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Don't Go There…Yet

Illinois Supreme Court Rule 219(c) provides several options for courts facing abuse of the discovery process. While often tempting to use, sanctions such as default judgments against defendants and dismissals with prejudice against plaintiffs should only result from persistent misconduct and after less onerous enforcement options and warnings have failed.

THERE ARE FEW THINGS LITIGATORS AND JUDGES DREAD more than a protracted discovery dispute. Given the angst discovery misconduct provokes, siccing the Illinois Supreme Court Rules on a culprit is understandable. But a measured response may be more prudent. Penalizing bad behavior with a default judgment is rarely necessary, even as a response to perjury or defiance of court orders.

This article examines discovery sanctions available under Illinois Supreme Court Rule 219(c) and why courts use default judgments against defendants—or dismissals with prejudice against plaintiffs—sparingly.

Rule 219(c)'s progressive levels of sanctions

Rule 219(c) addresses a party or "any person" who "unreasonably fails to comply with any provision" of the Supreme Court Rules regarding discovery or pretrial procedure.[1] Still, Rule 219(c) exists to compel, not castigate. (This contrasts with the more punitive Illinois Supreme Court Rule 137.[2] While there are similarities between the two rules, courts impose Rule 137 sanctions only for the filing of pleadings, motions, or other papers that violate its requirements.[3])

Before seeking sanctions under Rule 219(c), a party must comply with Illinois Supreme Court Rule 201(k). Rule 201(k) requires a spirit of cooperation during discovery and mandates that every discovery motion include a statement affirming reasonable attempts to resolve differences have been unsuccessful.[4] Once a motion for sanctions is properly before the court, the court must remain cautious. Enforcing discovery rules via Rule 219(c) is a "drastic consequence" reserved for "the most extreme cases."[5]

A motion for sanctions is checked by several factors, each of which must be measured and weighed against one another:[6]

- the surprise to the adverse party;
- the prejudicial effect of the proffered evidence;
- the nature of the evidence;
- the diligence of the adverse party seeking discovery;
- the timeliness of the adverse party's objection; and
- the good faith of the party offering the evidence.[7]

To remedy a discovery violation under Rule 219(c), courts can:

- stay proceedings until the order is adhered to;
- preclude the offending party from filing another pleading

1. Ill. S. Ct. R. 219(c).
2. See *Rankin v. Heidlebaugh*, 321 Ill. App. 3d 255, 258 (5th Dist. 2001).
3. See, *e.g.*, *In re Marriage of Adler*, 271 Ill. App. 3d 469, 475 (1st Dist. 1995).
4. Ill. S. Ct. R. 201(k).
5. *In re Vanessa C*, 316 Ill. App. 3d 475, 483 (1st Dist. 2000).
6. *Shimanovsky v. General Motors Corp.*, 181 Ill. 2d 112, 124 (1998).
7. *Melrose Commons LLC v. Selective Imports, Inc.*, 2016 IL App (1st) 143110-U, ¶ 34.

TAKEAWAYS >>

- Rule 219(c) addresses a party or "any person" who "unreasonably fails to comply with any provision" of the Supreme Court Rules regarding discovery or pretrial procedure. Still, Rule 219(c) exists to compel, not castigate.
- A written opinion explaining why the court is imposing Rule 219(c) sanctions is unnecessary. A court may articulate the reasons in open court or adopt the reasoning of a written motion for which the rationale for sanctions is provided.
- Default is warranted only for a "contumacious disregard for the court's authority" and if all other enforcement measures prove futile.

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IN *IN RE MARRIAGE OF BRADLEY*, A LITIGANT WHO "LIED IN THIS CASE AND LIED MORE THAN ONCE" WAS BARRED FROM ASSERTING A CLAIM. THIS SANCTION WAS PROPORTIONATE TO THE DISCOVERY VIOLATION, WHICH WAS SEVERE DUE TO THE UNTRUTHFUL STATEMENTS BUT LIMITED TO THE ASSET THE LIE INVOLVED.

relating to the failure;
- preclude the offending party from maintaining a particular claim;
- bar a witness from testifying;
- enter a judgment by default; and
- strike any portion of a pleading.[8]

Attorneys' fees and fines also are permissible.[9] Finally, Rule 219(c) enables courts to fashion any order that is "just." A just order ensures "both discovery and trial on the merits" and can range from an in-court scolding to default judgment.[10] The primary end is to not punish the dilatory party.[11] But there is a fine line between coercion and punishment.

Hearing before sanctioning

Unlike Rule 137, Rule 219(c) does not require an evidentiary hearing before sanctioning. But when a court proceeds under Rule 219(c), it still should hold a hearing on the merits. In *Shimanovsky v. General Motors*, the appellate court reversed the dismissal of a suit because it was done without assessing prejudice from evidence destroyed by the plaintiff.[12] The Illinois Supreme Court affirmed and held that default judgment is not automatic when evidence is destroyed.[13] A court must instead consider the circumstances in a hearing.[14] *Shimanovsky* thus endorses hearings to ascertain the appropriate sanction.

If sanctions are granted, the court must specify its reasons.[15] But a written opinion explaining why the court is imposing sanctions under Rule 219(c) is unnecessary. A court may articulate the reasons in open court or adopt the reasoning of a written motion for which the rationale for sanctions is provided.[16]

A heightened standard of review

When mulling the merits of appealing sanctions, defer to trial courts on discovery issues. Rule 219(c) sanctions, like other discovery issues, are reviewed for abuse of discretion.[17] But within the context of sanctions, such a standard appears less deferential.

When reviewing sanctions, an appellate court's scrutiny increases. Consider that a sanctions order must be factually sound and reasoned.[18] The sanction must be just and proportionate to the offense.[19] Reversal is necessary if the sanctioned party's conduct was not unreasonable.[20] Finally, an appellate court will not affirm a sanctions order without any basis in the record.[21]

This elevated review may originate after determining whether "justice is being done" with a default judgment.[22] Such an approach embodies the courts' "liberal attitude in setting aside defaults."[23] Thus, courts arguably dilute the abuse-of-discretion standard for sanctions, especially default judgment. Not surprisingly, this area is rife with reversals.

Rule 219(c)'s nuclear option

Nestled amongst the Rule 219(c) sanctions is default judgment. But its placement belies its power. Since default judgment prevents cases from being resolved on the merits, courts do not mince words on the potency of a default judgment: "most onerous," "drastic," "ultimate," and "last resort."[24] While Rule 219(c) seeks to ensure discovery compliance, default defeats this aim because it ends the case. Courts thus use this remedy in limited and fact-specific circumstances.

To warrant default judgment, the prejudice from a discovery violation must be so great that default is the only answer. In *In re Marriage of Hirschfeld*, the second district reversed a default judgment because the discovery violation was not so prejudicial that default was the only cure.[25] Rather, the plaintiff still had to prove his case.[26] The second district reached a similar result in *Inverrary Condominium Ass'n v. Karaganis*.[27] A plaintiff's false affidavit and failure to produce documents

ISBA RESOURCES >>

- Matthew Hector, *Court Sanctions Lawyer Over Witness's Improper Comments*, 104 Ill. B.J. 12 (Jan. 2016), law.isba.org/2A9AZxI.
- Hon. Barbara Crowder, *Sanctions and Spoliation*, Trial Briefs (Aug. 2011), law.isba.org/2LydTFw.
- Jeffrey A. Parness, *Postjudgdment Sanctions: Do Trial Courts Have Too Little Power?*, 97 Ill. B.J. 314 (June 2009), law.isba.org/2LL3Nhq.

8. Ill. S. Ct. R. 219(c).
9. *Id.*
10. *Cirrincione v. Westminster Gardens Ltd. Partnership*, 352 Ill. App. 3d 755, 771 (1st Dist. 2004).
11. *Blakey v. Gilbane Building Corp.*, 708 N.E.2d 1187, 1191 (4th Dist. 1999).
12. *Shimanovsky v. General Motors Corp.*, 181 Ill. 2d 112, 127 (1998).
13. *Id.*
14. *Id.*
15. Ill. S. Ct. R. 219(c).
16. *Colon v. Howell*, 2017 IL App (1st) 170809-U, ¶ 27; *Chabowski v. Vacation Village Ass'n*, 291 Ill. App. 3d 525, 528 (2d Dist. 1997).
17. *Shimanovsky*, 181 Ill. 2d at 120.
18. *Cirrincione v. Westminster Gardens Ltd. Partnership*, 352 Ill. App. 3d 755, 761 (1st Dist. 2004).
19. *Gonzalez v. Nissan North America, Inc.*, 369 Ill. App. 3d 460, 464 (1st Dist. 2006).
20. *Koppel v. Michael*, 374 Ill. App. 3d 998, 1004 (1st Dist. 2007).
21. *Id.*
22. *Engelke v. Moutell*, 20 Ill. App. 3d 253, 256 (5th Dist. 1974).
23. *Id.*
24. *Locasto v. City of Chicago*, 2014 IL App (1st) 113576, ¶¶ 3, 28, 35, 42.
25. *In re Marriage of Hirschfeld*, 2018 IL App (2d) 170106-U.
26. *Id.* ¶¶ 46, 49.
27. *Inverrary Condominium Ass'n v. Karaganis*, 2017 IL App (2d) 160271.

were not sanctioned.[28] The court affirmed because, among other things, the defendant suffered no prejudice.[29]

Once a trial court finds substantial prejudice, it examines the propriety of default based on: 1) the degree of the litigant's responsibility for the noncompliance; 2) the litigant's compliance with previous discovery orders; 3) whether less coercive measures are available or would be futile; and 4) whether the litigant was warned of default.[30] The final two elements, often the focus of appeals, are discussed here.

Forewarned is forearmed

A court should not enter default judgment before advising that default looms. The first district in *Locasto v. City of Chicago*[31] vacated default judgment against a defendant because the trial court failed to inform the defendant its case was in jeopardy when the defendant disregarded numerous discovery requests.[32] In *Venteurs, LLC v. Johnson*,[33] the first district reversed an "extreme" default sanction where, despite the defendant ignoring the deadline to answer the complaint, the trial court did not label the prior extensions of time as "final."[34]

American Consumer Products v. Inland Real Estate Auctions further established the importance of warning a party before ending the case.[35] The trial court did not advise the plaintiff that dismissal might occur if a discovery deadline was missed. The court also did not previously sanction the plaintiff. As such, the second district reversed the dismissal with prejudice.

Employing more lenient sanctions

Abuse of discretion also occurs when a court resorts to default judgment prematurely. Less coercive sanctions should be sought first because it is "a rare case in which the trial court could not formulate increasingly severe sanctions."[36] Default is warranted only for a "contumacious disregard for the court's authority" and if all other enforcement measures prove futile.[37]

Koppel v. Michael illustrates the proper use of progressive sanctioning.[38] The trial court issued five intermediate sanctions, including attorneys' fees, fines, and witness barring. As such, the final sanction of default judgment was affirmed. Contrast *Koppel* with *In re Marriage of Hirschfeld*.[39] In the latter case, the court entered default after a party flouted discovery orders. But default was premature: Progressive sanctions and warnings of default were not used and the default judgment was reversed.

While intransigence often spurs sanctions, perjury is another cause. The seriousness of perjury notwithstanding, courts should first address falsity with sanctions less onerous than default. The fourth district confirms this in *In re Marriage of Bradley*.[40] A litigant who "lied in this case and lied more than once" was barred from asserting a claim.[41] This sanction was proportionate to the discovery violation, which was severe due to the untruthful statements but limited to the asset the lie involved.

Another alternative to default judgment is attorneys' fees. Forged documents warranted fees, not default, in *In re Marriage of Mowen*.[42] The fourth district affirmed the fee sanction despite the "intentionally deceptive" discovery.[43] Echoing *Mowen* is *Martzaklis v. 5559 Belmont Corp.*, where a litigant instructed an investigator to lie to obtain evidence after discovery closed.[44] The first district affirmed the attorneys' fees.

These cases establish that various remedies must be deployed before default. Indeed, even perjured parties are entitled to progressive sanctions under Rule 219(c).

Conclusion

Discovery abuse is a distasteful aspect of litigation. And while defying court orders and lying during discovery should never be tolerated, a measured response is necessary. Rather than trying to prevail in one fell swoop, victims of discovery misconduct should seek relief that directly corresponds to the wrongdoing. The epitome of punishment, default judgments clash with the spirit of Rule 219(c)'s compliance aims (even if compliance must be coerced). It is thus the last resort for extreme situations. IBJ

IN *IN RE MARRIAGE OF HIRSCHFELD*, THE SECOND DISTRICT REVERSED A DEFAULT JUDGMENT BECAUSE THE DISCOVERY VIOLATION WAS NOT SO PREJUDICIAL THAT DEFAULT WAS THE ONLY CURE. RATHER, THE PLAINTIFF STILL HAD TO PROVE HIS CASE.

28. *Id.* ¶¶ 17-19.
29. *Id.* ¶¶ 43-44.
30. *Locasto v. City of Chicago*, 2014 IL App (1st) 113576, ¶ 35.
31. *Id.* ¶ 12.
32. *Id.* ¶ 3.
33. *Venteurs, LLC v. Johnson*, 2017 IL App (1st) 151464-U.
34. *Id.* ¶¶ 15-17.
35. *American Consumer Products v. Inland Real Estate Auctions*, 2017 IL App (2d) 170069-U.
36. *Locasto*, 2014 IL App (1st) (113576), ¶ 37.
37. *Gonzalez v. Nissan North America, Inc.*, 369 Ill. App. 3d 460, 466 (1st Dist. 2006).
38. *Koppel v. Michael*, 374 Ill. App. 3d 998, 1005 (1st Dist. 2007).
39. *In re Marriage of Hirschfeld*, 2018 IL App (2d) 170106-U.
40. *In re Marriage of Bradley*, 2011 IL App (4th) 110392.
41. *Id.* ¶ 29.
42. *In re Marriage of Mowen*, 2014 IL App (4th) 130795-U, ¶ 93.
43. *Id.*
44. *Martzaklis v. 5559 Belmont Corp.*, 157 Ill. App. 3d 737, 737-38 (1st Dist. 1987).