NOTES

LITIGATION-ENDING SANCTIONS: ALASKA COURTS' USE OF RULE 37

I. INTRODUCTION

Alaska Rule of Civil Procedure 1 states that the "rules shall be construed to secure the just, speedy and inexpensive determination of every action and proceeding."[1] The goals of Rule 1 provide an important framework for examining other procedural rules, and it is within this framework that the entire rules system should be applied. Recognizing the relationship between this framework and the rules system is particularly important when applying the rules governing discovery. Discovery practices and procedures, because they occur in the initial stages of litigation and involve direct interaction between the parties with little or no judicial supervision, may determine the character of the succeeding stages of litigation.[2] The discovery process has a tangible effect upon each of the goals of Rule 1, and its use or abuse can be a significant factor in determining whether the judicial process renders a decision that is fair, prompt, and based on the merits.

Alaska Rule of Civil Procedure 37,[3] which is substantially the

1. ALASKA R. CIV. P. 1.

2. The federal and Alaska discovery rules generally contemplate limited judicial intervention in the discovery process and depend on cooperation between opposing parties. *See* Brazil, *Improving Judicial Controls over the Pretrial Development of Civil Actions: Model Rules for Case Management and Sanctions,* 1981 AM. B. FOUND. RESEARCH J. 875, 882. Given the minimal amount of judicial supervision, the possibility of discovery abuse and bickering leading to a polluted pretrial environment is significant. Uncooperative behavior in the discovery process often results in an incomplete, prolonged, and expensive litigation process. *See id.* at 881.

3. ALASKA R. CIV. P. 37 provides:

Rule 37. Failure to Make Discovery: Sanctions.

(a) Motion for Order Compelling Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) *Appropriate Court.* An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the judicial district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the judicial district where the deposition is being taken.

(2) *Motion.* If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

(3) *Evasive or Incomplete Answer.* For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) *Award of Expenses of Motion.* If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to Comply With Order.

(1) *Sanctions by Court in Judicial District Where Deposition is Taken.* If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the judicial district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) *Sanctions by Court in Which Action is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to sup-

port or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses including the attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) Expenses on Failure to Admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of sudivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

same as its federal counterpart,[4] was enacted to ensure adherence to the discovery process. The rule authorizes the court to issue orders compelling discovery[5] and to impose sanctions for a failure to comply with such orders.[6] The sanctions available to the court range from the assessment of costs resulting from the noncompliance to the imposition of a default judgment.[7] This note will examine the implementation of Rule 37 litigation-ending sanctions,[8] initially focusing on the development of their use in the federal system. Particular attention will be given to the degree of culpability which should be required before such sanctions are imposed. After considering some of the alternative culpability standards, this note will examine the Alaska courts' experience with these sanctions. The relevant Alaska cases will be analyzed and suggestions will be offered concerning the future imposition of Rule 37 litigation-ending sanctions by the Alaska courts.

II. RULE 37 AND THE DEVELOPMENT OF CULPABILITY STANDARDS IN THE FEDERAL COURTS

A. Background

The discovery provisions of both the Alaska and Federal Rules of Civil Procedure are found in Rules 26 through 37. Rule 26 establishes the permissible scope of the discovery process. It provides that discovery may be obtained of any unprivileged information relevant to the subject matter involved in the pending action.[9] The broad scope of this rule was intended to assist the courts in reaching the merits of legal disputes by a process more conducive to the pursuit of truth than that envisioned by the "sporting theory" of justice.[10]

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4. FED. R. CIV. P. 37 is almost identical to the Alaska rule, but includes an additional section, 37(g), which provides for the assessment of expenses against a party or its attorney that fails to participate in good faith in the framing of a discovery plan by agreement as required by FED. R. CIV. P. 26(f).

5. ALASKA R. CIV. P. 37(a).

6. ALASKA R. CIV. P. 37(b).

7. *Id.*

8. Litigation-ending sanctions include those that have the effect of terminating the litigation after a less than full adjudication on the merits. The emphasis in this definition is on the effective termination of the action without an adjudication of the significant issues in the case. For example, the sanction of default is clearly a litigation-ending sanction because the case is never tried on its merits. In contrast, the exclusion of certain evidence may or may not rise to the level of a litigation-ending sanction, depending on the nature of the issue to which the evidence relates.

9. ALASKA R. CIV. P. 26(b)(1).

10. FED. R. CIV. P. 26(b)(1); *see also* Werner, *Survey of Discovery Sanctions,* 1979 ARIZ. ST. L.J. 299, 301 ("In rejecting the 'sporting theory' of justice, the federal discovery rules contravened the adversary notion previously embedded in our legal system.").

> The discovery process has three primary functions:
> (1) To narrow the issues, in order that at trial it may be necessary to produce evidence only on a residue of matters that are found to be actually disputed or controverted.
> (2) To obtain evidence for use at the trial.
> (3) To secure information about the existence of evidence that may be used at the trial and to ascertain how and from whom it may be procured . . . .[11]

Consistent with the predominant goals of the rules, the discovery process is directed toward full and open disclosure of relevant information. Accordingly, an exchange of less than the desirable amount of information results in a frustration of discovery. Such an outcome is reminiscent of the sporting theory of justice and results in significantly less emphasis on the merits of a dispute than was envisioned by the proponents of the procedural rules.[12]

The general purpose of Rule 37 sanctions is "to effectuate the discovery process."[13] More specifically, as recognized by the Second Circuit, discovery sanctions serve a threefold purpose: "[to] ensure that a party will not be able to profit from its own failure to comply [with discovery;] . . . to secure compliance with the particular order at hand[;] . . . [and to act as a] general deterrent . . . on the instant case and on other litigation."[14] These purposes indicate that sanctions are expected to play a significant, even determinative, role in litigation if the discovery process is abused.

Rule 37 is the primary source of sanctions for abuse of the discovery process.[15] Under Rule 37(a), an aggrieved party seeking discovery may move for an order to compel discovery.[16] If the order is granted

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11. 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2001 (1970).

12. FED. R. CIV. P. 37 advisory committee note.

13. Ketchikan Cold Storage Co. v. State, 491 P.2d 143, 147 (Alaska 1971).

14. Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d 1062, 1066 (2d Cir. 1979) (citations omitted); *see also* United States v. Sumitomo Marine & Fire Ins. Co., 617 F.2d 1365, 1369 (9th Cir. 1980).

15. Renfrew, *Discovery Sanctions: A Judicial Perspective,* 67 CALIF. L. REV. 264, 267 (1979). Rule 37 is not the exclusive source of authority for imposing discovery sanctions in the federal system. Federal courts have inherent power to impose sanctions for abuse of the judicial process and are authorized by statute, 28 U.S.C. § 1927 (1982), to assess costs against attorneys who unreasonably multiply the proceedings. Renfrew, *supra,* at 268-69.

16. This note is concerned with the sanctioning process under Rule 37(b). The sanctions authorized by this subsection may not be imposed unless a court order to permit or provide discovery has been violated. The sanctions provided by Rule 37(c) and (d) may be invoked in the absence of a violated court order. Rule 37(c) provides for the assessment of expenses against a party that fails to admit the genuineness of any document or the truth of any matter asserted under Rule 36. Rule 37(d) authorizes the imposition of certain Rule 37(b)(2) sanctions upon motion against a party that has failed to appear for a deposition, or to serve answers, objections, or responses to certain interrogatories or requests. If the sanction sought under Rule 37(d) is

and the party to whom the order is directed fails to comply, the discovering party may seek relief under Rule 37(b). This subsection contains a wide range of sanctions that may be imposed for noncompliance with court discovery orders. The rule authorizes the court to: require the noncomplying party or its attorney, or both, to pay the reasonable expenses, including attorney's fees, incurred by the innocent party as a result of the failure to obey the order;[17] strike out a portion of the pleadings;[18] establish designated facts;[19] preclude the admission of designated matters in evidence;[20] deny the opportunity to support or oppose designated claims or defenses;[21] treat the failure to comply as contempt of court;[22] dismiss all or part of the action or render a default judgment;[23] or make any other order that is just.[24] Once the court determines that a party has failed to comply with a discovery order, the selection and imposition of a sanction is within the discretion of the trial court.[25]

Litigation-ending sanctions include establishment-preclusion orders,[26] dismissal orders, and default judgments. Dismissal orders and default judgments terminate an action outright.[27] Establishment-preclusion orders can establish or preclude a party from establishing a particular claim or defense that goes to a central issue in the case, an action that, for all practical purposes, determines the outcome of the litigation.[28] Most of the discussion of the application of Rule 37 has centered on the circumstances and behavior that warrant the imposition of these litigation-ending sanctions. Much of this discussion responds to the tension inherent in a procedural system that places great emphasis on a full adjudication on the merits, yet provides discovery

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litigation-ending, it is subject to the same constraints as those sanctions available under Rule 37(b).

17. ALASKA R. CIV. P. 37(b)(2).

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

19. *Id.* at 37(b)(2)(A).

20. *Id.* at 37(b)(2)(B).

21. *Id.*

22. *Id.* at 37(b)(2)(D) ("except an order to submit to physical or mental examination").

23. *Id.* at 37(b)(2)(C).

24. *Id.* at 37(b)(2).

25. *See* Hawes Firearms Co. v. Edwards, 634 P.2d 377, 378 (Alaska 1981) (quoting Oaks v. Rojcewicz, 409 P.2d 839, 844 (Alaska 1966)); *see also* 8 C. WRIGHT & A. MILLER, *supra* note 11, § 2284.

26. *See generally* Ketchikan Cold Storage Co. v. State, 491 P.2d at 146-47 (court reversed an establishment-preclusion order going to a central issue in the case).

27. Default judgments result in a disposition favorable to the plaintiff. Dismissals have the effect of terminating the plaintiff's action.

28. *See generally Hawes Firearms Co.*, 634 P.2d at 378 (defendant's defenses were stricken pursuant to Rule 37 and trial was conducted as to damages only).

mechanisms that permit courts to dispose of cases without considering the merits.[29]

B. Due Process Limitations on the Imposition of Sanctions

Constitutional limitations on the imposition of litigation-ending sanctions militate against the liberal application of the harshest Rule 37 sanctions. The due process clause of the fifth amendment, as applied to the states by incorporation in the fourteenth amendment, governs much of the sanctioning process. The general boundaries[30] of the due process limitations and the principles underlying the application of Rule 37 are outlined in four United States Supreme Court opinions, two of which were decided before the Federal Rules of Civil Procedure were enacted.

In *Hovey v. Elliot,* the Supreme Court addressed the issue whether a court possessed discretionary power to impose sanctions when a party refused to obey a court order to deposit money with the court.[31] The Court refused to uphold the lower court's sanctions — striking the delinquent party's answers and entering a decree *pro confesso.* The Court held that the complete denial of an opportunity for a trial on the merits and the rendering of a decree without a hearing violated the party's due process rights and was an unconstitutional response to contempt.[32]

Twelve years later, in *Hammond Packing Co. v. Arkansas,*[33] the Court affirmed a default judgment entered after the defendant had failed to comply with a court order to produce specified witnesses and documents. The Court approved the trial court's use of a presumption that "the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense."[34] Noting that all that was required of the defendant was a bona fide effort to comply with the order, the Court stated that any

29. *See generally* Werner, *supra* note 10, at 301-02 (In addition to the tension between the "reach-the-merits" philosophy and the use of sanctions to enforce discovery procedures, the author identifies the tension inherent in a system that seeks mutual disclosure while maintaining its strong adversarial nature.).

30. The precise constitutional limits on a court's power to impose litigation-ending sanctions have not been defined by the United States Supreme Court. *See* 8 C. WRIGHT & A. MILLER, *supra* note 11, § 2283; *see also infra* text accompanying notes 36-47.

31. Hovey v. Elliot, 167 U.S. 409 (1897).

32. *Id.* at 444-46. The plaintiffs in the action had obtained the decree in an earlier trial and argued that the decree was binding upon the defendants in separate proceedings. The case came to the United States Supreme Court after the New York Court of Appeals held that the judgment was beyond the jurisdiction of the rendering court. *Id.* at 412-13. The Supreme Court affirmed. *Id.* at 446-47.

33. 212 U.S. 322 (1909).

34. *Id.* at 351.

reasonable showing of inability to comply would satisfy its requirements.[35]

The Court in *Hammond* distinguished the *Hovey* decision as one involving "a denial of all right to defend as a mere punishment."[36] The original Advisory Committee Note to Federal Rule 37 also recognized this distinction between *Hovey* and *Hammond* — the difference "between the justifiable use of [litigation-ending sanctions] as a means of compelling the production of evidence, and their unjustifiable use, as in *Hovey v. Elliot* . . . for the mere purpose of punishing for contempt."[37]

Several years after the promulgation of the Federal Rules of Civil Procedure, the Court elaborated upon the *Hovey-Hammond* distinction in *Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers.*[38] This case involved a court order requiring the Swiss plaintiff to produce certain business records. The plaintiff opposed the order on the ground that under Swiss law the production of the records would subject the custodian to criminal penalties. The trial court held that the possibility of criminal sanctions in Switzerland was not a legitimate basis for refusing to comply with the court order and granted a motion for dismissal pursuant to Rule 37(b)(2).[39] The court of appeals affirmed, but the Supreme Court reversed. The Court declined to base its decision on due process grounds,[40] and stated that Rule 37(b)(2) should not be interpreted to permit dismissal or default for failure to comply with an order "when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner."[41]

The Court reaffirmed the *Societe Internationale* decision in *National Hockey League v. Metropolitan Hockey Club, Inc.*[42] After numerous extensions and promises to comply, the district court dismissed the plaintiff's antitrust action for failure to answer interrogatories as ordered. The court of appeals reversed the dismissal, finding that there was insufficient evidence to support a finding that the plain-

35. *Id.* at 347, 353-54.

36. *Id.* at 350.

37. FED. R. CIV. P. 37 advisory committee note.

38. 357 U.S. 197 (1958).

39. *Id.* at 201-02.

40. The Court noted that the *Hovey* and *Hammond* decisions did not resolve the question whether "due process is violated by the striking of a complaint because of a plaintiff's inability, despite good faith efforts, to comply with a pretrial production order." *Id.* at 210. Instead of explicitly considering the "serious constitutional questions" provoked by such an action, the Court construed Rule 37 in such a manner as to preclude the use of the harsher sanctions if the inability to comply was in good faith. *Id.* at 212.

41. *Id.* at 212.

42. 427 U.S. 639, 640 (1976).

tiff's conduct was willful, intentional, or in bad faith.[43] The Supreme Court reversed, holding that the district court's finding of flagrant bad faith was supported by the record. The Court explicitly disapproved of the leniency exhibited by the court of appeals, stating that

> the most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.[44]

The *National Hockey League* decision signaled a shift in the Court's approach to failures to comply with discovery orders because the Court "went beyond the traditional wisdom that parties will comply in the future, given one more chance."[45] The Court stressed the importance of the deterrent function of Rule 37, a function which up to that time rarely had been recognized.[46] The Court's approval of the *Societe Internationale* principle was clear, but it was also apparent that, at least in certain situations, the general deterrent effect of harsh sanctions should take precedence over the "reach the merits" philosophy that had prevailed in *Societe Internationale.*[47]

C. Culpability Requirements

The four preceding opinions provide the framework in which commentators and courts have analyzed the imposition of Rule 37 litigation-ending sanctions.[48] This section will briefly discuss suggested alternatives to the requirements for the use of the sanctions. The focal point of this discussion is culpability; that is, the degree of fault in failing to comply with a discovery order that is required to

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43. *In re* Professional Hockey Antitrust Litig., 531 F.2d 1188, 1195 (3d Cir. 1976).

44. 427 U.S. at 643.

45. Note, *Federal Rules of Civil Procedure: Defining a Feasible Culpability Threshold for the Imposition of Severe Discovery Sanctions,* 65 MINN. L. REV. 137, 143 (1980-81).

46. *See id.* at 149; *see also* Note, *Discovery Sanctions Under the Federal Rules of Civil Procedure: A Goal-Oriented Mission for Rule 37,* 29 CASE W. RES. L. REV. 603, 623 (1978-79) (The *National Hockey League* decision "signifies a subordination of lenity in the imposition of sanctions in favor of the theory that noncompliance can be deterred through the imposition of harsh sanctions."); Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions,* 91 HARV. L. REV. 1033 (1978) [hereinafter cited as Note, *Emerging Deterrence*].

47. *See* Werner, *supra* note 10, at 319.

48. It should be noted that the *Hovey* and *Hammond* decisions were decided on constitutional due process grounds, thereby providing the constitutional boundaries for the imposition of discovery sanctions. While the Court did consider the due process implications of the use of litigation-ending sanctions in *Societe Internationale* and *National Hockey League,* these decisions were based on the Court's interpretation of Rule 37.

justify the imposition of sanctions that will effectively terminate an action with less than a full adjudication on the merits.

The imposition of litigation-ending sanctions under Rule 37(b) has been analyzed by one commentator under three alternative culpability thresholds.[49] These thresholds are identified as conventional intent, gross negligence, and ordinary negligence. The conventional intent threshold is the standard that predominates in the federal courts. As articulated in both *Societe Internationale* and *National Hockey League,*[50] the standard demands that Rule 37(b) should not be interpreted to authorize the imposition of litigation-ending sanctions in the absence of "wilfulness, bad faith, or any fault of the [noncomplying party]."[51] The emphasis of this approach is on the remedial and compensatory goals of the discovery sanction process: to compensate the injured party for the noncompliance.[52] Litigation-ending sanctions are inconsistent with the remedial goal because they end the litigation and do not remedy the noncompliance. For this reason courts traditionally have held that only exceptional circumstances would warrant termination of an action before an adjudication on the merits.[53] Of the three approaches, the conventional intent standard places the greatest emphasis on reaching the merits of a dispute.

The second threshold, gross negligence, is a product of the *National Hockey League* and *Societe Internationale* opinions. The standard calls for the imposition of the harshest sanctions when noncompliance results from gross negligence. It has been adopted in two circuits. Relying heavily on *National Hockey League,* the First Circuit. in *Affanato v. Merrill Brothers,*[54] affirmed a default judgment

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49. *See* Note, *supra* note 45, at 141-49.

50. Although the *National Hockey League* opinion was concerned primarily with the deterrent effect of sanctions, the Court clearly demonstrated that an integral component of the decision was the "flagrant bad faith" and "callous disregard of responsibilities" displayed by the noncomplying party. *National Hockey League,* 427 U.S. at 643. The behavior of the noncomplying party serves to place the decision squarely within the confines of *Societe Internationale.*

51. *Societe Internationale,* 357 U.S. at 212. The term most often referred to with respect to the requirement for culpable conduct is "willfulness." Although the precise meaning of the term cannot be articulated, as its construction is often influenced by its context, the following definition may be useful to keep in mind:

> An act or omission is "willfully" done, if done voluntarily and intentionally and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law.

BLACK'S LAW DICTIONARY 1434 (5th ed. 1979).

52. *See* Note, *supra* note 45, at 141.

53. *Id.* Under the remedial rationale, the most severe discovery sanctions should be imposed only when a lesser sanction would not return the parties to equal positions. *See id.* at 150.

54. 547 F.2d 138 (1st Cir. 1977).

that had been entered because of the defendant's failure to answer interrogatories. The court found that the conduct of the defendant's attorney went well beyond ordinary negligence and justified the imposition of a final default judgment.[55] The court cited the deterrence objective of Rule 37 and stated that the policy favoring disposition of cases on their merits must be weighed against "the time and energies of our courts and the rights of would-be litigants awaiting their turns to have other matters resolved."[56] The court omitted any reference to an intent or willfulness requirement.

The most extensive discussion of the gross negligence standard is found in *Cine Forty-Second Street Theatre v. Allied Artists Pictures Corp.*,[57] in which the court found gross attorney negligence to be grounds for a preclusion order tantamount to a dismissal. The court recognized that commentators[58] have generally suggested that willfulness or conscious disregard of a court order is a prerequisite for imposition of the more severe sanctions of Rule 37. Nonetheless, the court seized upon the language in *Societe Internationale* to support its holding that gross negligence may properly be "embraced within the 'fault' component of *Societe Internationale's* triple criterion."[59]

In contrast to those courts that adhere to the conventional intent threshold, the courts following the gross negligence culpability threshold place greater importance on the efficient administration of discovery than on reaching the merits of a dispute.[60] The *Affanato* and *Cine* courts emphasized the purpose and value of the Rule 37 sanctions as a means of protecting other litigants, as well as the resources of the judicial system,[61] while maintaining fidelity to the demands of due process.

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55. *Id.* at 141. The noncompliance in this case arose out of an unusual set of circumstances. The original attorney in charge of the defendant's case left his law firm in Massachusetts and moved to Maine. The firm allowed him to continue to handle the case. Over a period of years, the lawyer ignored repeated discovery orders. Though it was argued that the firm had every reason to trust the attorney and that the firm had no knowledge of his noncompliance, the court found the decisive fact to be that the conduct of counsel, with which the defendant was chargeable, amounted to "near total dereliction of professional responsibility." *Id.*

56. *Id.* at 140 (quoting Von Poppenheim v. Portland Boxing & Wrestling Comm'n, 442 F.2d 1047, 1054 (9th Cir. 1971), *cert. denied,* 404 U.S. 1039 (1972)).

57. 602 F.2d 1062 (2d Cir. 1979).

58. *See, e.g.,* Note, *Emerging Deterrence, supra* note 46, at 1043; *see also* 4A J. MOORE, J. LUCAS, & D. EPSTEIN, MOORE'S FEDERAL PRACTICE ¶ 37.03[2.-5] (2d ed. 1984).

59. *Cine,* 602 F.2d at 1067.

60. *See* Note, *supra* note 45, at 147.

61. *See generally Cine,* 602 F.2d at 1068 (courts should not shrink from imposing harsh sanctions when warranted "in this day of burgeoning, costly and protracted litigation"); *Affanato,* 547 F.2d at 140 (time and energies of courts should be considered in selecting a sanction).

The third threshold, that of ordinary negligence, has yet to be adopted by any court. Proposals for an ordinary negligence standard are based on the view that "[s]ince a finding of negligent failure to comply with a discovery order presupposes 'fault,' the ordinary negligence threshold would comport with *Societe Internationale's* mandated minimum culpability standards."[62] It is argued that an ordinary negligence standard would be consistent with, and serve the purposes of, the deterence rationale advanced by *National Hockey League* and perhaps would be more workable than a gross negligence threshold.[63]

III. THE ALASKA INTERPRETATION OF RULE 37

There are few Alaska cases which discuss the use of discovery sanctions. The cases that have considered the grounds for the imposition of litigation-ending sanctions do not provide a clear understanding of the Alaska Supreme Court's position on discovery sanctions. Specifically, the cases raise questions concerning the culpability requirement.

A. The Role of Willfulness

The positions the Alaska courts have taken on the use of discovery sanctions have been based on federal court interpretations of Federal Rule of Civil Procedure 37.[64] In its first consideration of Rule 37, the Alaska Supreme Court recognized that its interpretation of Civil Rule 37(b)(2)[c][65] would follow that of the rule's model, Federal Rule 37, as set forth in *Societe Internationale.*[66] In *Oaks v. Rojcewicz,* the court reversed a dismissal with prejudice, holding that Rule 37 should be construed to authorize dismissals of claims only when it is established that a party's failure to comply with a production order is willful. In this decision, the court reviewed the prevailing federal practice

62. Note, *supra* note 45, at 148.

63. *Id.* at 148-49. The author suggests that the ordinary negligence threshold is a logical extension of the *Societe Internationale* and the *National Hockey League* decisions, and that because the distinction between gross and ordinary negligence is often blurred, the ordinary negligence threshold should ultimately be adopted. *Id.* at 156-57.

64. *See, e.g.,* Hawes Firearms Co. v. Edwards, 634 P.2d 377, 378 (Alaska 1981); Oaks v. Rojcewicz, 409 P.2d 839, 843 (Alaska 1966). It should be noted that while the Alaska courts are bound by the constitutional limitations on the imposition of litigation-ending sanctions as expressed by the federal courts, they need not necessarily adhere to rule interpretations as set forth in the federal system. The assumption in this note is that the Alaska courts intend to follow federal precedent as a general guide.

65. Predecessor to the current ALASKA R. CIV. P. 37(b)(2)(C).

66. Oaks v. Rojcewicz, 409 P.2d 839, 843 (Alaska 1966).

and recognized that the more severe sanctions, such as dismissal with prejudice, should be imposed only for flagrant abuses of discovery procedure.[67] The *Oaks* court, however, did not state that willfulness is required for *all* Rule 37 sanctions.

Despite the Alaska court's professed adherence in *Oaks* to the United States Supreme Court's interpretation of Rule 37, subsequent Alaska decisions occasionally reveal an uneasiness with some of the basic principles that have been propounded by the Supreme Court. Specifically, some opinions manifest a misunderstanding of the proper role of willfulness in the sanctioning process.[68] This misunderstanding, which may simply be a result of an imprecise articulation of the court's reasoning, has been evident in cases in which it has not been the determinative factor. Such incongruencies, however, deserve comment. Because the use of litigation-ending sanctions generates relatively few judicial opinions, the possibility that a careless statement will lead to a misapplication of the law is too great to be left unaddressed.

In *Hart v. Wolff*,[69] the Alaska Supreme Court affirmed a dismissal resulting from a refusal to comply with an order to produce requested documents. Citing the *Oaks* decision, the court stated that "it should be noted that application of Rule 37 sanctions against a party who has failed to make discovery is not proper unless the court finds that there has been a *'willful refusal* on the part of a party ordered to make discovery.' "[70] Although the requirement of willfulness for the imposition of the dismissal sanction was recognized in *Oaks,* the *Oaks* opinion does not support the overreaching proposition set forth in *Hart.* Not all Rule 37 sanctions require willfulness, as other Alaska decisions readily acknowledge.[71] Although the *Hart* case did involve the question whether an action was properly dismissed[72] — an issue dependent on a finding of willfulness — the court's language was not so limited. Rather, the opinion suggests that willfulness is a requirement for the imposition of the least, as well as the most, drastic sanctions.

Similar implications arise from the court's opinion in *Hawes Firearms Co. v. Edwards.*[73] *Hawes* involved an appeal from an order striking all of the appellant's defenses and limiting the trial to the question

67. *Id.* at 844.

68. *See infra* text accompanying notes 69-80.

69. 489 P.2d 114 (Alaska 1971).

70. *Id.* at 118 (emphasis in original) (quoting Oaks v. Rojcewicz, 409 P.2d 839, 840 (Alaska 1966)).

71. *See, e.g.,* State v. Guinn 555 P.2d 530, 543 (Alaska 1976); Ketchikan Cold Storage Co. v. State, 491 P.2d 143, 148 (Alaska 1971).

72. *Hart,* 489 P.2d at 115.

73. 634 P.2d 377 (Alaska 1981).

of damages. For all practical purposes, this order was a litigation-ending sanction.[74] As the court correctly recognized, the severity of the sanction required a showing of willfulness before the sanction could be imposed. In describing the operation of Rule 37(b), however, the court stated that "[w]illfulness, in the sense of a conscious intent to impede discovery, and not mere delay, inability or good faith resistance, must be demonstrated before sanctions may be imposed."[75] As in *Hart,* the court's language is too broad because it states that willfulness must be present before a court may impose any of the Rule 37(b) sanctions.

The unqualified language of the *Hawes* opinion appears to have had a small, but potentially significant, impact on the court's later interpretation of the rule. Under Rule 37(c), a less severe sanction — the assessment of expenses — is available when a party fails to admit the truth of a matter requested under Rule 36 that is subsequently proved.[76] In *Riley v. Northern Commercial Co.,*[77] Rule 37 was involved only because the petitioner requested that Rule 37(c) sanctions be imposed rather than have certain responses deemed admitted pursuant to Alaska Rule of Civil Procedure 36. The court, relying on *Hawes,* noted that sanctions imposed pursuant to Rule 37(c) were only appropriate where a party willfully intends to impede the discovery process.[78] The *Hawes* opinion, however, did not involve a Rule 37(c) motion, nor did it address the requirements of that subsection. Thus, the *Riley* court seemingly relied on the sweeping statement in *Hawes* that a finding of willfulness is necessary for the imposition of all Rule 37 sanctions.

In *Pew v. Foster,*[79] the court again quoted with approval the *Hawes* statement that willfulness must be demonstrated before any Rule 37 sanctions are imposed. Although the case only indirectly concerned a default judgment under Rule 37, *Pew* is further evidence of the court's inattentiveness to the appropriate application of the rule. The *Hawes* statement, albeit confined to a footnote and correct in its application to the *Pew* case,[80] should be restricted to litigation-ending

74. The sanction of the striking of defenses amounted to a finding that the defendant manufacturer's handgun was defective. The trial was then to proceed to the question of damages against the defendant. *Id.* at 378.

75. *Id.*

76. ALASKA R. CIV. P. 37(c).

77. 648 P.2d 961 (Alaska 1982).

78. *Id.* at 964 n.4.

79. 660 P.2d 447 (Alaska 1983).

80. The court in *Pew* was concerned with a default judgment. To the extent that it recognized that willfulness is required for the sanction of default, the court was correct. *Id.* at 449 n.3.

sanctions. Such general statements present the danger that subsequent Alaska opinions are likely to draw upon them to interpret Rule 37.

Not every Alaska Supreme Court decision after *Oaks* has articulated willfulness as a requirement for the imposition of all Rule 37(b) sanctions. Some decisions have declined to adopt the unqualified willfulness requirement and have followed the *Oaks* decision by limiting the willfulness requirement to litigation-ending sanctions. For example, in *Ketchikan Cold Storage Co. v. State,*[81] the court refused to sustain an establishment-preclusion order, noting that sanctions which prevent a full adjudication on the merits should be imposed only upon the clearest showing that such a sanction is necessary.[82] The court found that the record did not reveal willful noncompliance with the lower court's production order, and it reversed the establishment-preclusion order. In so holding, the court revealed that it understood the true extent of the willfulness requirement:

> Although Rule 37 does not in terms require a showing of willfulness before any of its sanctions come into play, we will not sustain an establishment-preclusion order relating to a central issue in a case absent a showing of a willful failure to comply. In Oaks . . . we held that a showing of wilfulness was a prerequisite to a dismissal as a sanction under Civil Rule 37(b)(2)(c).[83]

Despite the absence of willful conduct in *Ketchikan,* the Alaska Supreme Court affirmed the lower court's assessment of the appellee's costs in seeking enforcement of the discovery order. The court recognized the power of the court under Rule 37(b) to enter "such orders in regard to the refusal as are just"[84] and found that the appellant's conduct, while not willful for purposes of imposing litigation-ending sanctions, justified the imposition of less severe sanctions.[85] The *Ketchikan* opinion sets forth the proper mode of analysis for Rule 37(b) sanctions. Willfulness is not a necessary condition for imposition of all Rule 37 sanctions.[86] Rather, willfulness is an additional requirement for sanctions that terminate litigation without a full adjudication on the merits.[87] If willfulness is absent, the effect on the application of

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81. 491 P.2d 143 (Alaska 1971).

82. *Id.* at 147. As the court noted, the establishment-preclusion order imposed in *Ketchikan* had a direct bearing on the critical issue determined by the jury. *Id.*

83. *Id.* at 148.

84. ALASKA R. CIV. P. 37(b) (1973). The current language of the rule reads in terms of "failure" rather than "refusal."

85. 491 P.2d at 149. Specifically, the court cited the costly tardiness and lack of cooperation with the discovery process on the part of the appellant as behavior which merited the assessment of the costs of discovery.

86. *Societe Internationale,* 357 U.S. at 208.

87. As is made clear in the *Ketchikan* decision, in cases involving establishment-preclusion orders, the termination without a full adjudication must relate to a central issue in the case. *See generally* State v. Guinn, 555 P.2d 530, 543 (Alaska 1976)

Rule 37(b) is twofold. First, the use of non-litigation-ending sanctions under Rule 37(b) is still available, despite suggestions to the contrary. Second, a court may not impose the more severe sanctions authorized by the rule.

Subsequent Alaska decisions also have recognized that willfulness is not required for the imposition of all sanctions under Rule 37(b). In *Continental Insurance Cos. v. Bayless & Roberts, Inc.*,[88] the court noted that before litigation-ending sanctions may be imposed pursuant to Rule 37(b)(2), a party must have willfully disobeyed an order compelling discovery.[89] The extension of the willfulness requirement to less severe sanctions was not mentioned. In *State v. Guinn*,[90] the trial court received testimony predicated on an accident report which was based largely on a missing notebook. The state had failed to comply with an order compelling production of the notebook. After it was established at trial that the state had not made reasonable efforts to locate the notebook before trial, the court invoked Rule 37(b) to strike the testimony based on the notebook. Noting that the state's failure to produce the notebook did not constitute bad faith or purposeful deception, the court held that the sanction selected under Rule 37 was not so drastic as to require willfulness.[91]

These three cases, *Ketchikan, Continental,* and *Guinn,* reveal that the unqualified requirement of willfulness which has been read into Rule 37 by several Alaska Supreme Court opinions is not always invoked by the court. Moreover, even those cases that contain the sweeping language concerning the willfulness requirement were correctly decided on their facts.[92] Nevertheless, the overreaching language in some opinions is clearly contrary to the prevailing view in the federal courts.[93] The inconsistent approach can only serve to confuse litigants concerned about the imposition of sanctions in the Alaska court system. The Alaska Supreme Court should take note of the potential confusion its imprecision invites and articulate which sanctions require willful noncompliance and which do not.

(though precluded from making use of certain testimony, the sanctioned party remained free to establish its contention by any other means available).

88. 548 P.2d 398 (Alaska 1976).

89. *Id.* at 404.

90. 555 P.2d at 530.

91. *Id.* at 543.

92. It will be recalled that the *Hart* and *Hawes* cases, although the opinions overextended the willfulness requirement, did involve sanctions that required an enhanced level of culpability.

93. *See supra* text accompanying notes 50-51. *See also Societe Internationale,* 357 U.S. at 208 (once a party fails to comply with a discovery order, Rule 37(b)(2) may be invoked; willfulness is relevant only to the choice of sanction).

B. The Burden of Showing Culpability

Rule 37 does not expressly state which party should bear the burden of proving or disproving culpability for failure to comply with discovery orders. Both the Alaska and the federal courts have been rather hesitant to address this issue and generally do not put the burden on either party. Instead, the courts prefer to analyze the issue on the basis of the evidence in the record.[94] The failure of most courts to discuss the allocation of burdens in discovery sanction cases may reflect the belief that a formal allocation is simply unnecessary.[95]

Once a failure to comply with a discovery order occurs and sanctions are sought, the party seeking discovery will present evidence that demonstrates culpable conduct on the part of the noncomplying party. The emphasis will be on behavior that smacks of bad faith or intentional non-cooperation. To refute these contentions, the party from whom discovery is sought will introduce evidence which militates against such a finding and emphasizes the innocent nature of the noncompliance. The resolution of these conflicting contentions rests in the discretion of the trial court. Deciding whether the circumstances reveal conduct sufficiently culpable to warrant the imposition of a litigation-ending sanction need not entail explicit consideration of the meeting of burdens. The court simply can review the record to determine whether sufficient culpability is exhibited without expressly considering the burden of proof issue.

The discussion of the burden of proof in two recent Alaska Supreme Court cases illustrates the significance of the allocation of burdens. In these cases the court approached the burden issue from two different perspectives. In *Hawes Firearms Co. v. Edwards*,[96] the Alaska Supreme Court noted that although the trial court did not specifically consider willfulness, it did find that certain information was withheld from discovery without justification. Given the noncomplying party's inability to justify his failure to comply with the discovery order, the trial court struck his defenses and tried the case as to damages only. The supreme court approved the effect of the trial court's reasoning, because it placed the burden of refuting willfulness on the party from whom discovery was sought.[97] A requirement that the noncomplying party show that its action was not willful is significant because it sets up a presumption of willfulness. This presumption

94. *See, e.g.*, Diaz v. Southern Drilling Corp., 427 F.2d 1118, 1126-27 (5th Cir. 1970).

95. The nature of the issue, whether and to what degree a party is at fault for failing to comply with the court's order, and the fact that the decision rests within the discretion of the court, arguably render a discussion of burdens unnecessary.

96. 634 P.2d 377, 378 (Alaska 1981).

97. *Id.* at 378 n.2.

becomes important in cases in which culpable conduct is not manifest in the record, but no justification exists for the noncompliance.[98]

In contrast to the burden analysis in *Hawes,* the Alaska Supreme Court appeared to place a burden of showing willfulness on the discovering party in *Ketchikan Cold Storage Co. v. State.*[99] Noting that the only evidence of willful nondisclosure was the noncomplying party's delay in making discovery and the unsubstantiated allegations of the opposing counsel, the court reversed an establishment-preclusion order because the record did not show willfulness.[100] The emphasis on a showing of willful nondisclosure in *Ketchikan* suggests that it is incumbent upon the discovering party to produce evidence that reveals the requisite level of culpability. Had the burden in *Ketchikan* been imposed on the noncomplying party, the court's analysis would have focused on the question whether the record or the noncompliant showed an absence of willfulness.

IV. SUGGESTIONS FOR THE APPLICATION OF LITIGATION-ENDING SANCTIONS

A. Create a Rebuttable Presumption of Willfulness

The Alaska courts should clarify which party bears the burden of proving culpability, or its absence, in Rule 37(b) litigation-ending sanction cases. This burden should be placed on the party that has failed to comply with the court's discovery order. Upon a failure to comply with a request for sanctions, the court should require the noncomplying party to demonstrate that his failure was not sufficiently culpable to warrant a litigation-ending sanction. In other words, the noncompliance should be presumed to be culpable unless the delinquent party shows that his failure was not due to willfulness, bad faith, or any fault of his own.

United States Supreme Court precedent supports imposing this burden on the noncomplying party. As previously discussed, the Court held in *Societe Internationale*[101] that Rule 37 should not be construed to authorize dismissal when it has been established that the

98. In Hart v. Wolff, 489 P.2d 114 (Alaska 1971), the supreme court found support in the record that a discovery order had been willfully disobeyed. This support consisted of, *inter alia,* the facts that the noncomplying party did not have a satisfactory explanation as to why certain records were not produced and admitted to having made no efforts to produce the records. Though a burden was not expressly imposed on the noncomplying party, the implication is that a failure to justify noncompliance may be sufficient for a finding of willfulness. *Id.* at 118.

99. 491 P.2d at 143.

100. *Id.* at 148.

101. Societe Internationale pour Participations Industrielles et Comerciales, S.A. v. Rogers, 357 U.S. 197 (1958).

nondisclosure is the result of an inability to comply.[102] The language the Court used to preclude the use of strict sanctions when an inability to comply is shown suggests that the delinquent party bears the burden of explanation, because the noncomplying party is in the best position to show an inability to comply.[103]

The Alaska Supreme Court in *Hawes Firearms Co. v. Edwards*[104] has also recognized the logic of this approach. As noted, the *Hawes* court approved the imposition of a burden of showing that noncompliance was not culpable. In most instances, only the noncomplying party knows the precise reason for its failure to comply. It would be unreasonable to impose the burden of explaining that party's noncompliance on the party seeking discovery. "If that were the requirement, then the moving party would have a limitless number of questions to answer, for there are an infinite number of *possible* reasons why one may not have answered, most of them dependent upon the facts not at all within the ken of one's opponent."[105]

Placing the burden of showing nonculpability on the noncomplying party is also in accord with *Hammond Packing Co. v. Arkansas.*[106] In *Hammond,* the Court approved of a presumption which treated the failure to produce evidence as an admission of a lack of merit in the asserted defense. Though the Court in *Societe Internationale* recognized that the presumption utilized in *Hammond* might violate the noncomplying party's due process rights if good faith inability to comply were shown, placing the burden of showing that good faith inability upon the noncomplying party would not create due process problems. Indeed, the legitimacy of such an approach is implicit in *Hammond.*[107]

In addition to conforming to the Supreme Court's interpretation

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102. *See supra* text accompanying note 41.

103. The Court cited "[t]he findings below, and what has been shown as to petitioner's extensive efforts at compliance" as grounds for concluding that the noncompliance was due to inability, hence not deserving of dismissal. 357 U.S. at 211. Certainly, it was the noncomplying party who showed his extensive efforts at compliance.

104. 634 P.2d 377 (Alaska 1981).

105. *Id.* at 378 n.2 (quoting Frates v. Treder, 249 Cal. App. 2d 199, 204, 57 Cal. Rptr. 383, 387 (1967) (emphasis in original)).

106. 212 U.S. 322 (1909).

107. The Court in *Hammond* recognized that "all the statute required was a *bona fide* effort to comply with an order made pursuant to its provisions, and therefore any reasonable showing of an inability to comply would have satisfied the requirements both of the statute and the order." *Id.* at 347. In *Societe Internationale,* the Court indicated that the presumption utilized in *Hammond* might violate due process if it were imposed because of a party's inability, despite good-faith efforts, to comply with a discovery order. *Societe Internationale,* 357 U.S. at 210. The suggestion here would preserve a party's due process rights; a litigation-ending sanction would be imposed only if the delinquent party failed to adequately explain its noncompliance.

of Rule 37, the requirement that the noncomplying party demonstrate that its behavior was not sufficiently culpable to permit litigation-ending sanctions is consistent with other discovery procedures. For instance, before a sanction may be imposed under Rule 37(b), there must be a failure to comply with a court order to permit or provide further discovery. Because the party from whom discovery was sought will have had an opportunity to comply with the court order, it is only reasonable to require that party to explain its failure to comply. In sum, a party that is responsible for impeding the discovery process should bear the responsibility of justifying its own delinquency.

Alaska Rules of Civil Procedure 26 and 34 also support a requirement that an adequate explanation be given for noncompliance. The availability of a protective order under Rule 26(c) "for good cause shown"[108] is evidence of the policy of requiring those parties seeking to avoid discovery to justify their actions. While the courts have the authority to issue protective orders precluding discovery in some instances, the party seeking protection must first explain why discovery should not be allowed.[109] Similarly, Rule 34 permits objection to a discovering party's request for production, but requires the objecting party to state the basis for his objection.[110]

B. Adopt a Diminished Culpability Standard

The Alaska courts should clarify the role of culpability under Rule 37. At the very least, the courts should align themselves with the majority position which only requires greater culpability when the sanction sought would effectively terminate the litigation. Despite language to the contrary in some opinions,[111] it seems clear that the Alaska Supreme Court does not intend to extend the enhanced culpability requirement to all the sanctions permitted by Rule 37. A position extending that requirement to all sanctions would not only be contrary to the interpretation of Federal Rule 37, but would be difficult to defend given the design and variety of sanctions permitted by the rule.

The Alaska courts should also review the degree of culpability necessary for the imposition of litigation-ending sanctions. As the preceding analysis suggests, the court can adopt distinct positions on the level of culpability that warrants imposition of more serious sanctions. The prevailing position, based on the Supreme Court's holdings in

108. ALASKA R. CIV. P. 26(c).

109. *See* 4A J. MOORE, J. LUCAS & D. EPSTEIN, *supra* note 58, at ¶ 26.68.

110. ALASKA R. CIV. P. 34(b). *See generally* Kozlowski v. Sears, Roebuck & Co. 73 F.R.D. 73, 76 (D. Mass. 1976) (Under Rule 34, a party from whom discovery is sought has the burden of showing the reason why discovery should not be allowed.).

111. *See, e.g., Hawes,* 634 P.2d at 378.

Societe Internationale and *National Hockey League,* requires that the failure to comply be due not to inability, but to "willfulness, bad faith, or any fault of [the noncomplying party]."[112] Thus, the noncomplying party must be guilty of some intentional action or omission in the failure to obey the discovery order before litigation-ending sanctions may be imposed. An alternative position, that identified as the gross negligence threshold,[113] should be considered by the Alaska courts. Under this standard, behavior need not rise to a level which exhibits intention or willfulness; rather, grossly negligent conduct is sufficient to warrant the imposition of the harshest sanctions.[114]

There are three reasons for adopting this alternative position. First, despite its current lack of recognition, the gross negligence standard is consistent with the Court's reasoning in *Societe Internationale.* As noted by the court in *Cine Forty-Second Street Theatre v. Allied Artists Pictures Corp.,*[115] the *Societe Internationale* Court's choice of the term "fault" in its discussion of Rule 37(b) must be recognized as deliberate and meaningful. "[I]f 'fault' has any meaning not subsumed by 'willfulness' and 'bad faith,' it must at least cover gross negligence of the type present in this case."[116] The *Societe Internationale* opinion made clear that dismissal is not appropriate when the failure to comply with a discovery order is due to a party's *inability* to comply. The gross negligence standard would be consistent with *Societe Internationale* because it would not impose sanctions when the failure to comply is due to the party's inability to do so.

Second, the effect that the gross negligence threshold would have on the administration of justice supports adopting the approach. By giving the courts the power to terminate those cases that unnecessarily prolong and needlessly frustrate the judicial process, the diminished culpability requirement would enhance the courts' power to further the just, speedy, and inexpensive resolution of every action and proceeding. Because grossly negligent conduct is as capable of producing unnecessary delay and expense as willful noncompliance, the full range of Rule 37 sanctions should be available to address such behavior.[117]

The deterrent function of sanctions is the third consideration supporting adoption of the gross negligence standard in Alaska. The

112. *Societe Internationale,* 357 U.S. at 212.

113. *See* Note, *supra* note 45, at 145-47; *see supra* text accompanying notes 54-61.

114. Gross negligence is defined as "[i]ndifference to present legal duty and utter forgetfulness of legal obligations, so far as other persons may be affected, and a manifestly smaller amount of watchfulness and circumspection that the circumstances require of a person or ordinary prudence." BLACK'S LAW DICTIONARY 932 (5th ed. 1979).

115. 602 F.2d 1062, 1067 (2d Cir. 1979).

116. *Id.*

117. The emphasis here is on making the sanctions available but by no means

United States Supreme Court's opinion in *National Hockey League v. Metropolitan Hockey Club, Inc.* unequivocally approved of the proposition that deterrence was a legitimate function of Rule 37.[118] While most observers consider intentional behavior to be the most susceptible to deterrence,[119] negligent conduct is also considered capable of being deterred.[120] The adoption of a standard that permits courts to treat grossly negligent noncompliance as they do intentional noncompliance comports with the shift in *National Hockey League* to a more deterrence-oriented approach.

The importance of reaching the merits of each dispute, however, should not be underestimated or overwhelmed by concerns of efficiency. The reluctance of courts to impose litigation-ending sanctions, even in cases of intentional abuse of discovery, has traditionally been based on due process concerns. The cases from which the diminished culpability standard has developed have been mindful of the due process limitations on the imposition of litigation-ending sanctions.

V. CONCLUSION

A reduced culpability threshold, coupled with the imposition of a burden upon the noncomplying party to show that this threshold was not reached, would result in better discovery performance. These changes would sharpen the awareness levels of those parties involved in litigation with respect to their responsibilities to the court and to their opponents. Moreover, if the responsibilities of the parties in the discovery process, particularly those of noncomplying parties, are more clearly articulated and emphasized, the amount of noncompliance is likely to diminish.

Robert Carroll

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mandatory. The choice of sanctions is at all times within the discretion of the the trial court.

118. 427 U.S. 639, 643 (1976).

119. *See* Note, *supra* note 45, at 151.

120. *See* G. CALABRESI, THE COSTS OF ACCIDENTS 133-73 (1970).