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# *Fisons*: Will It Tame the Beast of Discovery Abuse?

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# *FISONS:* WILL IT TAME THE BEAST OF DISCOVERY ABUSE?

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Abstract: In *WSPIEA v. Fisons*, the Washington Supreme Court held that evasive and misleading discovery tactics violate Civil Rule 26(g). This Note examines the discovery tactics used in *Fisons* against the backdrop of the historic failure of courts to impose adequate sanctions for discovery abuse. It argues that courts must do more to deter discovery abuse by clearly articulating the requirements of the rules governing discovery, imposing severe sanctions for discovery abuse, and closely monitoring discovery in large, complex cases.

*Never give in, never give in, never, never, never, never . . . except to convictions of honor and good sense.*

*Sir Winston Churchill (1874–1965)*

The Washington Supreme Court sent waves of shock through the state's legal community on September 16, 1993, when it ordered sanctions against a major drug company and its attorneys for discovery abuse. In *Washington State Physicians Insurance Exchange & Association v. Fisons Corporation*,[1] the court unanimously held that evasive and misleading responses to discovery requests violate Civil Rule 26(g), which requires judges to impose sanctions when an attorney or client violates the letter or the spirit of the underlying discovery rules. The court remanded the case for the imposition of sanctions and the trial court approved a settlement in which the defendants agreed to pay a $325,000 fine.

The mere fact that the court took action in this case is causing litigators to reflect on discovery tactics, but the opinion itself breaks no new ground, relying on established precedent to interpret the rule. Instead, the significance of *Fisons* lies in the fact that the court is now *enforcing* the discovery rules. Although this is an important first step to curb discovery abuse, *Fisons* will have a lasting impact only if courts clearly enunciate the requirements of Rule 26(g) and impose severe sanctions for discovery abuse, instead of approving inadequate settlements.

This Note examines *Fisons* against the backdrop of the historic failure of courts to impose meaningful sanctions for discovery abuse. Part I

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

examines the discovery tactics used in *Fisons*. Part II explains Rule 26(g) as interpreted by Washington and federal courts. Part III contends that *Fisons* represents a larger phenomenon of discovery abuse that will abate only with aggressive judicial action to enforce the rules. Part IV argues that *Fisons* illustrates the need for reform and suggests that the Washington Supreme Court should clarify the legal standard for Rule 26(g) and explicitly direct trial courts to impose severe sanctions when warranted.

## I. THE CASE

### *A. The Facts*

In January 1986, two-year-old Jennifer Pollock suffered severe and permanent brain damage after being treated with the asthma drug Somophyllin Oral Liquid (Somophyllin), a brand name for the generic drug theophylline.[2] Jennifer's parents sued the doctor who gave her the drug and the drug manufacturer, the Fisons Corporation. The doctor cross-claimed against the drug company, alleging that Fisons had failed to warn him about the dangers of the drug. In January 1989, the doctor and his insurance company settled with the Pollocks for $1 million. The claims against the drug company continued into a fourth year of discovery.

Over a year after the doctor settled with the Pollocks, an anonymous source sent a "smoking gun" document to the Pollocks' attorney. The document, a 1981 letter from Fisons to physicians, warned of possible "life-threatening theophylline toxicity" when children took the drug while suffering a viral infection.[3] The letter proved that Fisons knew of the risks of theophylline at least four years before Jennifer Pollock was severely disabled by the drug,[4] thus contradicting Fisons's primary defense in the litigation.

Shortly after the letter surfaced, the Pollocks and the doctor moved for sanctions for discovery abuse, claiming that Fisons and its attorneys at the Seattle law firm of Bogle & Gates should have produced the theophylline letter in response to discovery requests. A special discovery master denied sanctions, but ordered Fisons to deliver all documents requested relating to theophylline. The next day, a second "smoking

2. *Id.* at 307, 858 P.2d at 1058.

3. *Id.* at 307–08, 858 P.2d at 1058.

4. *Id.* at 337, 858 P.2d at 1074.

gun" document was found among the 10,000 documents delivered. This document, a 1985 internal Fisons memorandum, reported a dramatic increase in seizures, permanent brain damage, and death caused by theophylline.[5] The memo indicated that physicians might not be aware of these risks and concluded that the "epidemic" of theophylline toxicity justified an end to promotional activities. Yet the company continued to market the drug to unwitting physicians until 1990.

Shortly after the 1985 memorandum was found, Fisons settled with the Pollocks for $6.9 million. The doctor's claims against Fisons, however, went to trial. The court awarded the doctor $3.2 million plus attorneys' fees based on product liability and Consumer Protection Act claims,[6] but denied a renewed motion for sanctions for discovery abuse.[7]

Fisons appealed the judgment to the Washington Supreme Court. The doctor and his insurance company cross-appealed the trial court's refusal to impose sanctions. The supreme court affirmed the judgment but reduced the doctor's damages.[8] The court also held that Fisons had violated Rule 26(g)[9] and remanded the case for a determination of appropriate sanctions. The trial court approved a settlement agreement imposing a sanction of $325,000 on Fisons and its attorneys, to be paid to the doctor's insurance company.[10]

In support of sanctions, the doctor and the Pollocks had argued that they had repeatedly requested the smoking gun documents through interrogatories and requests for production during the four years preceding the dramatic revelation of their existence. Fisons and its attorneys responded that these documents did not fall within the scope of discovery, which they claim was limited to the Somophyllin files. Both

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5. *Id.* at 309, 858 P.2d at 1059.

6. *Id.* at 309–10, 858 P.2d at 1059.

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

8. The court held that the doctor was not entitled to recover for his pain and suffering under the Consumer Protection Act, thus reducing his damages to $1.1 million. *Id.* at 318, 858 P.2d at 1064.

9. *Id.* at 352, 858 P.2d at 1083. Rule 26(g) requires discovery requests to be signed by the attorney or pro se litigant as 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 the litigation . . . .

Both attorneys and clients can be punished for violating the rule. Sanctions are mandatory, although the exact penalty is determined by the trial judge. A party need not request sanctions for a judge to impose them.

10. Order Imposing Sanctions, *Fisons*, (No. 86-2-06254-6).

the letter and the memo[11] were located in the files of a different Fisons product.[12] The doctor disputed that he had limited the scope of discovery to the Somophyllin files.[13] The doctor had specifically requested letters sent by the company to physicians "concerning theophylline toxicity in children."[14] Fisons had responded that "[s]uch letters, if any, regarding Somophyllin . . ." would be produced. Yet Fisons never produced the 1981 theophylline letter, purportedly because it did not "regard" Somophyllin.[15] The court concluded that Fisons should have produced the 1981 theophylline letter in response to this discovery request.[16]

The court stated that no conceivable discovery request would have uncovered the documents, given Fisons's responses.[17] When the doctor and the Pollocks sought documents concerning Somophyllin, Fisons responded that all relevant documents would be provided but failed to produce the smoking guns.[18] When the plaintiffs asked for theophylline, Fisons claimed that the scope was limited to Somophyllin and, thus, did not encompass materials related to the generic name of the drug.[19] When they asked for the Intal files, where the letter was located, Fisons responded that the request was not reasonably calculated to lead to the discovery of admissible evidence.[20]

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11. Six other documents were also found, one of which indicated that Fisons knew of the risks of theophylline for seven years before Jennifer Pollock's injury. Respondent/Cross-Appellant's Brief at 32–35, *Fisons*, (No. 86-2-06254-6).

12. The documents were located in the files of Intal, another Fisons asthma drug. Fisons sent the 1981 letter warning of theophylline toxicity to doctors to promote Intal, which competed with Somophyllin. 122 Wash. 2d at 347, 858 P.2d at 1080.

13. The court found that the doctor and the Pollocks never limited the scope of discovery because they had sent discovery requests referring to both Somophyllin and theophylline. Yet Fisons limited the scope of its *responses* to Somophyllin. The court found that the plaintiffs could not have known that Fisons was limiting the scope to the Somophyllin files. *Id.* at 353, 858 P.2d at 1083.

14. *Id.* at 348, 858 P.2d at 1081.

15. The court found this response to be improper, stating, "[A] document that warned of the serious dangers of the primary ingredient of Somophyllin Oral Liquid is a document *regarding* Somophyllin Oral Liquid." *Id.* at 353, 858 P.2d at 1083 (emphasis in original).

16. *Id.* at 350, 858 P.2d at 1081. The court found that Fisons had promoted theophylline and Somophyllin as one and the same, noting that Fisons referred to theophylline and Somophyllin interchangeably in its literature. *Id.* at 348, 858 P.2d at 1080.

17. *Id.* at 352. 858 P.2d at 1083.

18. *Id.* at 348–49, 858 P.2d at 1081.

19. *Id.* at 352, 858 P.2d at 1083. Fisons responded to one theophylline request by stating, "Fisons has no documents regarding theophylline and otherwise responsive to this discovery request." *Id.* at 350, 858 P.2d at 1081.

20. 122 Wash. 2d at 350, 858 P.2d at 1082.

The plaintiffs also requested the names of all persons who had expressed opinions about the risks of theophylline and all Fisons employees who had evaluated the safety of the drug.[21] In its responses, the drug company omitted the name of Cedric Grigg, Fisons's Medical Communications Director,[22] who had approved the two smoking gun documents. As a result, the plaintiffs were unable to depose Grigg and learn of the existence of the smoking guns.[23]

Fisons never specifically objected to the production of theophylline documents located outside of the Somophyllin files,[24] leading plaintiffs' counsel to believe that no such documents existed. Instead, Fisons generally objected and then stated that it would produce the documents.[25] Moreover, Fisons and its attorneys claimed on several occasions that no relevant information was being withheld. In a 1989 letter to the Pollocks' attorney, one of Fisons's attorneys stated that Fisons's files contained no documents relevant to the plaintiffs' claims.[26] In a 1989 brief, Fisons wrote that it had already produced every document related to the plaintiffs' theory of the case.[27]

The doctor relied upon the claims that all relevant documents had been or would be produced[28] and, therefore, did not move to compel production of the theophylline documents. The court held that the discovery responses failed to "comply with either the spirit or letter of the discovery rules" and thus violated Rule 26(g). The court then remanded the case to the trial court to impose sanctions against Fisons, Bogle & Gates, or both.[29] Because the parties settled, the trial judge did not determine what type of sanction was appropriate, but merely approved the settlement. As part of the settlement, Bogle & Gates

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21. Respondent/Cross-Appellant's Brief at 13, *Fisons*, (No. 86-2-06254-6).

22. 122 Wash. 2d at 347, 858 P.2d at 1080.

23. Respondent/Cross-Appellant's Brief at 14, *Fisons*, (No. 86-2-06254-6). Fisons claimed it was not required to list Grigg because he was not responsible for evaluating the safety of the drug. However, this does not explain why Grigg was not listed as someone who had "expressed opinions about the risks of theophylline." In one letter, Grigg claimed that theophylline had killed or maimed "perhaps hundreds" of asthmatics. *Id.* at 35.

24. 122 Wash. 2d at 352, 858 P.2d at 1083.

25. *Id.* Fisons repeatedly issued a general objection, followed by the statement, "Without waiver of these objections and subject to these limitations, Fisons will produce documents responsive to this request at plaintiff's request at a mutually agreeable time at Fisons's headquarters." *Id.* at 349–50, 858 P.2d at 1081.

26. Respondent/Cross-Appellant's Brief at 20, *Fisons* (No. 86-2-06254-6).

27. *Id.* at 22.

28. 122 Wash. 2d at 353, 858 P.2d at 1083.

29. *Id.* at 356, 858 P.2d at 1085.

admitted that its attorneys had advised Fisons that the rules did not require the drug company to produce the documents.[30]

### *B. The Reasoning*

#### *1. The Legal Standard of Rule 26(g) Articulated in Fisons*

The court held that the trial court erred when it interpreted Rule 26(g) to require proof of intent before sanctions can be imposed.[31] Rather, Rule 26(g) imposes an objective standard, meaning that subjective belief or good faith does not shield an attorney from the rules.[32] The court also held that the trial court erred when it concluded that a motion to compel discovery was a prerequisite to a sanctions motion.[33]

The court carefully examined the language of Rule 26(g) to interpret its elements. The court stated that an attorney's signature certifies that the discovery responses were made after a reasonable inquiry *and* are 1) consistent with the rules; 2) not interposed for any improper purpose; and 3) not unreasonable or unduly burdensome or expensive.[34] In order to be "consistent with the rules," responses to discovery requests[35] must not be misleading.[36] The court stated that fair and reasoned resistance to discovery is not sanctionable. In contrast, misleading responses are sanctionable because they undermine the purposes of discovery and impair the fairness of the litigation process.[37]

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30. All Parties' Joint Recommendation of Award of Sanctions at 2, *Fisons* (No. 86-2-06254-6). The law firm and the drug company agreed to be jointly liable for the payment of the sanction. Order Imposing Sanctions at 2, *Fisons* (No. 86-2-06254-6).

31. 122 Wash. 2d at 345, 858 P.2d at 1079.

32. *Id.* at 343, 858 P.2d at 1078.

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

34. *Id.* at 344, 858 P.2d at 1078.

35. Invoking Rule 33(a), the court stated: "A response to an interrogatory must be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated." Citing Rule 34(b), the court stated: "A response to a request for production shall state . . . that inspection and related activities will be permitted as requested, unless the request is objected to . . . ." *Id.* at 343–44, 858 P.2d at 1078.

36. *Id.* at 346, 858 P.2d at 1079–80 (citing Jerome v. Pardis, 783 P.2d 919 (Mont. 1989) (holding responses to discovery that attempt to mislead the requesting party by concealing information material to the other party's case are not consistent with the rules and the "spirit of discovery")).

37. *Id.* at 346, 858 P.2d at 1080.

### 2. *Application of the Law to the Facts of* Fisons

The court concluded that Fisons's discovery responses were misleading and inconsistent with the spirit and purpose of the discovery rules.[38] Fisons never claimed that it had overlooked the smoking gun documents among its records when crafting its responses to the discovery requests.[39] Instead, Fisons had argued that its conduct was justified for five reasons. First, as discussed above, it claimed that the plaintiffs had limited the scope of discovery to the Somophyllin files and, therefore, the drug company was not obligated to produce anything not located in those files. Second, it maintained that the theophylline documents were never intended to relate to Somophyllin because they were developed to promote another drug, Intal. Third, Fisons contended that it had produced everything that it had agreed to produce or was ordered to produce. Fourth, it argued that the plaintiffs had failed to ask for the documents and had neglected to compel discovery. Finally, it asserted that good lawyering requires that discovery be an adversarial process.[40] The court rejected each of these arguments.[41]

To support its contention that it did not break the rules, Fisons submitted affidavits of twelve legal practitioners and academics claiming that its conduct was consistent with the practice of the local bar.[42] The court rejected the consideration of this evidence, stating that "conduct is

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38. The court stated, "[T]he 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." *Id.* at 341, 858 P.2d at 1077 (citing the Advisory Committee Note to the Amendments to the Rules, 97 F.R.D. 166, 216–19 (1983).

39. *Id.* at 352, 858 P.2d at 1083.

40. In an affidavit submitted to the court on remand, Bogle & Gates attorney Guy P. Michelson stated that he was not attempting to avoid production of the theophylline documents. According to the affidavit, Mr. Michelson learned of the documents in 1987—after he had responded to the doctor's request for letters to physicians concerning theophylline toxicity. Mr. Michelson argued that he did not believe at that time that the theophylline letters *regarded* Somophyllin and, thus, did not supplement his previous responses with the newly acquired evidence. Alternatively, Mr. Michelson argued that the responses informed the plaintiffs that Fisons was limiting the scope of discovery to the Somophyllin files and that it was the plaintiffs' duty to object to this limitation or to move to compel production of the documents. Michelson Aff. ¶¶ 4–10, *Fisons,* (No. 86-2-06254-6).

41. 122 Wash. 2d at 352–54, 858 P.2d at 1083–84.

42. One expert argued that "[t]endentious, narrow and literal positions with regard to discovery are, in my opinion both typical and expected in the civil discovery process. A lawyer has no obligation to volunteer information that is not within the scope of discovery." Boerner Decl. ¶ 12, *Fisons,* (No. 86-2-06254-6). Mr. Boerner is a Professor of Law at the University of Puget Sound specializing in Professional Responsibility. *Id.* at ¶ 1.

to be measured against the spirit and the purpose of the rules, not against the standard practice of the local bar."[43]

The discovery conduct of Fisons's attorneys also may have violated the Washington Rules of Professional Conduct (RPC),[44] although the majority opinion did not address this issue[45] and no complaints were filed with the Washington State Bar Association. First, the attorneys may have violated RPC Rule 3.4(d), which requires a party responding to discovery to "make [a] reasonably diligent effort to comply" with discovery requests.[46] Second, the attorneys may have violated RPC Rule 4.1(a), which prohibits attorneys from knowingly[47] making "a false statement of material fact or law to a third person."[48]

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43. 122 Wash. 2d at 345, 858 P.2d at 1079.

44. Washington Rules of Professional Conduct (1994) [hereinafter RPC].

45. The disciplinary procedures do not give courts the power to find a violation of the RPC, but judges can refer cases to the bar association for investigation. A formal referral by the supreme court, however, could prejudge an attorney's conduct and impair that attorney's right to appeal disciplinary measures imposed by the bar association because it is the supreme court itself that hears appeals of such measures. Yet it is useful for the supreme court to discuss the application of the RPC in its opinions to help explain the rules.

In fact, the dissent in *Fisons* suggested that Bogle & Gates had violated RPC Rule 3.3, which requires candor toward the tribunal, in a matter unrelated to the discovery abuse. Justice Brachtenbach, joined by Justices Utter and Johnson, found that the attorneys had misstated the holdings of cases they cited in their appellate brief. *Id.* at 368, 858 P.2d at 1091. Justice Brachtenbach also found that the attorneys had misrepresented a ruling of the trial court at another point in the brief and noted the "egregious lack of candor" of doing so. *Id.* at 370, 858 P.2d at 1092.

46. RPC Rule 3.4(d). Aronson Decl. ¶¶ 6–11, *Fisons,* (No. 86-2-06254-6). Robert Aronson is a Professor of Law at the University of Washington specializing in Professional Responsibility. *Id.* at ¶ 3.

47. Fisons's attorneys have now acknowledged that they knew the documents existed. Michelson Aff. ¶ 4, *Fisons,* (No. 86-2-06254-6). Yet the attorneys argued that the discovery responses were not "knowingly false" because they claimed to believe that Fisons was not obligated to produce the documents. *Id.* at ¶ 10; McKinstry Aff. ¶ 5, *Fisons,* (No. 86-2-06254-6). Mr. McKinstry was the head of the Litigation Department at Bogle & Gates from 1970–1991. *Id.* at ¶ 3.

48. RPC Rule 4.1(a). Aronson Decl. at ¶ 13. Fisons and its attorneys submitted signed discovery documents containing statements to both the opposing counsel and the court that the supreme court later found to be misleading. The attorneys also stated in a letter and a brief that all relevant documents contained in Fisons's files had been produced. *See supra,* notes 26–27 and accompanying text. *See also* Pearson Decl. 12, *Fisons,* (No. 86-2-06254-6) (stating that, if Fisons's attorneys knew that the drug company was concealing relevant evidence or giving false answers to discovery requests, they violated RPC Rule 4.1(a). Vernon Pearson is a retired justice of the Washington Supreme Court. *Id.* at 7. *But see* Boerner Decl. ¶ 11, *Fisons,* (No. 86-2-06254-6) (arguing that the attorneys could not have violated RPC Rule 4.1 because an objection is a legal argument and, thus, cannot be either true or false).

### 3. *The Purpose of Sanctions Under Rule 26(g)*

The court listed the various purposes of sanctions and gave the trial court general guidelines for determining a sanction on remand. The court explained that sanctions should be sufficient to "deter, to punish, to compensate, and to educate,"[49] adding that the purpose of Rule 26(g) is to deter discovery abuse by providing "an impetus for candor and reason" during discovery.[50] The court stated that the sanction should ensure that the wrongdoer does not profit from the wrong.[51] The court acknowledged that imposing sanctions is neither easy nor pleasant for a trial judge, but emphasized that sanctions must be imposed when warranted because misconduct breeds more misconduct when it is tolerated.[52] The court suggested that monetary sanctions be paid to a court fund.[53]

## II. JUDICIAL INTERPRETATION OF DISCOVERY RULES

### A. *The Origin of the Rules*

Although courts have inherent authority to impose sanctions,[54] Rules 26(g) and 37 specifically direct judges to impose them for discovery abuse. Whereas Rule 37 applies to several specific types of discovery abuse, Rule 26(g) applies to any type of abuse committed through a discovery request, response, or objection.[55]

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49. 122 Wash. 2d at 356, 858 P.2d at 1085.

50. *Id.* at 343, 858 P.2d at 1077.

51. *Id.* at 356, 858 P.2d at 1085.

52. *Id.* at 355, 858 P.2d at 1084.

53. *Id.* at 356, 858 P.2d at 1085.

54. This authority arises from the court's inherent power to ensure that cases are resolved in an expeditious and orderly manner. Link v. Wabash R. Co., 370 U.S. 626, 630–31 (1962).

55. Rule 37 allows, but does not require, judges to impose sanctions on a party who has violated a discovery order, failed to admit a true fact, or failed to object or respond to an interrogatory or request for production. R.F. Barron Corp. v. Nuclear Fields PTY, Ltd., No. 91-C7610, 1993 U.S. Dist. Lexis 8404 at *18 (N.D. Ill. June 21, 1993) (interpreting federal rule 37, which mirrors the Washington rule).

In contrast, Rule 26(g) is broader in its application and stricter in its enforcement. It requires parties and attorneys to sign each discovery request, response, or objection certifying that, to the best of their knowledge formed after a reasonable inquiry, it comports with the letter and the spirit of the rules. Estate of Eckel v. Narciso, 154 B.R. 527, 529 (Bankr. E.D. Ark. 1992). It also requires a judge to impose sanctions against a party violating the rule.

Rule 37 was not applicable in *Fisons* for two reasons. First, the defendant did not have the opportunity to violate a discovery order because the plaintiff, believing that no theophylline

The federal courts adopted Rule 26(g) in 1983[56] to help enforce the liberal discovery rules.[57] In 1947, the U.S. Supreme Court discussed the high hopes of those who developed the liberal discovery system in *Hickman v. Taylor,* stating that "[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation."[58] More than 30 years after *Hickman,* however, the ideals of liberal discovery were still inhibited by practitioner misuse of discovery tactics. In 1979, the Supreme Court declared that discovery was "not infrequently" being exploited to the disadvantage of justice.[59] In that same year, the Court signaled its desire to deter discovery abuse in *National Hockey League v. Metropolitan Hockey Club.*[60] In *National Hockey League,* the Court upheld the dismissal of a claim as a sanction for discovery abuse, reasoning that severe sanctions were appropriate, not merely to penalize wrongdoers, but also to deter those tempted to engage in discovery abuse.

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documents existed, did not seek one. Second, the defendant did not fail to respond, but submitted misleading answers.

Although Fisons's conduct would thus not have been sanctionable under Rule 37 at the time it occurred, it would be sanctionable on that basis under the recently amended Washington rules. Rule 37 now treats an evasive and misleading response as a failure to respond. Civil Rule 37(d) as amended, effective September 1, 1993.

56. Washington adopted the rule in 1985.

57. Congress amended the discovery rules in November 1993 to require voluntary disclosure of certain information within 30 days after service of defendant's answer. Under the revised rule, plaintiff and defendant are required to identify all persons having information that bears significantly on the claims or defenses, copy or describe all documents that bear significantly on the claims or defenses, estimate damages, and disclose any insurance agreement that may satisfy the judgment. The United States District Court for the Western District of Washington, however, has yet to adopt this rule.

Although the rule change would expedite the exchange of certain types of information, it would be unlikely to affect the type of discovery abuse that occurred in *Fisons,* because attorneys would still balk at disclosing smoking gun documents. For example, if the new rule had been in effect during the discovery phase of *Fisons,* the drug company still could have failed to disclose the theophylline-related documents by claiming they did not "bear significantly" on the Somophyllin claim because they did not *relate* to Somophyllin. Although such an argument would fail in the wake of *Fisons,* it would fail irrespective of the rule change. And unless the wrongdoer is caught and punished under the new rule, such abuse will continue. Therefore, unless accompanied by better judicial enforcement, no change in the rules would be likely to affect cases like *Fisons.*

*See* Thomas M. Mengler, *Eliminating Abusive Discovery Through Disclosure: Is It Time Again For Reform?,* 138 F.R.D. 155 (1992).

58. 329 U.S. 495, 507 (1947).

59. Herbert v. Lando, 441 U.S. 153, 179 (1979) (Powell, J., concurring).

60. 427 U.S. 639 (1979) (per curiam).

Heeding the Court's admonitions in *National Hockey League*, the Advisory Committee on Civil Rules[61] drafted Rule 26(g) four years later. Rule 26(g) seeks to thwart discovery abuse by requiring an attorney to conduct pretrial discovery in a responsible manner.[62] The rule mandates that judges impose sanctions when a party fails to comply with the spirit or purpose of Rules 26 through 37.[63] To make it easier for judges to find discovery violations, the rule contains an objective reasonable inquiry requirement, similar to Civil Rule 11.[64] The rule does not require the attorney to certify that the client's factual responses to discovery requests are actually true, but rather that the attorney has made a reasonable effort to assure that the client has provided all information responsive to the request.[65]

The Advisory Committee emphasized that sanctions are more effective when they are consistently imposed as both a penalty for discovery abuse and a deterrent for potential abusers.[66] Sanctions can be a reprimand, costs and attorneys' fees associated with the abuse, injunctive relief, disbarment from practicing before the forum court, dismissal or preclusion of a claim or defense, default judgment, a bar on the introduction of evidence, or anything else the court finds appropriate.[67] However, the most common type of sanctions are the payment of costs and attorneys' fees associated with the abuse.[68]

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61. Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (Advisory Committee).

62. Bergeson v. Dilworth, 132 F.R.D. 277, 292 (D. Kan. 1990) (citing the Advisory Committee Note to the Amendments to the Rules 97 F.R.D. 165, 216–20 (1983)).

63. Chambers v. NASCO, Inc., 501 U.S. 32 (1991) (citing the Advisory Committee Note, *supra* note 62).

64. The rule's previous subjective standard allowed offending attorneys to claim the "safe harbor" of subjective good faith to insulate them from sanctions. *Bergeson*, 132 F.R.D. at 292. Given that bad faith was difficult to establish, the subjective approach made judges reluctant to impose sanctions. *Chambers*, 501 U.S. 32 (1991).

65. Fretz v. Keltner, 109 F.R.D. 303, 310 (D. Kan. 1985) (citing the Advisory Committee Note, *supra* note 62).

66. Advisory Committee Note, *supra* note 62, at 220.

67. Gregory P. Joseph, *Sanctions: The Federal Law of Litigation Abuse* 494 (1989).

68. *Id.* at 495.

### B. *Discovery Abuse in Federal Court: The Interpretation of "Reasonable Inquiry" and the Imposition of Sanctions*

#### 1. *The Interpretation of "Reasonable Inquiry"*

Because Rule 26(g) requires an attorney to base discovery responses on a reasonable inquiry into the factual and legal basis of the discovery response,[69] the definition of "reasonable inquiry" is critical to the interpretation of the rule.[70] What is reasonable is a matter for the court to decide, based on the totality of the circumstances.[71] A party is required to use reasonable efforts to gather responsive information.[72] At a minimum, the attorney or the client must establish a reasonable procedure for the collection of responsive information.[73] Counsel can rely on statements from the client as long as that reliance is appropriate.[74] Obviously, if counsel responds to the discovery request without even asking the client to look for responsive material, counsel has failed to conduct a reasonable inquiry.[75] Yet a reasonable inquiry into the facts ordinarily requires more than exclusive reliance on the client.[76] If an attorney uncovers facts during the investigation that conflict with those provided by the client, the attorney must either convince the client of the true facts or withdraw.[77]

A responding party must not only conduct a reasonable inquiry, but it must also use the information obtained to give a complete response.[78] When counsel knows, or with a reasonable inquiry should have known, a fact necessary to a complete response and fails to disclose that fact, Rule

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69. National Ass'n of Radiation Survivors v. Turnage, 115 F.R.D. 543, 555 (N.D. Cal. 1987) (citing the Advisory Committee Note, *supra* note 62).

70. The reasonable inquiry requirement parallels that of Rule 11. Apex Oil Co. v. Belcher Co. of New York, 855 F.2d 1009, 1015 (2d Cir. 1988) (citing the Advisory Committee Note, *supra* note 62).

71. United States v. Kramer, No. 89-4340(G), 1992 U.S. Dist. LEXIS 7651 at *11 (D.N.J. March 31, 1992) (citing the Advisory Committee Note, *supra* note 62).

72. *Id.*

73. National Ass'n of Radiation Survivors v. Turnage, 115 F.R.D. at 556.

74. *Kramer,* 1992 U.S. Dist. LEXIS 7651 at *11.

75. Perkinson v. Houlihan's/D.C., Inc., 110 F.R.D. 55, 58 (D.D.C. 1986) *aff'd,* Perkinson v. Gilbert/Robinson, Inc., 821 F.2d 686 (D.C. Cir. 1987). *See also* Bergeson v. Dilworth, 132 F.R.D. 277, 292 (D. Kan. 1990) (imposing sanctions on counsel who admitted having "flat missed" information relevant to the accuracy of his discovery response).

76. *Bergeson,* 132 F.R.D. at 288.

77. *Id.*

78. *Kramer,* 1992 U.S. Dist. LEXIS 7651 at *16. *See also Bergeson,* 132 F.R.D. at 289.

26(g) is violated.[79] Because discovery documents deal with more specific subject matter than motions or papers, Rule 26(g) imposes a more stringent certification requirement than Rule 11.[80]

### 2. *The Imposition of Sanctions for Discovery Abuse*

The nature of the sanction imposed is a matter of judicial discretion to be exercised in light of the particular circumstances.[81] Although judges normally limit sanctions to costs and attorneys' fees associated with the abuse,[82] courts do occasionally impose more severe monetary sanctions[83] or non-monetary sanctions, such as default judgments, when the discovery abuse is particularly egregious.[84]

In a case of egregious discovery abuse similar to that committed in *Fisons*, a district court imposed varied penalties. In *National Association of Radiation Survivors v. Turnage*, the defendant had destroyed critical evidence and had failed to comply with multiple discovery requests.[85] The court stated that the defendant had violated the reasonable inquiry requirement of Rule 26(g) and had engaged in willful or reckless obstruction of discovery. The court required the defendant to pay the plaintiff class $105,000 in attorneys' fees, $15,000 to the clerk of the court for unnecessary use of the court's time, and the expenses of a special master to monitor discovery for the rest of the case.[86]

In another case similar to *Fisons*, the Eleventh Circuit upheld a sanction that included a default judgment, fines against the clients and attorneys, and costs and attorneys' fees associated with the abuse. In that case, *Malautea v. Suzuki*,[87] the defendant "stubbornly withheld

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79. *Perkinson*, 110 F.R.D. at 58.

80. Apex Oil Co. v. Belcher Co. of New York, 855 F.2d 1009, 1015 (2d Cir. 1988).

81. National Ass'n of Radiation Survivors v. Turnage, 115 F.R.D. 543, 562 (N.D. Cal. 1987) (citing the Advisory Committee Note, *supra* note 62).

82. See *supra* note 68 and accompanying text.

83. Chambers v. NASCO, Inc., 501 U.S. 32 (1991) (holding that $1 million sanction against a plaintiff who abused discovery in bad faith was not an abuse of discretion).

84. Monroe v. Ridley, 135 F.R.D. 1, 2–3 (D.D.C. 1990) (imposing default judgment on defendant who failed to cooperate in discovery and, later, falsely assured the court that all relevant documents had been turned over); *cf.* Perkinson v. Houlihan's/D.C., Inc., 110 F.R.D. 55 (1986), *aff'd*, Perkinson v. Gilbert/Robinson, Inc., 821 F.2d 686 (D.C. Cir. 1987) (finding that a new trial would be more appropriate than a default judgment).

85. 115 F.R.D. 543 (N.D. Cal. 1987). Like the plaintiffs in *Fisons*, the plaintiffs learned of the withholding of evidence through an anonymous letter. *Id.* at 546.

86. *Id.* at 559.

87. 987 F.2d 1536 (11th Cir. 1993), *cert. denied*, 1993 U.S. LEXIS 5655 (1993).

discoverable information" by improperly objecting, providing partial responses to interrogatories,[88] and deliberately concealing damaging evidence.[89] The court found that these discovery tactics were a violation of Rule 26(g) because they were used for an improper purpose.[90] The court stated that an attorney's duty to a client can never outweigh his or her duties as an officer of the court.[91]

### C. *The Interpretation of "Reasonable Inquiry" and the Imposition of Sanctions by Washington Courts*

#### 1. *The Interpretation of "Reasonable Inquiry"*

The Washington Supreme Court had never examined Rule 26(g) prior to *Fisons*. However, the sole Washington Court of Appeals case interpreting the rule[92] held that the plaintiff had violated the reasonable inquiry requirement by submitting discovery responses that were unreasonable under the circumstances.[93]

Washington cases interpreting the reasonable inquiry requirement of Rule 11 employ a similar standard. In *John Doe v. Spokane & Inland Empire Blood Bank*, the court of appeals said the reasonable inquiry requirement was to be judged on whether a reasonable attorney in similar circumstances could believe his or her actions were factually and legally

88. *Id.* at 1540. In addition to violating discovery orders, defendants improperly refused to answer interrogatories on the grounds that certain words and phrases were ambiguous, leading the judge to conclude that the defendants' objections were part of an overall plan to obstruct the plaintiff's discovery attempts. The defendants also responded to general questions by limiting their answers to a narrow field.

89. *Id.*

90. The court also found that, in failing to comply with a discovery order, the defendant had violated Rule 37(b), which specifies that dismissal or default judgment is an appropriate sanction. Even if the defendant had not violated a discovery order, a default judgment would have been appropriate under Rule 26(g), especially since the court held that the defendant and its attorneys engaged in an "unrelenting campaign to obfuscate the truth." *Id.* at 1544.

91. *Id.* at 1546. The court acknowledged that the ABA Model Rules of Professional Conduct underscore the duty to advocate zealously and neglect the corresponding duty to advocate within the bounds of the law, thus encouraging attorneys to override their "ancient" duties as officers of the court. *Id.* at 1546–47.

92. Clipse v. State, 61 Wash. App. 94, 808 P.2d 777 (1991) (holding that sanctions were proper under Rule 26(g) when the plaintiff made misleading disclosures of expert witnesses during discovery).

93. *Id.* The court rejected the plaintiff's argument that, since Rule 26(g) does not actually require discovery responses to be well-grounded in fact, his inaccurate discovery responses were not sanctionable under the rule. *Id.* at 102 n.4, 808 P.2d at 780 n.4.

justified.[94] In *Miller v. Badgley*, the court of appeals held that an attorney's "blind reliance" on a client's representations would rarely constitute a reasonable inquiry.[95]

### 2. *The Imposition of Sanctions for Discovery Abuse*

Although Washington courts have rarely imposed severe sanctions for discovery abuse, such sanctions are not unprecedented. In *Snedigar v. Hoddersen,* the Washington Supreme Court stated in dicta that the imposition of a default judgment is appropriate where a party willfully refuses to comply with a discovery order and substantially prejudices an opponent's ability to prepare for trial.[96] The court defined a willful violation as one committed without a reasonable excuse.[97]

Moreover, appellate courts have overruled some trial courts for imposing insufficient sanctions. In *Gammon v. Clark Equipment Co.*,[98] the court of appeals remanded a case for a new trial when the sanction for discovery abuse was de minimis. In *Gammon*, a product liability action, the defendant violated a court order to produce all relevant accident reports and produced them at trial only after a twist of fate similar to that in *Fisons*.[99] The trial court imposed a sanction of $2,500. The court of appeals stated that this award was de minimis in the context of a $4.5 million case.[100] Such a small sanction would encourage litigants to delay and commit evasive tactics.[101]

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94. 55 Wash. App. 106, 111, 780 P.2d 853, 857 (1989).

95. 51 Wash. App. 285, 302, 753 P.2d 530, 539, *review denied,* 111 Wash. 2d 1007 (1988).

96. 114 Wash. 2d 153, 169, 786 P.2d 781, 788 (1990).

97. *Id.*

98. 38 Wash. App. 274, 686 P.2d 1102 (1984), *aff'd, remanded, en banc,* 104 Wash. 2d 613, 707 P.2d 685 (1985) (stating that a defendant should not determine unilaterally what is relevant to a plaintiff's claim).

99. *Id.* at 278, 686 P.2d at 1105. A person seeking to sue the same defendant for a similar injury came to plaintiff's counsel's office on the eve of trial. This gave counsel cause to believe that all of the accident reports ordered by the court had not been produced. *Id.*

100. *Id.* at 282, 686 P.2d at 1107.

101. *Id.*, 686 P.2d at 1107.

## III. *FISONS* IS A PRODUCT OF A SYSTEM THAT ALLOWS LAWYERS TO ABUSE DISCOVERY WITH VIRTUAL IMPUNITY

### *A.* Fisons *Illustrates the Need for Aggressive Judicial Action To Curb Discovery Abuse*

The legal community need look no further than *Fisons* to see the need for aggressive judicial action to curb discovery abuse. In *Fisons*, the discovery system failed. The disclosure of critical evidence hinged on the benevolence of an anonymous party, instead of on the checks and balances of the discovery system.[102]

*Fisons* represents a systemic problem. Discovery abuse is common in large cases[103] with millions of dollars resting on the outcome.[104] The most pervasive type of discovery abuse is the use of incomplete or evasive responses to discovery requests,[105] which occurred in *Fisons*. For every case in which a smoking gun appears by chance, there is surely a case in which evasive tactics pay off.[106] Misleading and evasive tactics not only prevent justice for individual litigants, but also compromise the system's ability to adjudicate disputes fairly.[107] Moreover, concealing evidence in product liability cases like *Fisons* perpetrates an injustice against the public by delaying disclosure of a product's dangers.[108]

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102. *See* Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 Vand. L. Rev. 1295, 1359 (1978) (arguing that adversarial discovery leaves the achievement of justice to chance).

103. Earl C. Dudley, Jr., *Discovery Abuse Revisited: Some Specific Proposals to Amend the Federal Rules of Civil Procedure*, 6 U.S.F. L. Rev. 189, 191–92 (1992).

104. Charles B. Renfrew, *Discovery Sanctions: A Judicial Perspective*, 2 Rev. Litig. 71, 87 (1981).

105. Wayne D. Brazil, *Improving Judicial Controls over the Pretrial Development of Civil Actions: Model Rules for Case Management and Sanctions*, 1981 Am. B. Found. Res. J. 873, 880 (1981); *see also* C. Ronald Ellington, *A Study of Sanctions for Discovery Abuse*, Federal Justice Research Program, Office for Improvements in the Administration of Justice 9 (1979) (concluding that disputes over unanswered or incompletely answered interrogatories and requests for production give rise to the greatest number of sanctions motions).

106. The use of misleading and evasive tactics is difficult to detect, except in rare cases when the smoking gun is inadvertently disclosed. Renfrew, *supra* note 104, at 88.

107. When fairness is only fortuitous, people become alienated from our system of justice. Brazil, *supra* note 102, at 1359; *see also* Renfrew, *supra* note 104, at 72 (contending that pretrial abuses prevent future litigants from using the judicial process to vindicate their rights).

108. As soon as the smoking gun documents were discovered, the judge ordered that they be sent to the federal Food and Drug Administration, which then required that warning labels be placed on all theophylline products. If the documents had been disclosed when the plaintiffs requested them, they would have been sent to the FDA three years earlier.

### *B. The Roots of Discovery Abuse*

Discovery abuse is rooted in the adversarial nature of litigation, the economic structure of our legal system, and the failure to require lawyers to behave as officers of the court. Until discovery reforms address these root causes, discovery abuse will continue.[109]

Although the discovery rules were specifically designed to make the process less adversarial,[110] litigators' adversarial instincts lead them to "duck and dodge" during discovery.[111] Lawyers are raised on the basic tenet that the interests of the client are paramount.[112] Pressures to behave adversarially militate against the production of all of the information necessary to resolve disputes fairly.[113]

The economic structure of our legal system reinforces the adversarial character of discovery.[114] Hourly billing gives lawyers an economic interest in excessive discovery.[115] The huge profits that litigators stand to gain through the use of contingent fees create incentives to abuse discovery.[116] Fears about malpractice increase a litigator's resistance to disclosure of incriminating information.[117] Moreover, highly sophisticated corporate clients can encourage discovery abuse when the financial stakes are high.[118]

These cultural and economic pressures to be a zealous advocate conflict with a lawyer's role as an officer of the court.[119] The law does not stress a lawyer's independent duty to seek truth when it is not in the

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109. *See* Michael E. Wolfson, *Addressing the Adversarial Dilemma of Civil Discovery,* 36 Clev. St. L. Rev. 17, 45 (1987–88).

110. *Id.* at 64.

111. Attorney William Helsell, arguing against sanctions in *Fisons*; *see* Stuart Taylor Jr., *Sleazy in Seattle,* The Am. Lawyer, April 1994, at 76.

112. Wolfson, *supra* note 109, at 49. Some jurisdictions require lawyers to "represent a client zealously within the bounds of the law." *Model Code of Professional Responsibility* Canon 7 (1981). The Washington Rules of Professional Conduct, however, contain no such provision.

113. Brazil, *supra* note 102, at 1360.

114. *Id.* at 1296.

115. Abraham D. Sofaer, *Sanctioning Attorneys for Discovery Abuse Under the New Federal Rules: On the Limited Utility of Punishment,* 57 St. John's L. Rev. 680, 727 (1983).

116. Renfrew, *supra* note 104, at 88.

117. Wolfson, *supra* note 109, at 47.

118. Dudley, *supra* note 103, at 221. In high stakes corporate litigation, it is unlikely that the client is uninvolved in the discovery strategy. *Id.*

119. Eugene R. Gaetke, *Lawyers as Officers of the Court,* 42 Vand. L. Rev. 39, 87 (1989).

client's interest.[120] The following statement from the United States Supreme Court sends a mixed signal at best:

> Under our adversary system, the role of counsel is not to make sure the truth is ascertained but to advance . . . [the] client's cause by any ethical means. Within the limits of professional propriety, causing delay and sowing confusion not only are . . . [counsel's] right but may be . . . [counsel's] duty."[121]

### C. *Deterrence of Discovery Abuse Requires that Judges Punish Abuse and Closely Supervise Discovery in Large, Complex Cases*

Given the pressures to abuse discovery, the discovery system needs external controls to function properly.[122] Yet the existing control mechanism, Rule 26(g), has been thus far ineffective because judges are still reluctant to impose sanctions.[123] Although the Supreme Court has directed courts to impose punitive sanctions to deter discovery abuse,[124] courts have not done so.[125] The relatively light sanctions that judges have frequently imposed under the rule[126] pale by comparison to the potential benefits of abuse. Judges must impose severe sanctions to reduce this incentive to break the rules.[127] Because the threat of even sizable monetary sanctions may not deter abuse in large cases, courts should also refer such cases to the bar for disciplinary action.[128]

Yet no system of sanctions and disciplinary action will curb discovery abuse as effectively as more judicial involvement in discovery.[129] Such

120. Renfrew, *supra* note 103, at 88.

121. Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 325 (1985).

122. Brazil, *supra* note 104, at 884.

123. *Id.* at 924. Rule 26(g) has failed to live up to its potential because courts do not often use it. 8 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2052 (Supp. 1993).

124. *See supra*, note 60 and accompanying text.

125. Dudley, *supra* note 103, at 218–19. Instead of imposing deterrent sanctions, courts have preferred to impose the least severe sanction necessary to compensate the aggrieved party. Renfrew, *supra* note 104, at 85.

126. Judges normally award only costs and attorneys' fees associated with the abuse. Wolfson, *supra* note 109, at 45. It can be argued that such compensatory fines are not actually sanctions; the term "sanction" connotes punishment, not compensation. Brazil, *supra* note 105, at 941.

127. Renfrew, *supra* note 104, at 83.

128. Brazil, *supra* note 105, at 952.

129. Ellington, *supra* note 105, at 8.

involvement increases the probability that abuse will be detected[130] and decreases the likelihood that it will occur in the first place.[131] Early discovery conferences help to define the issues in dispute[132] and put parties on notice that abusive behavior will result in sanctions.[133]

## IV. *FISONS* ILLUSTRATES THE NEED FOR REFORM

*Fisons* illustrates that the discovery system is in need of reform. The court system failed to detect the abuse, initially failed to conclude that Fisons and Bogle & Gates had violated the rules, and ultimately failed to impose a sanction stiff enough to prevent this type of discovery abuse from happening again.

*Fisons*'s significance lies in the fact that the Washington Supreme Court is now *enforcing* Rule 26(g).[134] The objective standard of the rule will prevent attorneys from claiming lack of intent, ignorance of the rules, or "everybody does it" as a defense to claims of discovery violations. *Fisons* does not, however, break new legal ground.[135] Rather, the court affirmed the status quo interpretation of the rule by issuing a vague legal standard and neglecting to specify what type of sanctions trial courts should impose.

### *A. The* Fisons *Legal Standard Is Vague*

First, the court neither explained the reasonable inquiry requirement nor articulated how Fisons and its attorneys failed to conduct a

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130. Much discovery abuse will inevitably go undetected, making the imposition of severe sanctions when parties do get caught even more critical for deterrence. Renfrew, *supra* note 104, at 90.

131. Ellington, *supra* note 105, at 116.

132. Dudley, *supra* note 103, at 199.

133. *Id.* at 222.

134. Fisons's legal experts contended that the court should have provided notice of the rule's requirements before imposing sanctions. Boerner Decl. ¶ 12, *Fisons*, (No. 86-2-06254-6). However, as noted below, notice of the rule's requirements could be found in federal and Washington caselaw. *See infra* note 134. It would have set an absurd precedent to exonerate these defendants from the rule's requirements merely because they were the first offenders to be sanctioned by the supreme court. Such a precedent could strip all new or dormant rules of their deterrent effect.

135. After the court issued the opinion, Fisons's attorneys declared in the media that the decision "changed the rules." Jolayne Houtz, *Fines Say It's Not OK to Withhold Evidence*, Seattle Times, Jan. 30, 1994, at B2. However, although Washington courts had not interpreted Rule 26(g) in a published opinion prior to 1991, the *Fisons* court did not change the rules. The court merely rearticulated the requirements of the rule that had been described in a Washington appellate case, federal cases, and by the committee that developed the federal version of rule 26(g).

reasonable inquiry. Second, the court failed to state explicitly that a lawyer's duty as an officer of the court to conform to the discovery rules will always trump the client's interests when these goals conflict. Third, the holding implies that narrow, literal interpretations of discovery requests violate the discovery rules, but the court's reasoning does not address the boundaries of such a standard.

The *Fisons* court did not clarify the reasonable inquiry requirement. The court stated that Rule 26(g) imposes an objective standard, determined that the responses were improper, and ended the analysis there. The court said the trial court should have engaged in a two-step analysis to determine whether Fisons had violated Rule 26(g). First, the trial court should have asked whether the attorney certified the responses to the best of his knowledge after a reasonable inquiry. Second, it should have determined whether the responses were consistent with the underlying discovery rules.[136] However, the court skipped the reasonable inquiry requirement and confined its analysis to the substantive issue of whether the discovery tactics were consistent with the rules.[137] The court concluded that Fisons broke those rules[138] by issuing misleading or "non" responses to the discovery requests.[139]

Although compliance with Rule 26(g) seems to turn on whether a party has made a reasonable inquiry, the court failed to articulate what kind of an inquiry constitutes a reasonable one.[140] Exclusive reliance on

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136. The court explained that Rule 26(g) also requires that the discovery document be (2) not interposed for an improper purpose, or (3) not unreasonable or unduly burdensome or expensive. 122 Wash. 2d at 344, 858 P.2d at 1078. Although *Fisons* rested on whether the responses were consistent with the rules, the vague responses and the systematic nature of the discovery evasion suggest that Fisons did act with an improper purpose—to conceal discoverable evidence. If the court had stated that the discovery responses were interposed for an improper purpose, the court could have found that Fisons acted recklessly or in bad faith. Such a statement would have made the opinion stronger and, perhaps, the sanction harsher.

137. Given the systematic nature of the discovery abuse, it would appear that the court assumed that Fisons and Bogle & Gates knew that the documents existed and, thus, had no need to reach the reasonable inquiry question. However, the attorneys at Bogle & Gates did not admit that they knew about the documents until after the supreme court decided this case.

138. The *Fisons* court said that Rule 33(a) and Rule 34(b) require a party to answer all interrogatories and requests for production *fully* unless a specific and clear objection is made. If Fisons did not want to respond or if it disagreed with the scope of discovery, the rules required it to move for a protective order. 122 Wash. 2d at 353–54, 858 P.2d at 1083–84.

139. *Id.* at 347, 858 P.2d at 1080.

140. The *Fisons* court said a trial court should consider all of the surrounding circumstances, the importance of the evidence to the proponent, and the ability of the opposing party to formulate a response when determining whether an attorney has complied with the rule. *Id.* at 343, 858 P.2d 1078. Although these factors may have comprised the court's attempt to shed light on the standard, they are more relevant to the severity of the abuse than to the reasonableness of the inquiry.

a client's assertion that relevant documents do not exist would rarely constitute a reasonable inquiry.[141] But what if an attorney reads every document provided by the client and still does not uncover the smoking gun? To what degree must an attorney challenge a client's (or corporate counsel's) claim that all relevant material is being provided? The court said only that the reasonable inquiry requirement is governed by an objective standard. This statement sheds no new light on Rule 26(g), because the rule's plain language indicates an objective standard.

The court rejected the use of evidence of the local standard of legal practice to show that the attorneys at Bogle & Gates were complying with Rule 26(g).[142] The court's decision to reject evidence of community norms indicates that practitioners have an absolute duty to conduct discovery in a responsible manner. Yet how far does that duty go? The court never stated that a lawyer's duty to the court transcends his or her duties to the client. In failing to address the cultural and economic pressures to engage in adversarial discovery, the court missed a golden opportunity to give meaning to the phrase "officer of the court."

Although it is now clear that a party must turn over information that the opponent asks for directly, it is not clear whether a practitioner must volunteer information that the opponent requests obliquely. The court emphasized an attorney's responsibilities to comply with the spirit and purpose of the discovery rules. Yet, although the Washington rules *encourage* the free flow of information, they do not yet *mandate* it.[143] Therefore, the requesting party still technically bears the burden of soliciting information in discovery. The *Fisons* opinion hints that the requesting party's burden of precision in crafting discovery requests is declining and that the responding party's burden to produce is commensurately rising.[144] Yet the court neither states this nor articulates the limits of such a standard.[145]

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141. *See supra* notes 25, 95 and accompanying text.

142. Regardless of whether adversarial discovery tactics represent the community norm, Fisons's specific conduct may well have fallen outside the boundaries of that norm.

143. The federal rules now mandate the automatic exchange of certain information at the outset of the litigation. *See supra* note 57.

144. *See* Stephen Gillers, *Truth or Consequences,* A.B.A. J., Feb. 1994, at 103 (suggesting that *Fisons* could foreshadow a decline in the use of adversarial semantics in discovery).

145. It can be argued that *Fisons*'s ambiguity will promote compliance with the spirit of the discovery rules more effectively than the articulation of a bright line rule would have because lawyers are adept at finding ways around such rules. This ambiguity will certainly produce positive results if the decision compels attorneys to err on the side of disclosure.

Given that the court failed to articulate a clear standard, the court apparently ordered sanctions against Fisons and its attorneys based on the facts of the case. Since *Fisons*, hopefully, represents the outer boundary of discovery abuse, its facts do not shed much light on appropriate discovery conduct for the average practitioner.

### B. *Fisons Fails To Set a Precedent for Meaningful Sanctions To Deter Discovery Abuse*

The *Fisons* court missed an opportunity to set a precedent for serious enforcement of the discovery rules. Instead of establishing a baseline level of sanctions sufficient for the sort of abuse committed in the case, the court described the purpose of sanctions in general terms. Lacking specific guidance, the trial court approved an inadequate settlement as a sanction.[146] The sanction inadequately compensated the injured parties and failed to implement the purposes the Supreme Court articulated.[147]

Contrary to the court's mandate, the sanction did not fully compensate the parties and it completely failed to fulfill the deterrence, punishment, and education functions that the court directed the trial court to address. Deterrence of future abusers requires that sanctions be severe and detection and punishment of abusers be consistent.

#### 1. *The Trial Court Approved a Sanction That Provides Inadequate Compensation*

The sanction did not begin to compensate fully the injuries caused by the discovery abuse. More than three years elapsed from the time the documents should have been produced by the discovery requests to the time they surfaced. Concealing the smoking gun documents during this time injured the insurance company, the doctor, the taxpayers, the legitimacy of our legal system, and the health and safety of the public. The sanction should have addressed and compensated each of these injuries.

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146. Although settlement should normally be encouraged, it seemed improper in this case because the injury was not limited to the individual parties. Given the overriding public interest in an effective sanction, the court should have determined the sanction based on the purposes it was to serve. The party-driven approach to sanctions relies upon the very self-policing mechanism that proved inadequate in the underlying case.

147. If the court had given the trial court more specific guidance about sanctions, it is unlikely the parties would have settled for such an amount.

First, the sanction did not fully compensate the insurance company for its $500,000 settlement with the Pollocks. Neither did the sanction cover the legal fees paid by the insurance company as a result of the discovery abuse. Second, it did not compensate the doctor for any of his discovery abuse-related injuries[148] or for his legal expenses.[149] Third, the sanction failed to compensate the public for the court costs incurred as a result of the concealment of this evidence. The costs included several hearings with a special discovery master to resolve the dispute, the use of two trial judges to hear the sanctions motion, the appeal of the sanctions ruling to the supreme court, and the four-year delay in resolving the Pollocks' case. Fourth, because liability in this case hinged on the anonymous revelation of this evidence, Fisons's and Bogle & Gates's conduct undermined the credibility of our justice system.

Most important, the concealment of this evidence threatened public health and safety. Fisons continued marketing Somophyllin without a warning label until 1990, when the government mandated such labels. Although the injury to public health and safety stemming from this cannot be quantified, the product continued to be marketed aggressively to unsuspecting doctors treating asthmatic children.

### 2. *The Sanction Did Not Sufficiently Deter, Punish, or Educate*

First, the sanction should have been high enough to deter Fisons, its attorneys, and other potential abusers from abusing discovery in the future. In order to deter the client and others, the sanction would have had to be high enough to significantly reduce the economic incentive to conceal critical discoverable evidence. In a case in which damages alone were over $8 million, a $325,000 sanction is unlikely to convince future litigants to follow the rules.

Fisons faced three potential scenarios at the outset of the litigation. First, Fisons could have concealed the documents and not gotten caught and thus might not have been found liable. The cost of this scenario would have been nothing, assuming attorneys' fees remain constant.

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148. Neither did the doctor recover on his substantive claims for injuries sustained from Fisons's discovery abuse, which included his premature settlement with the Pollocks and the protraction of his case against Fisons. At trial, the court disallowed references to the discovery disputes. 122 Wash.2d at 333, 858 P.2d at 1072. As a result, the jury did not conclude that the doctor was entitled to recovery on a litigation fraud theory and, thus, did not award him compensation for his discovery-related injuries.

149. The court awarded the doctor half of his legal expenses under the Consumer Protection Act, however.

Second, Fisons could have disclosed the documents when the plaintiffs asked for them. The cost of this decision would have been $8 million, the ultimate costs that Fisons incurred as a result of the substantive claims of the doctor and the Pollocks. Third, Fisons could have concealed the documents and been caught, which is what happened. The cost of this scenario was $8 million for the substantive claims plus the $325,000 sanction.

Based on this purely economic analysis, it is easy to see why a defendant and its attorneys might choose to conceal evidence and face the risk of being caught.[150] The benefit of successfully concealing the documents in *Fisons,* when compared to the cost of disclosing them, was a savings of $8 million. The cost of concealing them and getting caught, when compared to disclosing the documents, was only $325,000, because the company would have been liable for the substantive claims under either scenario. Therefore, there was a very high potential payoff and a relatively low marginal cost for concealing the documents.

Not only was the sanction insufficient to deter such economically-motivated behavior, it also allowed both Fisons and Bogle & Gates to profit from the abuse, despite the fact that the supreme court expressly directed the trial court to ensure that the wrongdoers not profit from the wrong. At a minimum, the trial court should have required the drug company to disgorge the profits it earned from the continued sale of theophylline without warning labels.[151] The court should have required Bogle & Gates to disgorge the profit it earned from the discovery abuse as well.[152]

Second, neither the supreme court nor the trial court on remand attempted to punish Bogle & Gates for its conduct. Evidence suggests that Bogle & Gates's attorneys may have violated the Rules of Professional Conduct (RPC). Yet neither court referred the case to the Washington State Bar Association for disciplinary procedures. The court

150. This theoretical analysis assumes, of course, that the lawyer and the litigant are motivated solely by economic costs and benefits. Although this would rarely be the case in the real world, and was probably not the case in *Fisons,* the analysis does shed light on the economic incentives to abuse discovery.

151. After the trial court ordered the evidence to be sent to the FDA, which in turn mandated warning labels, sales of theophylline fell by 25%. From this we can infer that the company's theophylline earnings were 25% higher during the time Fisons was hiding the document than they would have been if it had been produced. The court should have required Fisons to disgorge these extra earnings.

152. The sanction should have at least required Bogle & Gates to disgorge the profit it earned from representing Fisons from the time it knew of the existence of the documents until the documents surfaced.

also could have referred to the firm[153] and the offending attorneys by name in its opinion.[154]

Third, the sanction imposed by the trial court does not educate practitioners about the discovery requirements. The supreme court encouraged the trial court to direct payment of monetary awards to a court fund. This fund could have subsidized Continuing Legal Education programs for lawyers. The fund could also have supported Washington State Bar Association efforts to combat discovery abuse. The court could have required that a certain portion of the sanction[155] serve these purposes, but failed to do so.

### 3. *This Type of Discovery Abuse Will Continue Until Judges Become Better Equipped and More Determined To Detect It and Enforce the Rules Consistently.*

Deterrence of discovery abuse not only requires the imposition of meaningful and consistent sanctions when parties are caught, but it also requires a system to detect abuse. Although the court encouraged trial judges to impose sanctions, it failed to give guidance about improving detection of abusers. Although this is a difficult problem to resolve, detection can be improved by educating judges about the requirements of Rule 26(g) and committing adequate resources to monitor discovery in large cases.

Judges must be educated about the requirements of the rule. Before the supreme court ruled in *Fisons*, judges either misunderstood the rule or mistakenly thought that its enforcement was discretionary. For example, in *Fisons*, two trial judges and a discovery master concluded that Fisons had not broken the rules. Given the especially egregious nature of Fisons's discovery tactics, it is difficult to imagine what type of abuse *would* have warranted sanctions by the lower courts. Although the supreme court's opinion sensitized judges to the requirements of Rule 26(g), it is critical that judges use their sanctioning power consistently.

Active judicial involvement in discovery is a prerequisite to consistent enforcement of the rules. Although judges can impose sanctions *sua*

153. The firm is identified in the opinion as defense counsel in the case, but is named nowhere else.

154. It can be argued, however, that the law firm suffered amply from the bad publicity it received during this case.

155. An appropriate portion would have been the amount that remained after all aggrieved parties were compensated.

*sponte,* they cannot do so if they do not know about the abuse. When the discovery abuse consists of evasive and misleading tactics, as in *Fisons*, it is difficult for even opposing counsel to know that something is awry. Therefore, judges should hold regular discovery conferences in large cases where discovery abuse is most likely to happen. Requiring parties to meet with the judge or discovery master throughout discovery might deter abuse by increasing the fear of detection. Although increased monitoring of discovery would require additional resources, *Fisons* illustrates that this action is necessary.

Although it is clear that the imposition of sanctions is a "difficult and disagreeable task"[156] for trial judges, the supreme court's efforts in *Fisons* will have been in vain if trial courts do not impose sanctions every time they are warranted. *Fisons* will ring as hollow as every other landmark discovery abuse decision over the past 50 years if it does not compel trial judges to enforce the rules.

### C. *Therefore, To Deter Discovery Abuse, the Court Should Explain the Legal Standard and Direct Trial Courts To Impose Severe and Consistent Sanctions*

The court should take several steps to clarify the legal standard of Rule 26(g). First, the court should define the boundaries of the reasonable inquiry requirement of Rule 26(g). Second, the court should explicitly state that, when justice requires it, the duty to the court to cooperate in liberal discovery will trump the client's interests. Third, the court should clarify whether the responding party is now required to err on the side of disclosure when interpreting all discovery requests.

To help deter discovery abuse, the court should ensure that sanctions are severe and are imposed consistently. Sanctions must fully compensate the parties who have been injured by the discovery abuse, while punishing the abuse, deterring others, and educating the legal community.

## V. CONCLUSION

Although *Fisons* sends a message that evasive and misleading tactics will not be tolerated in discovery, the decision fails to precisely outline an attorney's duties in discovery. The case also fails to set a precedent for severe sanctions for egregious discovery abuse. Given the

156. 122 Wash. 2d at 355, 858 P.2d at 1084.

compelling economic incentive to abuse discovery, the court must take additional decisive steps to define and enforce the rules if *Fisons*'s legacy is to endure.