settlement of the case.[19]

The pretrial conference provisions in Rule 26(f) are similar to those in Rule 16, but focus specifically on discovery.[20] Thus, contrary to Fuller's assertion, increased judicial involvement is not only anticipated by the discovery rules, it is necessary to the proper functioning of the rules.

The second of Fuller's foundations, that of preparation and presentation of cases by the parties, is a corollary to the neutrality concept. In our discovery system, the judge's role is traditionally a passive one.[21] Judicial passivity creates the incentive for parties and their representatives to make the most effective and persuasive case presentation as is possible.[22] One commentator likens this situation to a free market system in which "competition motivated by self-interest orders human affairs."[23] But the presence of the self-interest incentive begs the question of whether judicial passivity, and the adversarial process in general, achieve desirable results in the arena of civil discovery. The

18. FED. R. CIV. P. 26 advisory committee's note to the 1983 amendments, 97 F.R.D. 165, 218, 220 (1983).

19. FED. R. CIV. P. 16(a).

20. WASH. SUPER. CT. CIV. R. 26(f). "At any time after commencement of an action the court may direct the attorneys to appear before it for a conference on the subject of discovery." *Id.*

21. Schwarzer, *supra* note 13, at 709.

22. *Id.*

23. *Id. See also* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 493 (3d ed. 1986) ("The invisible hand of the market has its counterpart in the aloof disinterest of the judge.")

answer is "no"—judicial passivity and the gamesmanship it abets fuel negative consequences.

Self-interest, often masquerading as client interest, fosters an environment in which a lawyer's responsibility for substantive justice all but disappears. Litigation becomes a game in which lawyers are concerned with the production of belief, not knowledge.[24] One author's interviewee said, "[I]t is sometimes more fun to have a bad case than a good one for it tests your powers of persuasion more severely. Certainly I have seldom felt better pleased than when I persuaded [the court] to come to a decision which I was convinced was wrong . . . ."[25] Another commentator wrote, "The system . . . is not a search for truth. Rather it is a competition to win."[26]

The adversarial approach to discovery often rewards another form of self-interest—the desire to make money. By engaging in prolonged and contentious discovery, attorneys can keep the meter running longer, thereby amassing larger fees. All this comes, of course, at the client's expense, and perhaps even at the expense of the client's case.

The last of Fuller's three foundations describes a structured procedural system designed to find the truth. This postulates a climactic confrontation in which the clash of the advocates will reveal the truth, thus ensuring a just decision.[27] The Supreme Court has agreed: "The basic purpose of a trial is the determination of truth. . . ."[28]

But what of the many cases that never go to trial?[29] The adversarial model does not provide for a procedural mechanism to compel truth in pretrial phases. Yet attorneys entering into a settlement, for example, are no less interested in securing a just result for their clients than are those entering into a trial. Therefore, the need exists for a structured procedural system designed to find the truth beyond the confines of the courtroom. It is precisely this need which discovery rules aspire to fulfill.

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24. Deborah L. Rhode, *Symposium on the Law Firm as a Social Institution: Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 596 (1985).

25. Warren Lehman, *The Pursuit of a Client's Interest*, 77 MICH. L. REV. 1078, 1078 (1979) (alteration in original) (quoting the Rt. Hon. Lord Cross of Chelsea).

26. Stephen A. Salzburg, *Lawyers, Clients, and the Adversary System*, 37 MERCER L. REV. 647, 651 (1986).

27. Schwarzer, *supra* note 13, at 712.

28. Tehan v. Shott, 382 U.S. 406, 416 (1966).

29. "About 95% of civil cases filed in federal courts are terminated before trial." Schwarzer, *supra* note 13, at 707.

C. *Discovery and The Adversarial System: Irreconcilable Differences?*

The gaming notion of justice inspired by judicial passivity and self-interest clearly frustrates the policy of the discovery rules. When amending Rule 26 the advisory committee noted that "the spirit of the rules is violated when advocates attempt to use discovery tools as tactical weapons rather than to expose the facts and illuminate the issues by overuse of discovery or unnecessary use of defensive weapons or evasive responses."[30] Thus the adversarial presumption of preparation and presentation of cases by the parties, which prioritizes self-interest, is antithetical to the policies behind the discovery rules, which prioritize an attorney's duty to the court.

Moreover, by focusing on the trial process as the adversarial system's sole truth-seeking mechanism, Fuller's model disregards completely the discovery rules and their broad mission of promoting truth and candor outside the courtroom. Therefore, in addition to the practical incompatibilities suggested in the previous analysis, discovery as a structural mechanism is simply not contemplated by nor consistent with Fuller's adversarial model.

The discordancies which result from the application of discovery principles to Fuller's model illustrate the paradox faced by the court in *Fisons*: Discovery, though a necessary and major component of the adversarial system, clashes with the traditional notions which characterize the adversarial system. Resolution of this paradox would, therefore, demand more than a technical application of the discovery rules. A change in the general perception of discovery is required.

II. *Washington State Physicians Insurance Exchange and Association v. Fisons Corporation.*

A. *Facts Of The Case*

On January 18, 1986, two-year-old Jennifer Pollock suffered seizures caused by an excessive amount of the drug theophylline in her system.[31] The seizures led to severe and permanent brain damage.[32] Jennifer's parents sued Dr. James Klicpera, the prescribing pediatrician, and Fisons Corporation, the manufacturer of Somophylline Oral

30. Fed. R. Civ. P. 26 advisory committee's note to the 1983 amendments, 97 F.R.D. 165, 216-19 (1983).

31. Theophylline is a bronchodilator used to relieve symptoms of asthma and related respiratory diseases. Fisons' Reply Brief, Response to Klicpera's Cross Appeal, and Response to WSPIE's Cross-Appeal at 36 n.50, *Fisons* (No. 57696-3). At the time of Jennifer's injury, it was one of the most widely used ingredients in asthma medications world-wide. *Id.*

32. *Fisons*, 122 Wash. 2d at 307, 858 P.2d at 1058.

Liquid, the theophylline-based drug prescribed to Jennifer.[33] Dr. Klicpera cross-claimed against Fisons for damages and attorney's fees, pointing to Fisons' failure to warn that its theophylline-based medications were potentially dangerous when given to children with viral infections, and for damages for emotional distress.[34]

After nearly three years of discovery, Dr. Klicpera and his liability insurer, Washington State Physician's Insurance Exchange and Association (WSPIE), settled with the Pollocks.[35] More than a year later, on March 15, 1990, the Pollock's attorney received from an anonymous source a copy of a letter dated June 30, 1981.[36] Fisons originally sent the letter to certain "Key Influential Physicians" warning them of their need to understand that theophylline can be a "capricious drug," and alerting them to findings of "life-threatening theophylline toxicity" among asthmatic pediatric patients.[37] Of the roughly 6,000 physicians in Washington, only seven were included on the Key Influential Physicians list.[38] Of those seven, none were from Snohomish County, where Dr. Klicpera practiced.[39]

After receiving the document, the attorney forwarded it to Dr. Klicpera's attorney,[40] who then alerted Judge Knight.[41] The Pollocks and Dr. Klicpera argued that their discovery requests should have produced the letter and moved for sanctions against Fisons and its counsel.[42] Judge Knight appointed a special master, who denied the motion, but *sua sponte* expanded the scope of discovery, thus requiring Fisons to deliver all requested documents which related to theophylline.[43] Among the 10,000 documents produced was a 1985 memo from

33. *Id.*

34. *Id.*

35. *Id.* Fisons unsuccessfully challenged the settlement as unreasonable and collusive. *See* Fisons' Reply Brief, Response to Klicpera's Cross-Appeal, and Response to WSPIE's Cross-Appeal at 46 n.59, *Fisons* (No. 576-96-3). *Id.* The settlement provided that WSPIE would loan to the Pollocks $500,000 which would be contributed in the event of a settlement between the Pollocks and Fisons. *Fisons*, 122 Wash. 2d at 307, 858 P.2d at 1058. The Pollocks were guaranteed a minimum recovery of $1 million. *Id.* Dr. Klicpera's liability, if he were to remain as a party, was limited to a maximum of $1 million. *Id.*

36. *Fisons*, 122 Wash. 2d at 307-08, 858 P.2d at 1058.

37. *See* Brief of Respondent/Cross-Appellant James A. Klicpera, M.D. at 8, *Fisons* (No. 57696-3).

38. *Id.* at n.8.

39. *Id.*

40. *Fisons*, 122 Wash. 2d at 307, 858 P.2d at 1058.

41. Brief of Respondent/Cross-Appellant Washington State Physicians Insurance Exchange & Association at 24-25 (No. 57696- 3).

42. *Fisons*, 122 Wash. 2d at 308, 858 P.2d at 1058. Fisons and its counsel responded by arguing that Klicpera had, in essence, failed to ask the right questions, and that ethical obligations imposed by the adversarial nature of discovery prevented them from volunteering the information. *See infra* part II.B. and accompanying notes for a detailed discussion of these arguments.

43. *See Fisons*, 122 Wash. 2d at 308, 858 P.2d at 1058-59.

Fisons' director of medical communications to the company's vice president of sales and marketing in which the director recommended that, due to an "epidemic" of theophylline toxicity, the company cease promotional activities with regard to Fisons' line of theophylline products.[44]

The motion for sanctions was appealed to Judge Knight, who affirmed the special master's ruling and dismissed the sanctions claim with prejudice.[45] Shortly thereafter, Fisons settled with the Pollocks for $6.9 million, and the case was recaptioned to its present name.[46]

At trial in the Snohomish County Superior Court, Dr. Klicpera renewed the sanctions motion.[47] The trial court cited several reasons for denying the motion: The evidence did not support a finding that Fisons intentionally misfiled documents to avoid discovery; neither Dr. Klicpera nor the Pollocks had moved to compel production of documents before moving for sanctions; the conduct of Fisons and its counsel was consistent with customary and accepted litigation practices of the bar of Snohomish County and of the state; and the plaintiffs failed to prove that reasonable minds could not differ on the appropriateness of sanctions.[48]

The supreme court accepted review at Fisons' request.[49] Among the parties' sixty-three assignments of error was Klicpera's cross-appeal for the denial of sanctions for Fisons' alleged discovery abuses.[50]

B. The Battle

By the time the case arrived at the supreme court, the trenches had been deeply dug. On one side was Fisons, supported by a battery of fourteen experts, including Yale professor Geoffrey Hazard.[51] The group boasted 398 years of collective legal experience and participation in such groups as American Law Institute, Washington State Bar Association, WSBA Disciplinary Committee, and American College of

44. *Id.* at 308-09, 858 P.2d at 1059. For the text of the memo see Brief of Respondent/Cross-Appellant James A. Klicpera, M.D. at app. A, *Fisons* (No. 57696-3). "The record at trial showed that the drug company continued to promote and sell theophylline after the date of this memo." *Fisons*, 122 Wash. 2d at 309, 858 P.2d at 1059.

45. Fisons' Reply Brief, Response to Klicpera's Cross-Appeal, and Response to WSPIE's Cross-Appeal at 58, *Fisons* (No. 57696-3).

46. *Fisons*, 122 Wash. 2d at 309, 858 P.2d at 1059.

47. *Id.* at 308, 858 P.2d at 1059.

48. *Id.* at 344-45, 858 P.2d at 1078-79.

49. *Id.* at 310, 858 P.2d at 1060.

50. *See id.*

51. *See* Fisons' Reply Brief, Response to Klicpera's Cross-Appeal, and Response to WSPIE's Cross-Appeal at app. D, *Fisons* (57696- 3).

Trial Lawyers.[52] On the other side stood WSPIE, armed with the affidavits of only two experts.[53]

At the center of this battle of the affidavits were the two documents that, according to WSPIE, should have been produced in response to its interrogatories and requests for production. Both documents contradicted the position taken by Fisons, that it did not know that theophylline-based medications were potentially dangerous when given to children with viral infections. The first document was the anonymously-provided letter to select physicians discussing an article that contained a study confirming reports of "life-threatening toxicity when pediatric asthmatics . . . contract viral infections."[54] The second document, a Fisons interoffice memorandum, talks of an "epidemic" of theophylline toxicity and of a "dramatic increase of reports of serious toxicity to theophylline."[55]

According to the court, the drug company's responses and objections to the plaintiffs' interrogatories and requests for production were "misleading" and "contrary to the purposes of discovery."[56] However, according to Fisons, its responses to the plaintiffs' interrogatories fully complied with the scope of discovery as defined by the plaintiffs.[57] The drug company claimed that any nondisclosure was due to WSPIE's failure to ask the right questions.[58] Fisons argued further that WSPIE (and the Pollocks before them) failed to use available means to acquire the documents: First, WSPIE failed to make efforts to expand the scope of discovery to include the smoking gun documents;[59] and second, WSPIE failed to bring a motion to compel pro-

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52. *Id.*

53. WSPIE's experts on the discovery matter were Vernon Pearson, Justice of the Washington Supreme Court (retired), and University of Washington School of Law Assistant Dean Robert Aronson. *See* Fisons' Reply Brief, Response to Klicpera's Cross-Appeal, and Response to WSPIE's Cross Appeal at 60 n.76, *Fisons* (57696-3).

54. *Fisons*, 122 Wash. 2d at 338, 858 P.2d at 1075.

55. *Id.*

56. *Id.* at 346, 858 P.2d at 1079-80. For example, Request 3 stated: "Produce genuine copies of any letters sent by your company to physicians concerning theophylline toxicity in children." *Id.* at 348, 858 P.2d at 1081. To that request Fisons responded: "Such letters, if any, regarding Somophylline Oral Liquid will be produced at a reasonable time and place convenient to Fisons and its counsel of record." *Id.*

Justice Andersen noted that, "Had the request, as written, been complied with, the first smoking gun letter . . . would have been disclosed early in the litigation." *Id.* at 349, 858 P.2d at 1081. The court concluded, "It appears clear that no conceivable discovery request could have been made by the doctor that would have uncovered the relevant documents, given the above and other responses of the drug company." *Id.* at 352, 858 P.2d at 1083.

57. *See Fisons*, 122 Wash. 2d at 352-54, 858 P.2d at 1083-84.

58. *See id.* at 354, 858 P.2d at 1084.

59. *See* Affidavit of Payton Smith at 7-8, *Fisons* (No. 86-2-06254-6) (Superior Court for Snohomish County, August 31, 1990)).

duction of the documents.[60] Fisons relied heavily on "common usage and practice among practicing attorneys in this state" as setting the standard of conduct in discovery.[61] The drug company's approach to the issue was summed up by one expert: "Tendentious, narrow and literal positions with regard to discovery are, in my opinion both typical and expected in the civil discovery process."[62]

WSPIE's position on the other hand, relied on the broad policy of "cooperation and forthrightness" behind the discovery rules and sought to alert the court of the looming evils to be wrought by discovery postures like that of Fisons.[63] One affiant for the plaintiffs opined,

> I believe that the integrity of the legal profession and our judicial system is at issue in this case. The discovery rules were intended to facilitate the search for the truth, not frustrate it. Evasive and/or false responses to discovery requests should not be tolerated if our system of justice is to survive.[64]

With the two sides firmly polarized, the court made its determination.

C. *The Supreme Court Decides*

The court's first task was to determine the proper standard of review to apply to rulings regarding sanctions for discovery abuse. Despite Dr. Klicpera's argument that a de novo standard should apply, the court ruled that an abuse of discretion standard was appropriate.[65] Against this standard, the supreme court found that the trial court erred in considering the opinions of attorneys and other experts as to whether sanctions should be imposed.[66] The court noted that, contrary to the trial court's reasoning, intent to impede discovery is not a necessary component to the issuing of sanctions; nor is a motion to compel required before a sanctions motion can be filed.[67] The court went on to state that the proper measure of an attorney's conduct is the spirit and purpose of the rules, rather than the standard of practice of the local

60. *See id.* at 11.

61. *See id.* at 7.

62. Declaration of David Boerner at 10-11, *Fisons* (No. 86-2-06254- 6).

63. *See Fisons*, 122 Wash. 2d at 342, 858 P.2d at 1077.

64. Declaration of Vernon Pearson at 11, *Fisons* (No. 86-2-06254- 6).

65. A trial court abuses its discretion when its order is "manifestly unreasonable or based on untenable grounds or reasons." Holbrook v. Weyerhaeuser Co., 118 Wash. 2d 306, 315, 822 P.2d 271, 276 (1992). *See generally* National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976) (abuse of discretion standard is to be applied when reviewing the imposition of sanctions for discovery abuses); Snedigar v. Hodderson, 114 Wash. 2d 153, 169, 786 P.2d 781, 788 (1990) (sanctions imposed for failure to comply with discovery order would be reviewed for abuses of discretion).

66. *Fisons*, 122 Wash. 2d at 344, 858 P.2d at 1078.

67. *Id.* at 345, 858 P.2d at 1079.

bar, as found by the trial court.[68] In addition, the court found that many findings of fact entered by the trial court were either erroneous conclusions of law or not supported by the evidence.[69]

The court determined that, for this type of discovery issue, the proper sanctions rule was CR 26(g), which applies specifically to discovery disclosures.[70] Interpreting CR 26(g) for the first time, the court articulated a new objective standard to be applied by courts when asked to impose sanctions for discovery abuse.[71]

Under the standard, a court must determine whether the attorney's certifications to discovery responses were made after a reasonable inquiry and whether they: (1) were consistent with the rules; (2) were not interposed for any improper purpose; and (3) were not unreasonable or unduly burdensome or expensive.[72] To determine whether an inquiry was reasonable, the court must consider "all of the surrounding circumstances, the importance of the evidence to its proponent, and the ability of the opposing party to formulate a response or to comply with the request."[73]

Armed with this new standard, the court found that Fisons and its counsel had failed to comport with either the spirit or letter of the discovery rules in making responses to Klicpera and, therefore, faced mandatory sanctions under CR 26(g).[74] The court then remanded the case to the Snohomish County Superior Court for a determination of sanctions.[75] Just before that hearing, Fisons and its counsel entered into a settlement by which they would pay WSPIE $325,000, the larg-

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68. *Id.*

69. *Id.*

70. *Id.* at 339-40, 858 P.2d at 1076.

71. The rule also provides for sanctions at the court's discretion based on its inherent power. The supreme court cautioned that this inherent power should not be resorted to when rules adequately address the problem. *Id.* at 340, 858 P.2d at 1076.

72. *Id.* at 343, 858 P.2d at 1078 (referring to CR 26(g)).

73. *Id.*

74. WASH. SUPER. CT. CIV. R. 26(g) states:

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

It is important to note that this provision is effective without regard to fault. Sanctions become mandatory upon the finding of a violation. Only then does the court determine whether to assess the sanction to client, counsel, or both. By operating this way, the standard avoids placing a burden upon the attorney to investigate his client.

75. *Fisons*, 122 Wash. 2d at 358, 858, P.2d at 1085.

est sanction ever imposed in Washington, and among the largest ever imposed in the United States.[76]

III. THE FUTURE OF *FISONS*

A. Attorneys' Reactions: The Survey

Because this decision represents new law with potentially profound but otherwise uncertain implications, the Author conducted an informal, nonscientific[77] study to assess attorneys' opinions regarding the decision and its impact on the local legal community.[78] The study is based on a survey distributed to one hundred Seattle attorneys. In conducting the survey, the author sought to obtain, to the extent possible, a cross-section of attorneys based on gender, size of firm, and experience, with a focus on those who practice in the personal injury area.

The overall response rate was fifty-five percent. The average experience level was eight to twelve years, and seventy-six percent of respondents were employed in firms with fewer than thirteen attorneys. Although only seventy percent of respondents practiced in the area of complex civil litigation, eighty-nine percent were familiar with the *Fisons* case. Of those, eighty-two percent had read the supreme court's opinion, and sixty-six percent had read additional materials relating to the case, i.e., briefs, affidavits, newspaper articles, etc. Similarly, the great majority (eighty percent) had discussed the case with others. Unquestionably, the decision has seized the attention of Seattle attorneys.

Most illuminating, however, was that seventy-four percent of responding attorneys viewed this as a "good" decision, while only fourteen percent thought it was "bad." Likewise, eighty-five percent of

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76. Steve Miletich, *Bogle and Gates Agrees to Pay Sanction for Misconduct in Suit*, SEATTLE POST-INTELLIGENCER, Jan. 29, 1994 at A1. In the settlement agreement, Fisons' counsel acknowledged that it advised its client to withhold the smoking gun documents. *Id.*

77. The Author acknowledges a lack of scientific validity.

78. *See* Appendix for a copy of the Opinion Survey. The responses are on file with the author.

One survey respondent correctly noted that the components for this decision have been present all along. However, as applied, the ruling represents a dramatic departure from previous decisions involving somewhat mechanistic applications of 26(g). Cf. Chapman & Cole v. Itel Container Int'l., 865 F.2d 676, 685-6 (5th Cir. 1989) (under FED. R. CIV. P. 26(g), the duty to make a reasonable inquiry, which is based on an objective standard, is similar to the one imposed by FED. R. CIV. P. 11); Apex Oil Co. v. The Belcher Co. of New York, 855 F.2d 1009, 1015 (2d Cir. 1988) (Rule 26(g) imposes a more stringent certification requirement than Rule 11 because a discovery request, response, or objection usually deals with more specific subject matter than motions or papers); Royal Petroleum Co. v. Arkla, Inc., 129 F.R.D. 674 (W.D. Ok. 1990) (award of sanctions under Rule 26(g) against attorney for filing unsigned interrogatory responses on eve of trial).

respondents felt that sanctions were appropriate in this case. The remaining twelve percent were either undecided or ambivalent.[79] Those who provided additional comments were hopeful, but skeptically so, that the decision would have a continuing impact on the promotion of honesty and disclosure in discovery.

Despite overwhelming approval of the decision, respondents were less optimistic about the standard enunciated by the court. When asked whether the standard provides sufficient guidance for compliance with CR 26(g), nearly two out of three attorneys answered "no" (sixty-two percent).

Not surprisingly, respondents thought the decision would affect the conduct of others much more than their own. Only thirty-five percent of respondents indicated that the decision has had an appreciable impact on their own handling of civil discovery, but eighty-eight percent expect the decision to have an impact on the conduct of others. One conclusion to draw from this is that most attorneys feel that discovery abuse is conduct engaged in by others, while zealous representation describes their own behavior. This view of discovery indicates the pervasiveness of adversarial thinking in the context of discovery, and was specifically addressed by the court: "Subjective belief or good faith alone no longer shields an attorney from sanctions under the rules."[80] Along with its practical consequences, this reasoning compels a shift in the conceptual boundaries of discovery.

B. Remaining Issues: The Importance of Sanctions

Prior to *Fisons*, the mandatory sanctions provision in CR 26(g) had never been invoked. With regard to discovery requests, responses, and objections, discovery was conducted essentially without any mechanism to enforce the underlying rules. Now, with the court calling for a change both in attitude and behavior, sanctions have become the backbone of the discovery rules.

The goal of the sanctions provisions has been described as "accountability," a term that recognizes an attorney's duty to court, client, and opponent.[81] By vesting the court with the power to impose penalties upon its own initiative, an attorney should not feel safe taking advantage of an unwary opponent. Likewise, by placing upon a court the conspicuous limitation that a sanction be "appropriate," CR 26(g)

79. The response was in the form of a Likert scale, ranging from one (bad) to five (good). For example: Bad 1 2 3 4 5 Good

80. *Fisons*, 122 Wash. 2d at 343, 858 P.2d at 1078.

81. Syntex Pharmaceuticals Int'l. v. K-Line Pharmaceuticals, Ltd., Nos. 85-2814, 85-2949, 1988 U.S. Dist. LEXIS 11420, at *6 (D. N. J. 1988).

reserves to a court the sanction of dismissal, where the court would dispose of an action without trial on the issues.[82] Faced with such a drastic measure, the attorney's accountability to the client is better ensured. Finally, the availability of sanctions upon motion encourages attorneys to monitor the conduct of their opponents. But does it?

The *Fisons* court stated, "To avoid the appeal of sanctions motions as a profession or profitable specialty of law, we encourage trial courts to consider requiring that monetary sanctions awards be paid to a particular court fund or to court-related funds."[83] This is a critical error in the court's reasoning. The future success of this decision depends upon attorney involvement. Essential to attorney involvement is compensation for costs of pursuing sanctions.

Despite the court's statement that litigants should be compensated where appropriate, the Author's survey indicates that local attorneys are not convinced that the compensation incentive is much more than puffery. According to the court, the purposes of sanctions orders are to deter, to punish, to compensate and to educate.[84] Most respondents considered compensation to be the only objective which sanctions would fail to meet. Without a strong compensation incentive[85] (indeed, with the presence of such a *dis*incentive), the decision's potential for changing attorneys' behavior regarding civil discovery practices is at risk. Attorneys must be assured they will recover their costs, or they will not request sanctions at all. If this is allowed to happen, the *Fisons* ruling will be rendered impotent.

In addition, the courts or the legislature must formulate a set of guidelines to aid in determining what is an "appropriate" sanction. Consistency in the meting out of sanctions will fortify the deterrence component, provide an extra measure of objectivity to CR 26(g)'s least-objective provision, and reduce satellite litigation by providing, to the extent possible, a finite range of sanctions options given the circumstances.

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82. *See* Pope v. Federal Express Corp., 138 F.R.D. 675, 682-83 (W.D. Mo. 1990). *See also* Snedigar v. Hodderson, 114 Wash. 2d 153, 169, 786 P.2d 781, 788 (1990).

83. *Fisons*, 122 Wash. 2d at 356, 858 P.2d at 1085. One respondent commented that this suggestion is "ludicrous insofar as it runs contra to the whole conceptual basis for sanctions—to compensate the opposing party for attorneys' fees incurred as the result of a party's frivolous and/or baseless objections to a reasonable discovery request."

84. *Id.*

85. Of course, these incentives will not permit attorneys to whimsically file sanctions motion after sanctions motion—such motions are governed by CR 11, which has a "reasonable inquiry" requirement and a discretionary sanctions provision of its own.

IV. CONCLUSION

There is no shortage of literature which debates the discovery rules. But rather than illuminate any cohesive discovery system, the body of literature indicates the incoherence of the present ideology.[86] The problem addressed by the court in *Fisons* was posed by one commentator: "It is not intuitively obvious how to recast the litigation obligations of the lawyer. We have lived so long with the emphasis on 'duty to client' that redirecting the responsibilities of lawyers to the system is easier said than done."[87] Yet that is precisely what the Washington Supreme Court has attempted to do.

Discovery is and will continue to be a crucial component of our adversarial system. By contrasting the established goals of discovery with the foundations on which the adversarial system rests, one can begin to sense the source of the problem, as well as its solution.

The key to understanding *Fisons* is to recognize that it operates on two distinct levels. On a practical level the decision calls for a "need for more aggressive judicial control" with regard to sanctions, and it acknowledges that the premise of CR26(g) is that "imposing sanctions on attorneys who fail to meet the rule's standards will significantly reduce abuse by imposing disadvantages therefor."[88]

However, the true importance of *Fisons* lies in the implications which exist on a conceptual level. In an effort to reconcile the conflict resulting from an attorney's concurrent duties to client and court, the supreme court called for a departure from traditional client-centered adversarial thinking in the civil discovery context. By renouncing the "lawyer-made" standard adopted by the trial court and special master, and refocusing instead on the idealism-with-bite embodied in the rules, the court redefined the boundaries of discovery as a component in the adversarial system. *Fisons* presents an unprecedented opportunity for the legal community to reshape its thinking—a change from adversariness in spite of the rules to adversariness within the rules.

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86. *See* Rhode, supra note 24, at 594.

87. Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 19 (1984).

88. *Fisons*, 122 Wash. 2d at 342, 858 P.2d at 1077 (quoting FED. R. CIV. P. 26 advisory committee's note to the 1983 amendment, 97 F.R.D. 166, 216-19 (1983)).

APPENDIX

Opinion Survey Regarding
Washington State Physicians Insurance Exchange & Association v. Fisons Corportation 122 Wash. 2d 299

1. How many years have you been a member of the Washington State Bar?
   1-3 ☐ 4-7 ☐ 8-12 ☐ 13-18 ☐ 19-25 ☐ 26+ ☐
2. Before becoming a member of the Washington State Bar, were you a member of the Bar in another state?
   yes ☐ no ☐ If yes, which state? How many years? _____
3. How many attorneys are in your firm?
   Sole practitioner ☐ 2-12 ☐ 12-25 ☐ 26-50 ☐ 51-100 ☐ 100+ ☐
4. In what area(s) of law do you practice? _____
   _____
5. Do you practice civil litigation? yes ☐ no ☐
6. Are you familiar with the *Fisons* case? yes ☐ no ☐ If you answer is no, you need not continue. Nevertheless, please return the questionnaire. The information you've provided is important.
7. Have you read the Supreme Court of Washington's opinion? yes ☐ no ☐
8. Have you read any additional materials relating to the case, i.e., briefs, affidavits, newspaper articles, etc.? yes ☐ no ☐
9. Have discussed the case with others? yes ☐ no ☐
10. Do you think this is a "good" decision or a "bad" one?
    Good 5 4 3 2 1 Bad
11. Do you think that the court's opinion provides sufficient guidance to ensure that attorneys will know or should know when their conduct is sanctionable under CR 26(g)? yes ☐ no ☐
12. Do you feel that the court's imposition of sanctions was appropriate with regard to the conduct of Fisons or its counsel? yes ☐ no ☐
13. As of today, what impact has this decision had on your conduct in civil discovery? significant 5 4 3 2 1 none not applicable ☐
14. Do you think the decision has had or will have an effect on the conduct of others in civil discovery matters? yes ☐ no ☐
15. Whose counsel will it affect more? plaintiff ☐ defense ☐ both will be affected the same ☐
16. As a practical matter, do you think that courts have the ability to impose sanctions in a consistent manner? yes ☐ no ☐

17. Assuming that sanctions are imposed by courts in a consistent manner, do you think sanctions will be effective or ineffective in achieving the following objectives?

	effective	ineffective
a) punish	☐	☐
b) deter	☐	☐
c) compensate	☐	☐
d) educate	☐	☐

18. In your opinion, did Fisons Corp. and/or its counsel breach any duty imposed by rules of ethics? yes ☐ no ☐
19. In your opinion, what was the most important duty owed by Fisons' counsel?
    - ☐ Zealous representation of client
    - ☐ Ethical duty as officer of the court to use but not abuse the judicial process
    - ☐ Other _____
20. In your opinion, did Fisons Corp. and/or its counsel breach any duty imposed by rules of civil procedure?
    yes ☐ no ☐
21. In your opinion, did Dr. Klicpera's counsel breach any duty imposed by rules of ethics?
    yes ☐ no ☐
22. In your opinion, did Dr. Klicpera's counsel breach any duty imposed by rules of civil procedure?
    yes ☐ no ☐

PLEASE PROVIDE ANY ADDITIONAL COMMENTS BELOW